EMPLOYMENT TRIBUNALS

Claimant: **Mr L Richardson**

Respondent: **Calcot Services for Children Limited**

HELD AT: **By CVP at Bury St Edmunds ET**

ON: **27, 28, 29 & 30 November 2023**

BEFORE: **Employment Judge McCluskey, N Howard, S Laurence - Doig**

REPRESENTATION

Claimant: **Represented by Mr R O'Keefe , Counsel**
Respondent: **Represented by Ms H Suleman, Solicitor**

JUDGMENT having been sent to the parties on 15 January 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided

REASONS

Introduction

1. The claimant is making the following complaints: unfair dismissal and direct race discrimination,

2. Parties had prepared and exchanged witness statements prior to the final hearing.

3. There was a joint bundle of documents extending to 287 pages. Additional documents were lodged by the claimant and by the respondent prior to the start of evidence and were numbered pages 288 – 313.

4. The claimant gave evidence on his own behalf. Craig Arden – Senior Regional Officer, National Education Union also gave evidence on behalf of the claimant. Sarah Walton – Operations Manager, Lisa Litt –HR & Training Director, Robin Ward – Operations Director of Care and Claire Scarborough – Training Manager gave evidence on behalf of the respondent.

5. Prior to evidence commencing we agreed that the service user involved in the allegation for which the claimant was dismissed would be referred to as "the young person". There was some evidence led about another service user and they were referred to as "another young person".

Issues

6. We asked parties to agree a final list of issues for determination on liability. Issues were to be agreed on remedy in due course if required. Representatives agreed the final list of issues on the first morning of the hearing, during the adjournment to allow us to read the witness statements. The list of issues is appended to this judgment.

Findings in fact

7. We have only made findings in fact necessary to determine the issues. All references to page numbers are to the paginated joint bundle of documents provided to us.

8. The claimant was employed by the respondent from 23 April 2019 to 30 November 2021. The claimant is Black British. At the time of his dismissal, he was employed as a Teaching Assistant.

9. The respondent provides support services for children with special educational needs and disabilities. At the time of the claimant's dismissal the respondent operated one school, which is where the claimant worked, and a number of care homes.

10. The respondent has a Behaviour Policy. On 7 September 2020 the claimant signed to confirm that he had read and understood this policy. The policy included a paragraph which said that staff at the school are "*Team Teach trained and will follow the Team Teach behaviour management approach (de-escalation, prevention, physical intervention as a last result). Staff are aware that they are only allowed to perform techniques taught to them by the in-house Team Teach instructors*" (page 69).

11. On 6 May 2021 there was an incident at the school, involving the claimant and the young person. The young person made a complaint about the conduct of the claimant. An investigation was carried out that morning by Narges

Gonzalez, the Assistant Head Teacher. A statement was obtained from Oskar Budnik ("OB"), a Teaching Assistant who had witnessed the incident. A statement was also obtained from Sahra Pathima ("SP") another Teaching Assistant who witnessed the incident.

12. Both OB and SP said in their statements that the claimant had been racially abused by the young person and the claimant had then put the young person to the ground in a hold.

13. The claimant was suspended on full pay on 6 May 2021.

14. In the period from 6 May 2021 until late September 2021 the police and the Local Authority Designated Officer (LADO) carried out their own investigation into the incident. LADO is responsible for managing allegations against adults who work with children. The respondent's internal investigation was unable to progress during that period.

15. On 20 October 2021 the claimant was invited by the respondent to attend an investigation meeting. Based on the investigation information the respondent had obtained on 6 May 2021 from OB and SP, the allegation in the investigation invite letter was that the claimant "*breached our strict rules and procedures relating to safeguarding, of which you are aware, when you restrained a student by grabbing them by the throat and forced them to the floor on 6 May 2021*" (page 105).

16. The investigation meeting took place on 1 November 2021 and was conducted by Sarah Walton, Operations Manager. The claimant provided a written statement at the beginning of the investigation meeting. In his statement the claimant said that the young person was: "*.... heightened and unpredictable. I felt the situation was urgent and so at this point I pulled the back of his hood to prevent him getting to the kitchen where the knives are located. [the young person] asked me what I was doing, and I told him I was trying to stop him from entering the kitchen. Again, I received a torrent of racial abuse. I let go of his hoody and went into team teach mode by placing my hand on his elbow....*" The claimant describes receiving more racial abuse. He then said *"I began to move [the young person] back into the dinner hall area, I have a duty of care towards the students and other staff members. As we moved through the dining room [the young person] spat in my face for the second time and laughed. Because he was still unpredictable, I thought the safest place for us to be was on the floor. I got him down using the team teach method safely and easily. Oskar had cleared a space to make the area around us safe. When we were on the floor the young person started kicking out at me and caught my left knee on several occasions. During this I was still trying to pace him down using a calm voice*" (page 112).

17. During the investigation meeting Ms Walton asked the claimant questions about the contents of the written statement which he had provided. She asked him to describe what had happened with reference to his written statement. She asked him what team teach method he was describing in his written statement. She said she was a team teach tutor and there is no team teach method that takes a young person to the ground. She asked about the part of the claimant's written statement when he referred to other staff members having to restrain the young person. She asked if other staff members have restrained the young person to the ground. The claimant said no, it is normally to a chair. She said again that the respondent does not teach to take young people to the floor.

18. The claimant's written statement, provided at the beginning of the investigation meeting, listed the names of several colleagues whom he said would be able to confirm the young person's behaviour on 6 May 2021. Ms Walton concluded that she did not require to speak to those colleagues. She accepted the claimant's description of the young person's behaviour on 6 May 2021. She accepted that the young person's behaviour on the day was complex and challenging. She based that on working with hundreds of young people with complex and challenging behaviour in her professional role for many years.

19. Ms Walton showed the claimant a photograph of the young person. There was a mark on their neck. Ms Walton asked whether the claimant had pulled the hoody a bit too firmly, causing the mark. The claimant said he would go along with that explanation (page 116).

20. Following the investigation meeting and based on the claimant's admissions in his written statement, the investigation interview and the statements from OB and SP, Ms Walton formed the view that the claimant had acted outside of team teach training by moving the young person to the floor and that the claimant had pulled the hood of the young person's jumper from behind. Ms Walton recommended that the case proceed to a disciplinary hearing on those two allegations.

21. Lisa Litt, HR & Training Director also attended the investigation meeting. She was there in her capacity as a note taker. Towards the end of the meeting Ms Litt asked the claimant several questions which were investigatory in nature. She conceded in cross examination that that these questions were about what happened on 6 May 2021 and not questions to clarify matters for notes.

22. On 3 November 2021 the respondent wrote to the claimant to invite him to attend a disciplinary hearing. The allegations in the invite letter were "(*i) Use of a Team Teach technique that is not trained or used in the respondent's team teach protocol specifically, whilst in a hold, taking a young person to the floor; (ii) pull of a hood that is part of a jumper / hoody which was pulled by yourself*

when the young person had their back to you". The claimant was given the opportunity to bring a companion. The claimant was told that one outcome of the hearing was that his employment could be terminated without notice.

23. The disciplinary hearing took place on 29 November 2021. Prior to 29 November 2021 the claimant had received a copy of the notes of the investigation on 6 May 2021, the respondent's Behaviour Policy, the respondent's Disciplinary Policy, the statements from OB and SP and a statement from Claire Scarborough, team teach tutor for the respondent. Her statement said that staff were in receipt of level 1 or level 2 team teach training which taught that "*we must never take a child to the floor or initiate a ground hold*" (page 124).

24. The hearing date of 29 November 2021 was a rescheduled hearing date to accommodate availability of parties, including Mr Arden. Ms Robin Ward, who had been due to conduct the disciplinary hearing was unavailable. There were limited other staff members who could conduct the disciplinary hearing. The disciplinary hearing was chaired by Ms Litt. The claimant was accompanied by Mr Arden, trade union representative.

25. The claimant was given the opportunity to state his case at the disciplinary hearing. The claimant submitted that: (i) the young person presented as being heightened on the day in question, and that it was not known why, as information had not been relayed by way of a handover, so the cause was unknown and when he came into the school, he was all over the place; (ii) the training the claimant received may not cover all occasions, and the team teach workbook states that an employee may need to take reasonable steps outside the training; (iii) as the young person had spoken of stabbing himself that morning in the taxi, and could plausibly have obtained a knife, the claimant felt his actions were reasonable and proportionate, with the force he employed being reasonable in the circumstances: (iv) as part of a dynamic risk assessment he had "*just wanted him to be nice and safe and eased him down nice and safely*".

26. At the disciplinary hearing, Mr Arden said that Department for Education Guidance states that the decision on whether or not to physically intervene is down to the professional judgement of the staff member and that team teach advises that using force outside of their procedures is not necessarily inappropriate or illegal and that force must be reasonable, proportionate and necessary. Mr Arden said that the context of the events meant that the claimant's actions were reasonable, proportionate and necessary.

27. On 30 November 2021 Ms Litt wrote to the claimant terminating his employment with immediate effect for: "*use of a team teach technique that is not trained or used in the respondent's team teach protocol specifically whilst in a hold, taking*

a young person to the floor; and pull of a hood that is a part of a jumper/hoody which was pulled by the claimant when the young person had their back to him" (page 165).

28. The reasons given for dismissal of the claimant were as follows:

29. (i) our records clearly demonstrate that you have been trained in de-escalation and prevention, and as such are fully aware that holding is the last resort (as per our Behavioural Policy, section 3.3), and should certainly not be an action that is maintained for 3 to 5 minutes on the floor; (ii) the training and protocols are very clear that your role is to de-escalate heightened situations; (iii) they are also clear about safe and acceptable actions and it is clear you would have known that it would never be acceptable to pull a young person back by the hood, which could cause physical harm; (iv) it is clear that there were benches available to which the young person could have been taken for a seating position, yet you chose to force them to the floor; (v) you were unable to provide a satisfactory explanation for the degree of force you employed, other than that rather than follow the correct techniques and training you employed your own judgement that the situation was extreme enough to warrant the level of force you chose to exert: (vi) at no time during your explanations did you acknowledge that alternatives were available or that you recognised the reasons for the recognised and prescribed techniques, or that you accepted that you should have acted differently. Instead, your responses indicated that you were prepared to override instructions and training as a first and not a last resort; (vii) whilst you have suggested that the young person could potentially have obtained a knife, there was no evidence that this was actually the case, or likely to be the case, and therefore I do not find this possibility in itself sufficient justification for applying the degree of force that you did at the time that you did; (vii) It is clear from the training and the rules and procedures in place that you would have been aware that it was not reasonable for you to act in such a way; (viii) neither you nor any of the witnesses indicated that you sought help or support in responding to the young person's heightened state, despite the support of colleagues being readily available at the time. This further demonstrates that it was not reasonable for you to conclude that excessive force was necessary in the first instance (page 166).

30. The claimant appealed against the decision to terminate his employment. His grounds of appeal were (i) the disciplinary process was flawed and not carried out impartially (ii) the outcome was decided without considering relevant evidence; and (iii) the above points highlight the decision is therefore unreasonable and the sanction unfair.

31. The appeal hearing took place on 10 December 2021. It was conducted by Ray Challoner from Peninsula Face2Face. The claimant was accompanied by Mr

Arden as trade union representative. The claimant explained his grounds of appeal, and these were considered by Mr Challoner.

32. On the first ground the claimant said there had been a delay between the incident on 6 May 2021 and the disciplinary process. Mr Challoner concluded that there was a good reason for the delay given the LADO and police involvement. The claimant said the decision to dismiss by Ms Litt was not impartial as she had asked questions at the investigation meeting. Mr Challoner concluded that this did not make her impartial as she had played a minor role in the investigation and in any event had relied on evidence presented at the meetings. The claimant said he was being singled out because of a poor Ofsted report as other staff members had used physical restraint on the young person and had not been disciplined. Mr Challoner concluded that the investigation commenced on 6 May 2021 and the Ofsted report was dated October 2021, therefore they could not be linked. The ground of appeal was not upheld.

33. On the second ground the claimant said the outcome was decided without considering relevant evidence. The claimant said that he had explained why in the context of this specific incident he felt he needed to use reasonable force to keep the young person and others safe but that this had not been considered. Mr Challoner concluded that in relation to the pulling of the hood this had occurred as a first action. The ground of appeal was not upheld.

34. On the third ground the claimant said that the sanction of dismissal was unfair, and that the claimant had not been aware of the potential outcome. Mr Challoner concluded that respondent's disciplinary policy provided a non-exhaustive list of matters which could amount to gross misconduct including physical violence and that the potential outcome had been notified to the claimant in the disciplinary invite letter. The ground of appeal was not upheld.

35. On 27 September 2015 another employee of the respondent was dismissed for failure to follow the correct training in managing an incident with a service user. The employee had placed the service user into a headlock, which raised safeguarding and conduct concerns about this employee.

Relevant law

36. Section 94 of the Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed.

37. Section 98 ERA sets out that for a dismissal to be fair, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98 (1) or (2) of the ERA.

38. A reason relating to the conduct of the employee is one of the potentially fair reasons for dismissal (section 98(2)(b) ERA).

39. In terms of section 98(4) ERA, if the tribunal was satisfied that the respondent has established a potentially fair reason for dismissal, it must then determine the question of whether the dismissal was fair or unfair having regard to the matters set out in section 98(4) (a) and (b): whether taking into account the size and administrative resources of the employer, it acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee and the equity and substantial merits of the case.

40. Once it is established that the claimant was dismissed for a potentially fair reason relating to conduct the test of the substantive fairness outlined in **British Home Stores Limited v Burchell 1978 IRLR 380** is relevant to the question of whether it was reasonable for the respondent to treat that reason as sufficient to justify dismissal.

41. When applying the **Burchell** test, the tribunal should consider three issues: a. whether the employer genuinely believed that the employee was guilty of misconduct; b. did the employer have in its mind reasonable grounds on which to sustain that belief and c. at the stage at which the employer formed the belief on those grounds had the employer carried out as much investigation into the matter as was reasonable in the circumstances?

42. The ultimate test in determining the application at section 98(4) is whether the dismissal fell within the "band of reasonable responses", a test which reflects the fact that inevitably there may be different decisions reached by different employers in the same circumstances (see **British Leyland (UK Limited) v Swift 1981 IRLR 91**).

43. In applying section 98(4) ERA, the tribunal must not substitute its own view of the matter for that of the employer but must apply an objective test of whether the dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer (see **Iceland Frozen Foods Limited v Jones [1982] IRLR 439, Post Office v Foley and HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] IRLR 827CA**).

44. The range of reasonable responses test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached. **J Sainsbury plc v Hitt 2003 ICR 111, CA**. This includes whether the investigation carried out by the employer fell within the range of reasonable responses that a reasonable employer might have adopted.

45. There is always an area of discretion within which a respondent may decide on a range of disciplinary sanctions all of which might be considered reasonable. It is not for the tribunal to ask whether a lesser sanction would have been reasonable but whether or not the dismissal was reasonable (Boys **& Girls Welfare Society v McDonald [1996] IRLR 129**).

46. The test of whether or not the employer acted reasonably is usually expressed as an objective one — i.e. tribunals must use their own collective wisdom as industrial juries to determine 'the way in which a reasonable employer in those circumstances, in that line of business, would have behaved' — **NC Watling and Co Ltd v Richardson 1978 ICR 1049, EAT**.

47. Section 13 EqA provides as follows: *13 Direct Discrimination (1) A person (A) discriminates against another (B) if, because of a protected characteristic, (A) treats (B) less favourably than (A) treats or would treat others.*

48. Section 39 EqA provides as follows: "39 *Employees and applicants … (2) An employer (A) must not discriminate against an employee of A's (B)— (a) as to B's terms of employment; (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service; (c) by dismissing B; (d) by subjecting B to any other detriment. …*"

49. Section 136 EqA provides as follows: "1*36 Burden of proof If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision*."

50. There is a two-stage process in applying the burden of proof provisions in discrimination cases, as explained in the authorities of **Igen v Wong [2005] IRLR 258** and **Madarassy v Nomura International Plc [2007] IRLR 246**, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If he does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached.

Submissions

51. Both parties provided written submissions and made short oral submissions to supplement these. We carefully considered the submissions of both parties during our deliberations, and we have dealt with the points made in submissions, where relevant, when setting out the facts, the law and the application of the law to those facts. It should not be taken that a submission was not considered because it is not part of the discussion and decision recorded.

Discussion and decision

Unfair dismissal

Reason for dismissal

52. The first issue is what was the reason for dismissal? The tribunal found that the reason for dismissal was misconduct ie the respondent's belief that on 6 May 2021 the claimant used a team teach technique that is not trained or used in

the respondent's team teach protocol specifically whilst in a hold, taking the young person to the floor; and pull of a hood by the claimant when the young person had their back to him.

Misconduct investigation

53. The next question is the three stages in the **BHS v Burchell** case. First, did the respondent reasonably believe that the claimant committed the misconduct, ie that on 6 May 2021 he took the young person to the floor whilst in a hold, using a technique that is not trained or used by the respondent and pulled the young person's hood from behind The tribunal found that the respondent did reasonably believe that the claimant had committed this misconduct. Those were the allegations set out in the disciplinary invite letter and in the dismissal letter and were discussed with the claimant at the investigation meeting and the disciplinary hearing.

54. Second, was that belief held on reasonable grounds? The tribunal found that it was. The claimant had admitted at the investigation meeting and at the disciplinary hearing that on 6 May 2021 he had pulled on the hood of the young person from behind and that he had taken the young person to the ground in a hold., using a technique which was not taught or trained by the respondent. The respondent has a Behaviour Policy which says that staff are only allowed to perform techniques taught to them by the in-house "team teach" instructors. The claimant was aware that it did not teach techniques to any staff which included bringing young people to the ground in a hold. Ms Scarborough, a team teach trainer with the respondent provided written confirmation that staff were in receipt of level 1 or level 2 team teach training which taught that "*we must never take a child to the floor or initiate a ground hold*" Ms Walton, the investigation manager, was also a team teach trainer and knew that the respondent did not teach taking a young person to the ground whilst in a hold.

55. Third, was there a fair and reasonable investigation? The tribunal found that there was. There had been an investigation on the day of the incident with OB and SP, two other teaching assistants who had witnessed the incident. They both spoke to the claimant having been racially abused by the young person and the claimant having then put the young person to the ground in a hold.

56. Ms Walton held an investigation meeting with the claimant. He was given an opportunity to respond to the allegations. Ms Walton carefully considered the written statement the claimant provided at the investigation meeting. She went through his written statement asking questions about what the claimant had set out in his statement. Having done so she assessed whether further enquiry or investigation was required by the respondent. She decided to ask the Headteacher if there were any young people who had any reference to ground holds in their care plans. There were not.

57. Ms Walton considered the part of the claimant's written statement which said that other staff members had required to restrain the young person, on other

occasions. She asked the claimant whether that was restraint to the ground by other staff members. The claimant told her that other staff members had not restrained the young person to the ground (page 116). She concluded that no further enquiry was required about other staff members as the allegation against the claimant was about restraint to the ground. She considered the claimant's statement that other staff members would be able to speak about the behaviour of the young person on 6 May 2021. She concluded that no further enquiry was required of other staff members as she accepted the claimant's description of the behaviour of the young person. She accepted that the young person's behaviour was complex and challenging as she had worked with hundreds of young people with complex and challenging behaviour in her professional role. She concluded that no further investigation was required about the behaviour of young person on 6 May 2021, as that behaviour did not, in her view, justify the conduct of the claimant.

Procedure generally

58. As regards procedure generally, the tribunal found that the dismissal procedure followed was reasonable. The respondent carried out an investigation meeting with the claimant, as set out above. The claimant was then invited in writing to a disciplinary hearing. The letter inviting him to the hearing set out the allegations against him and told him that one outcome of the hearing could be his dismissal from employment. The letter told the claimant that he could bring a representative to the hearing. In advance of the disciplinary hearing the claimant was provided with a copy of all relevant documentation, including the investigation paperwork, the disciplinary and other relevant policies and the team teach materials. At the disciplinary hearing the claimant and his representative were given an opportunity to present his case to the respondent. The respondent adjourned the hearing to consider the claimant's case before reaching a decision. After the adjournment the claimant was informed of the outcome of his case the following day, namely that he was to be dismissed. He was provided with reasons for his dismissal. The respondent wrote to the claimant to confirm his dismissal without notice. The dismissal letter confirmed the claimant's right of appeal. At the appeal hearing the claimant and his representative were given an opportunity to present their grounds of appeal to the appeal manager. The appeal manager adjourned to consider the grounds of appeal before reaching a decision that the grounds were not upheld.

59. We considered whether the decision to appoint a disciplinary manager other than Ms Litt made the dismissal unfair. We concluded that it did not. The ACAS Code of Practice on Discipline and Grievance provides that in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing. Due to rescheduling of the disciplinary hearing the original disciplinary manager, Ms Ward, was unavailable. We accepted the respondent's evidence that there were limited other staff members who could conduct the disciplinary hearing. Whilst Ms Litt had asked several questions in the investigation meeting, her involvement was not substantial. She attended the investigation meeting as the note taker. The decision to recommend that the matter proceed to a disciplinary hearing was taken by Ms Walton alone and not Ms Litt. This was the evidence of both Ms Walton and Ms Litt which we accepted. We concluded that there was separation between the investigation

and disciplinary functions and that Ms Litt's questions at the investigation hearing did not impact on impartiality at the disciplinary hearing

60. We considered whether the decision to dismiss for taking the young person to the ground in a hold and for pulling of the young person's hoody, was outside of the band of reasonable responses open to the respondent.

61. The claimant's representative submits that this is because (i) staff in a school have a duty to use reasonable force to protect students from themselves and other students, and it is for that reason they are provided with a statutory power to that effect (section 9 Education and Inspections Act 2006). (ii) the protocol which the claimant presumes he was dismissed for acting outside of makes that clear – "Where risk of harm is foreseeable there is no excuse for waiting … That could be negligent"); (iii) a restraint using a technique which is not approved by the employer is not necessarily an assault – see **Crawford v Suffolk Mental Health Partnership NHS Trust [2012] EWCA Civ 138** where nurses had tied a patient's chair to a table with bed clothes. This was not an approved technique for restraint, and the Court of Appeal considered it was perverse to dismiss simply for adopting a technique not approved by the employer.

62. The first two of these submissions, essentially both about using force where necessary and foreseeable, is what the claimant said through his representative Mr Arden at the disciplinary hearing. He made reference to Department of Education guidelines to this effect. We concluded that Ms Litt as the disciplinary manager did consider these matters when raised in the hearing. She makes reference to having done so in the disciplinary outcome letter in her reasons, for example; "you were unable to provide a satisfactory explanation for the degree of force you employed, other than that rather than follow the correct techniques and training you employed your own judgement that the situation was extreme enough to warrant the level of force you chose to exert; at no time during your explanations did you acknowledge that alternatives were available or that you recognised the reasons for the recognised and prescribed techniques, or that you accepted that you should have acted differently. Instead, your responses indicated that you were prepared to override instructions and training as a first and not a last resort.

63. Ms Litt's conclusion was not that there would never be a situation where reasonable force could not be used but rather that was not the case here. Ms Litt's oral evidence was that her main concern was the admission by the claimant that he had taken the young person to the floor, outside of training. That was not her only concern as evidenced in her disciplinary outcome letter. The third submission made the claimant's representative is that a restraint using a technique which is not approved by the employer is not necessarily assault. We agree. We concluded that the respondent did not look only at the technique. We concluded that the respondent had not dismissed simply for adopting a technique not approved by it but had considered the explanation given by the claimant and looked at the incident in the round.

64. This brings us back to the question of whether there was a fair and reasonable investigation, as set out in Burchell. The claimant's representative submits that there ought to have been further investigation by the respondent of the level of risk posed by the young person. We are satisfied that there was sufficient enquiry by the respondent, both Ms Walton and Ms Litt of the level of risk. This is evidenced in the enquires made by Ms Walton and Ms Litt at the respective hearings which they chaired and the disciplinary outcome letter. Further, both OB and SP's statements referred to the claimant having been racially abused by the young person and the claimant having then brought the young person to the ground in a hold. These witnesses did not say that the young person was headed towards the kitchen, such that the claimant had to restrain the young person in a ground hold. The claimant's version of events and the claimant's assertion about the level of risk was not supported by either of the witnesses present. Further, the claimant's explanation about the young person being in a heightened state was considered by Ms Walton and Ms Litt in their respective hearings. They concluded that the behaviour of the young person and of service users in the school generally was often complex. Ms Litt concluded that did not justify the claimant bringing the young person to the ground in a hold.

65. We have reminded ourselves that the range of reasonable responses test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached. This includes whether the investigation carried out by the employer fell within the range of reasonable responses that a reasonable employer might have adopted: **J Sainsbury plc v Hitt 2003 ICR 111, CA**. For the reasons already given we are satisfied that the investigation carried out by the respondent fell within the band of reasonable responses.

66. We also considered the submission of the claimant's representative, as we understood it, that if Ms Walton had considered anything in her investigation beyond that the claimant had acted outside of training, the allegation and indeed the reason for dismissal was something different to that which the respondent asserted. We do not agree that the result of the investigation meeting and subsequent dismissal hearing was that the reason for dismissal was something different from that given by the respondent. The wider circumstances of the incident, as set out by the claimant in his written statement to Ms Walton and later at the disciplinary hearing were considered by the respondent. It was appropriate for them to do so. This did not change the reason for dismissal. Nor in our view did it mean that the investigation carried out by the respondent was such that it did not fall within the range of reasonable responses that a reasonable employer might have adopted. Nor in our view did it mean, as suggested by the claimant's representative that Ms Walton had framed the allegations against the claimant deliberately in such a way as to narrow the scope of the factual enquiry, and to direct Ms Litt towards dismissal of the claimant.

Sanction

67. We considered whether dismissal was a fair sanction. The tribunal was satisfied that in considering whether or not to dismiss the claimant it had considered alternatives to dismissal. This is referred to in the dismissal letter. Ms Litt's

evidence was that there was a trust issue in having the claimant remain in employment given the nature of the respondent's business. We accepted that and concluded that dismissal was a fair sanction.

Equity and the substantial merits of the case

68. The claimant asserted that there had been an inconsistency of treatment between him and other staff members. In the case of LH who was dismissed in 2015, we were satisfied that she had also been dismissed for not following training when she had put another young person in a headlock. The wording of the two dismissal letters is not precisely the same however it does refer to LH not following training. We were satisfied with Ms Walton's explanation that the circumstances were comparable and that both had been dismissed. There was no inconsistency of treatment.

69. In the case of OB, we were satisfied that the situation with OB was entirely different to that of the claimant. OB was responding to an incident where the claimant had already taken the young person to the floor. OB required to deal with that situation. There was no inconsistency of treatment. In the case of other staff more generally, at the investigation meeting the claimant said that whilst other staff had restrained the young person it was not by way of a hold taking him to the ground. The claimant also said that another staff member had restrained another young person. The claimant had not reported this, and the respondent had no knowledge of the incident. We concluded that there had been no inconsistency of treatment with other staff members.

70. The tribunal has set out above that it was satisfied the respondent had shown the reason for the claimant's dismissal was conduct. The tribunal has also set out above its conclusion that the respondent had reasonable grounds upon which to sustain his belief in the claimant's misconduct. The tribunal reminded itself that the question it must ask itself is not whether the tribunal would have dismissed the claimant. The tribunal must ask whether the respondent's decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted (**Iceland Frozen Foods Ltd v Jones 1983 ICR 17**). The claimant was in a position of trust. He had responded to the behaviour of the young person by bringing him to the ground. The claimant knew that was in breach of team teach training which he had received. The reason for dismissal was not only acting outside of training but the particular action of the claimant which was bringing the young person to the ground in a hold. The tribunal decided that, in the circumstances of this case, that the respondent's decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted. The dismissal was accordingly fair.

Direct race discrimination

71. The claimant asserted that he had suffered less favourable treatment by Ms Walton determining that the claimant should be disciplined for the alleged misconduct from 3 November 2021 and thereafter less favourable treatment by being dismissed. He relied on four comparators who are not Black British.

72. In this regard, we first considered whether the claimant had proven facts from which, if unexplained, we could conclude that the claimant had been disciplined from 3 November 2021 and thereafter dismissed because he is Black British. We found that he did not therefore the burden of proof does not shift to the respondent.

73. We considered the comparator LH. We concluded that the claimant was disciplined for the reasons already found and subsequently dismissed and that the comparator LH was also dismissed in the same circumstances. We concluded that LH was in the same material circumstances as the claimant but for race. However, we did not conclude that because the dismissal letters of the claimant and LH were not framed in precisely the same way this meant that the claimant had suffered less favourable treatment than the comparator LH. Both were dismissed for failure to follow the correct training having used an inappropriate physical restraint on a service user. The claimant did not suffer less favourable treatment because of his race.

74. We next considered the named comparator OB. The claimant asserted that OB was not disciplined or dismissed for holding the young person to the ground following the incident on 6 May 2021. OB was not disciplined. We accepted the respondent's evidence that they viewed the situation with OB as entirely different. He had arrived upon an incident where the claimant had taken the young person to the ground and OB was dealing with that situation. We concluded that it could not be said that OB was in the same material circumstances as the claimant but for his race. Accordingly, he is not an appropriate comparator.

75. Although two further actual comparators were identified by the claimant in the list of issues there was no or insufficient evidence to allow us to determine that the claimant had proved any facts from which, if unexplained, would point to the claimant's treatment being because of race for these comparators.

76. We next considered a hypothetical comparator. We did not consider that there was 'something more' giving rise to a prima facie case of race discrimination. The claimant asserts the following as the something more: Ms Walton framing the allegations against the claimant deliberately in such a way as to narrow the scope of the factual enquiry, and to direct Ms Litt towards dismissal of the claimant; Ms Walton's questioning at the 1 November hearing being consistent with that narrow approach – focusing on the extent of the claimant's training rather than circumstances relevant to reasonable force; Ms Litt, on her own evidence, adopting that same approach of focusing on the "admitted" conduct,

that of acting outside of training, prejudging the issue of disciplinary sanction from the outset; Failing to make reasonable enquiries which might have supported the claimant's case – e.g. of Ms Scarborough regarding the suitability of the bench; and of the chef regarding access to the kitchen on 6 May; Ms Litt making no enquiry as to who the individuals were who had restrained a child to the floor per the claimant's statement on 29 November 2021. We concluded that none of those matters had been established as facts and/or were not enquiries which ought reasonably to have been made as already set out.

77. For the reasons given above we concluded a hypothetical comparator would have been treated the same way.

78. In summary therefore we were not satisfied that the claimant had made out a case of direct discrimination in relation to either named or hypothetical comparators or when stepping back and looking at the whole picture, which would put the onus on the respondent to prove that there was a non-discriminatory reason for its actions. Accordingly, the direct race discrimination complaint fails.

Conclusion

79. Having concluded that each of the complaints is not well- founded, there is no requirement for a remedies hearing. The claimant's complaints dismissed.

Employment Judge McCluskey

Date: 5 March 2024

JUDGMENT SENT TO THE PARTIES ON

20 March 2024

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

APPENDIX 1

Unfair dismissal

1. Was the claimant's dismissal on 30 November 2021 for a reason relating to his conduct?
2. Did the respondent have a genuine belief, based on reasonable grounds, following a reasonable investigation, that the claimant was guilty of the conduct?
3. Was the claimant's dismissal fair or unfair within the meaning of s.98 ERA?

Direct Discrimination

4. Did the respondent treat the claimant less favourably than they treated or would have treated someone in the same material circumstances, who did not share the Claimant's race – in that he is Black – as follows (para 34 of ET1): :
    a. By Lisa Litt and / or Sarah Walton determining that the Claimant should be disciplined for the alleged misconduct from 03 November 2021; and / or ;
    b. By Lisa Litt dismissing the claimant for the alleged misconduct on 30 November 2021?
5. The claimant relies upon the following comparators (**i**n addition to a hypothetical comparator);
    a. Laura Hall also used a technique not taught within Team Teach training, but she was ultimately disciplined for using more than reasonable force, whereas the claimant was disciplined for acting outside of his training per se;
    b. In January 2021, Steven Quelch grabbed the same young person that the claimant was disciplined for restraining by his top, to ease him to the ground, and was not disciplined or dismissed. In October 2020, Steven Quelch restrained another young person, by holding the young person's wrists across the young person's chest, and easing him to the ground, outside of Team Teach training, and was not disciplined or dismissed;
    c. In February or March 2021, Patrick Lyne held the same young person by his arms against a wall, outside of his Team Teach training, and was not disciplined or dismissed;
    d. On 6 May 2021, Oskar Budnik restrained the same young person on the floor, and was not disciplined or dismissed;
6. Was that less favourable treatment because of the claimant's race?