EMPLOYMENT TRIBUNALS

Claimant: **Mr C Amoah**

Respondent: **Mitie Limited**

Heard at: London Central **On:** 16, 17, 18 December 2024
(by remote video hearing)

Before: Employment Judge B Smith (sitting with members)
Tribunal member S Husain
Tribunal Member J Griffiths

Representation
Claimant: In person
Respondent: Mr T Finn

JUDGMENT having been sent to the parties on 30 December 2024 and written reasons having been requested in accordance with Rule 60 of the Employment Tribunal Rules 2024, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed as an operative porter at the respondent between 22 April 2013 and 13 September 2023 when he was dismissed by reason of conduct. The claimant's employment transferred to the respondent in 2020 under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE').

2. ACAS conciliation commenced on 10 October 2023 and concluded on 12 October 2023. The claim was presented on 12 December 2023.

3. The claimant brings complaints of:

   (i) Unfair dismissal; and

   (ii) Direct race discrimination.

4. The alleged less favourable treatment because of race was the claimant's dismissal.

Procedure, documents, and evidence heard

5. The claimant was originally represented by solicitors in these proceedings, and later a law centre, but he represented himself at the final hearing.

6. No adjustments were required or asked for by any of the parties or witnesses. The Tribunal took regular breaks and no issues around adjustments arose during the hearing. The Tribunal was mindful of its obligations to part the parties on an equal footing and explained the process in clear language to the claimant throughout and gave him an opportunity to ask questions. The Tribunal confirmed that the claimant had been given sufficient time when relevant.

7. The claimant gave evidence under oath. The respondent's witnesses were Bertrand Kuate (investigation manager), Peter Johnson (disciplinary manager), and Victoria Kingshott (appeal manager). All gave evidence under oath or affirmation.

8. The claimant's witness Patience Ofori Attah did not attend to give evidence. The Tribunal explained to the claimant that her evidence would be given less weight as a result.

9. The list of issues was set by order of EJ Woodhead dated 13 March 2024. The agreed list of issues are replicated in the conclusions below with the issues relating to remedy omitted.

10. A complaint of victimisation was dismissed upon withdrawal as set out in the Judgment of EJ Woodhead dated 15 March 2024.

11. The parties agreed the claims and list of issues at the start of the hearing. The claimant agreed that the list of issues captured his claims. He confirmed at the start of the hearing he was still relying on his comparator as set out in correspondence between the parties, so this was included in the list of issues.

12. The agreed documents were:

    (iii) Hearing bundle paginated to 294;

    (iv) Agreed list of issues; and

    (v) Witness statement bundle paginated to 19 (Charles Amoah, Patience Ofori Attach, Bertrand Kuate, Peter Johnson, Victoria Kingshott).

13. Both parties made oral submissions at the close of the evidence. The claimant was given the 30 minutes he requested to prepare these after the respondent's oral submissions.

14. It was necessary to hear the claimant's evidence before that of Ms Kingshott in order to accommodate her availability and make the best use of the Tribunal's time. This was not objected to by the parties and no unfairness arose as a result.

15. Although the claimant had difficulties in accessing the bundle during his evidence, the Tribunal was able to display these to everyone using the Share function on CVP. No unfairness from this arose. The claimant had confirmed the documents at the very start of the hearing.

16. The claimant asked the Tribunal to record that the respondent's witness statements were served late. However, no particular application arose from this, although the claimant was permitted to cross-examine the respondent

witnesses on the basis of his allegation that they had drafted their statements after they had read his. In any event, no unfairness arose from the later service of witness evidence by the respondent and we were satisfied that the claimant had sufficient time to prepare for the hearing.

17. No timetabling objections were raised by the parties.

(i) Application for specific / third party disclosure of CCTV

18. The claimant's oral application on the first day of the hearing for specific disclosure by the respondent, or any relevant third party, to provide CCTV which may exist to cover the allegations which led to the claimant's dismissal was refused. The Tribunal considered Rules 31 and 32 Employment Tribunals Rules of Procedure 2013. The Tribunal asked whether the material existed, if so whether it was likely to be disclosable in the sense required by the Civil Procedure Rules 1998 (such as if it supported or undermined either party's case), whether it was necessary for a fair determination of the issues, and whether disclosure was consistent with the overriding objective.

19. Firstly, we did not consider that the material continues to exist, and if so it would be held by a third party (the NHS) in any event. We accepted the written statement of Victora Kingshott that the relevant CCTV was not accessible to the respondent and would not have been retained in any event, the retention period being either 28 or 30 days. Also, there were no known dates or times of the specific allegations against the claimant (which take place over a significant period of time) so it was unclear how any relevant CCTV footage was likely to be located in any event, even if it had been retained. Also, some of the allegations were less about what might be captured on CCTV, but what the claimant said and the effect this had on the complainant.

20. Even if this is wrong, we did not consider that the material is likely to be disclosable in any event. This is because the issues in the case, agreed by

the claimant, do not include, specifically, whether or not he committed the alleged misconduct which led to his dismissal. The focus of the claims is on whether or not the respondent carried out a reasonable investigation and the claimant was free to cross-examine the respondent witnesses on why the CCTV was not looked at as part of his disciplinary investigation, hearing or appeal. Also, the disclosure of the CCTV was not required for a fair determination of the claims. It is not, in fact, required at all. This is because there are relevant witnesses who can be asked questions about the relevant issues.

21. Finally, disclosure would not be proportionate or further the overriding objective. There would be potentially hours of CCTV to view, even if it had been retained, given the lack of detail about when the exact allegations took place. Further, any further enquiries about the CCTV – such as exactly what might have been caught on CCTV – would necessitate a postponement of the claim. This would prejudice the respondent due to the passage of time and increased costs and further delay would be wholly contrary to the overriding objective.

(ii) *Application for a witness order*

22. During the cross-examination of the investigator the claimant applied for a witness order for Deputy Sister Santos. The application was refused. This was because the Tribunal will not make an order that a witness attends a hearing to give evidence under Rule 32 Employment Tribunal Rules of Procedure 2013 unless (a) the witness can give evidence that is relevant to the issues in the case; (b) it is necessary to make such an order, for example, because the witness will not attend voluntarily; (c) the Tribunal is provided with the correct service address for the proposed witness; and (d) the making of such an order is in accordance with the overriding objective, applying the Tribunal's discretion.

23. We took into account the Presidential Guidance on Case Management Guidance Note 3: Witnesses and Witness Statements.

24. In accordance with paragraph 8 of the Presidential Guidance, the claimant needed to give the name and address of the witness, a summary of the evidence it is believed they will give, and an explanation as to why a witness order is necessary to secure their attendance. The service address is normally the witnesses home address.

25. The claimant did not know the witness' address. She is also not an employee of the respondent and therefore there is no good reason to believe that they would know her address. The claimant was also not in a position to give a summary of the evidence he believed that she would give. This is because she has not been interviewed or provided a witness statement. The only basis for the areas of evidence she may be able to speak about is that covered in an email account that she had already provided and is in the hearing bundle. Also, the witness had not been contacted voluntarily to attend the hearing. It was therefore not established that a witness order was in fact necessary.

26. It is also not the case that any evidence from this witness would be likely to be particularly relevant to the issues in the case given that the focus of the claim is on the reasonableness of the respondent's actions (and whether the claimant's race played a part in its decision making).

27. Also, if the claimant was to call the witness as his own witness (which he must if they are not a respondent witness, as she was not) then he would be limited to asking them open questions unless the Tribunal gives the claimant permission to treat them as 'hostile'. The party calling a witness cannot normally ask leading questions or cross-examine them. If it appears that the claimant will be required to ask the Tribunal's permission to treat the witness as hostile because they will need to cross-examine them then this can be a ground for refusing the witness order: Pasha v DHSS EAT 556/80. The Tribunal may also take into consideration whether the evidence the witness could give is unlikely to assist the claimant, or will support the respondent: Laing v Bury & Bolton Citizens Advice [2022] EAT 85 at [58]. It appeared to the Tribunal that the claimant would need to cross-examine this

witness because, from the questions he had asked in cross-examination of the respondent's witnesses, his point was that if the matters raised with the Deputy Sister were sufficiently serious then she should have reported the claimant sooner rather than giving him an informal warning. He would also need to challenge the account she had given by email of a conversation in January 2023. The claimant's likely need to ask the Tribunal for permission to treat her as hostile was another good reason to refuse the order. Also, her evidence was likely to be adverse to the claimant given her account by email.

28. Also, it would be wholly contrary to the overriding objective to grant a witness order at this stage of proceedings. It would necessarily have required an adjournment of the final hearing which could not be resumed for a significant period of time.

Relevant Law

(i) Burden of proof in EQA claims

29. The burden of proof for the EQA claims is governed by s.136 EQA:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

[…]

30. It was held in Field v Steve Pie [2022] EAT 68 at [37]:

'*In some cases there may be no evidence to suggest the possibility of discrimination, in which case the burden of proof may have nothing to add. However, if there is evidence that discrimination may have occurred it cannot be ignored. The burden of proof can be an important tool in*

determining such claims. These propositions are clear from the following well established authorities.' Further at [41] that '*if there is evidence that could realistically suggest that there was discrimination it is not appropriate to just add that evidence into the balance and then conduct an overall assessment, on the balance of probabilities, and make a positive finding that there was a non-discriminatory reason for the treatment*.'

31. It is not sufficient for the employee to only prove a difference in protected characteristic and a difference in treatment in order to shift the burden of proof: Madarassy v Nomura International Plc [2007] EWCA Civ 33.

32. Once the burden has shifted, the employer must prove that less favourable treatment was in no sense whatsoever because of the protected characteristic: Wong v Igen Ltd [005] EWCA Civ 142.

(ii) Direct race discrimination

33. Direct discrimination is prohibited conduct under s.13 EQA:

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. […]

34. The comparator's circumstances must be the same as the claimant's, or at least not materially different. This is because s.23 EQA says:

(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case.

[…]

35. The protected characteristic need not be the only reason for the less favourable treatment, or the main reason: London Borough of Islington v

Ladele [2009] IRLR 154 (EAT). The decision must be more than trivially influenced by the protected characteristic.

36. The question of less favourable treatment can be intertwined with the reason for that treatment: the principal question is why was the claimant treated as he was? If there were discriminatory grounds for that treatment then '*usually be no difficulty in deciding whether the treatment …was less favourable than was or would have been afforded to others.' There is a single question: did the complainant, because of a protected characteristic, receive less favourable treatment than others'*: Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337 HL.

(ii) Unfair dismissal

37. Section 94 Employment Rights Act 1996 ('ERA 1996') confers on employees the right not to be unfairly dismissed. The respondent admits that it dismissed the claimant within section 95(1)(a) ERA 1996. Section 98 ERA 1996 deals with the fairness of dismissals. The employer must show that it had a potentially fair reason for the dismissal within section 98(2) ERA 1996. If so, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

38. Misconduct is a potentially fair reason under section 98(2)(b) ERA 1996.

39. Section 98(4) ERA 1996 provides that the determination of whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 this shall be determined in accordance with the equity and the substantial merits of the case.

40. Following the guidance in British Homes Stores Ltd v Burchell 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827 the Tribunal must decide

whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on genuine grounds and after carrying out a reasonable investigation. In deciding whether the employer acted reasonably or unreasonably within section 98(4) ERA 1996 the Tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances in all aspects of the case, including the investigation, grounds for belief, penalty imposed and procedure followed. It is immaterial how the Tribunal would have handled the events or what decision it would have made and the Tribunal must not substitute its view for that of the reasonable employer: Iceland Frozen Foods Limited v Jones 1982 IRLR 439.

41. In considering procedural fairness we take into account all of the circumstances of the case, including the size and administrative resources of the employer and the principles of natural justice, including: whether the employee knows the case against him; whether there has been undue delay at any stage; whether the employee has had a chance to put his case; whether the employee is given a fair hearing and has the opportunity to be accompanied to the hearing; whether, where possible, the disciplinary hearing is held by independent third parties with sufficient seniority; and whether the employee is given a right of appeal.

42. Procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness: Taylor v OCS Group Ltd [2006] EWCA Civ 702.

43. In ascertaining the reason for a dismissal the Tribunal will often need look no further than the reasons given by the appointed decision maker. However, if that is an invented reason, it is the Tribunal's duty to penetrate through the invention rather than allow it to affect the Tribunal's own determination: Royal Mail Group Ltd v Jhuti [2019] UKSC 55.

44. Whether or not a dismissal by reason of conduct is fair depends not on the label attached to or characterisation of the conduct as gross misconduct, but whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee: HOPE v BMA [2022] IRLR at [25].

45. The range of reasonable responses approach applies equality to investigations as other parts of the disciplinary process: J Sainsbury PLC v Hitte [2003] ICT 111 at [34]. This includes investigations into potential mitigation if the investigation is necessary to put the misconduct into its proper context: Chamberlain Products Ltd v EAT [1995] ICT 113, 119.

Findings of fact

46. We make findings of fact on the balance of probabilities. We only make those findings of fact we consider necessarily to fairly determine the claims. There is no dispute about the authenticity of the documents.

47. As a matter of generality, we were cautious about relying on the claimant's account of matters of narrative where they were not supported by documentary evidence. For example, in the claimant's oral evidence we considered that he had a tendency to present his perception of events as established fact when in fact the details were less clear. An example of this was in respect of the claimant's comparator when he had a tendency to present what he had been told, or assumed, as first-hand knowledge. Also, in respect of the claimant's flexible working request, the claimant's oral evidence was that it had been agreed by David Johnson with whom he had a flexible working meeting, however this was not supported by the meeting notes. Rather, the meeting notes gave the impression that David Johson was amenable, in principle, to the request. The claimant had conflated this with actual agreement. We therefore could not simply accept all of the claimant's evidence at face value.

48. The claimant was employed as a Porter Operative at the respondent, a facilities and services provider, between 22 April 2013 and 13 September 2023. ACAS conciliation commenced on 10 October 2023 and concluded on 12 October 2023. The claim was presented on 12 December 2023. The claimant was summarily dismissed on 13 September 2023 by reason of gross misconduct by outcome letter of the same date.

49. The claimant's employment was transferred to the respondent under TUPE in 2020.

50. During the relevant period the claimant was working location was at University College London Hospital Trust (UCLH).

51. The relevant misconduct was allegations, accepted by the respondent, of effectively harassment and unprofessional behaviour brought by three nursing staff at UCLH.

52. Concerns were raised about the claimant's conduct by a Deputy Sister of UCLH to him in an informal way January 2023. Although the exact details of the nature of this conversation were in dispute, comparing her email to the respondent about the conversation with the claimant's oral evidence, it was not necessary to resolve these exact differences to determine the claims. The factual finding we have made above is consistent with both versions of events.

53. The investigation manager was Bertand Kuate. Mr Kuate is of the same or similar race as the claimant. The disciplinary hearing was managed by Peter Johnson. Victoria Kingshott was the appeal manager.

54. When the allegations were made against the claimant he was suspended on 15 May 2023 which was confirmed in writing by letter dated 18 May 2023. An investigation meeting happened on 9 June 2023, the claimant having been given notice of the allegations and meeting by letter dated 26 May 2023. The claimant was informed in writing of his right to be accompanied

at that meeting. A disciplinary hearing was held on 14 August 2023. Notice of the hearing was given by letter dated 28 July 2023. The claimant was represented at that hearing. The outcome of the hearing was given by letter dated 13 September 2023 which was that the claimant was summarily dismissed for reason of gross misconduct. The claimant appealed on 14 September 2023. The appeal hearing was on 3 October 2023. The appeal outcome was by letter dated 9 October 2023. The appeal was not upheld.

55. We accept (and find) that there was an issue between the claimant and Peter Johnson, his then line manager's manager, on 11 May 2021 about whether it was correct for the claimant and another to use a particular location named Podium 1 during break times. We find that this amounted to nothing more than them being told that they should not use that space during break time following instructions from a manager on the understanding of the position of UCLH. We do not find that, as a matter of fact, this played any part in the respondent's later decision making. There is no good reason, or proper evidential basis, for it to have done so. There is a significant period of time between this and the later events. Also, by its nature, it does not appear to be anything more than a simple management instruction.

56. We gave limited weight to the evidence of the claimant's witness on this point because she was not available for cross-examination. There was nothing particularly compelling about her evidence which otherwise assisted the claimant, other than confirming that the incident itself (if not the detail) happened.

57. The claimant and his union representative did not object to Mr Johnson being the disciplinary officer on the basis of prior incidents. The claimant accepted this in cross-examination. It was also not included as a specific ground of appeal, other than alleging general and unparticularised 'bias'.

58. The claimant had made a flexible working request in writing on 24 August 2021. Mr David Johnson invited the claimant to a meeting that took place

on 8 September 2021. The claimant had found someone to swap working patterns with. The claimant accepted this in cross-examination and this is supported by the meeting notes. The meeting notes do not show that the flexible working request was granted by David Johnson although they do suggest that he was amenable to the request. They show that the respondent would write to the claimant with the outcome. The request was then withdrawn by the claimant in writing on 20 October 2021. We find that this happened because it is clear from the documentary evidence.

59. As a question of fact, we do not find that it is more likely than not that this played any part in the later decision making of the respondent. There is no good reason, or proper evidential basis, for it to have done so. There was a significant period of time between this and the later decisions about the claimant. It was administrative in nature.

60. The investigation as carried out by someone with knowledge of the claimant but no working relationship with him. The investigator had training in carrying out investigations and extensive experience in doing so.

61. Three nurses at UCLH, who were not employees of the respondent, had raised concerns about the claimant harassing them whilst on duty at UCLH. The allegations included unwanted attention, buying an unwanted chocolate gift, and seeking them out unnecessarily for signatures when other nurses were available, and invading their personal space such that the claimant's breath could be felt. One nurse's account was that she felt sufficiently uncomfortable that she would wear a fleece to cover her body. Other nurses were told that he would make them his 'queen'. The concerns were brought to the respondent's attention. Some dated back to 2022. It was flagged to the respondent that the claimant's behaviour had been previously reported to the Deputy Sister who had an informal conversation with the claimant in January 2023. The respondent was contacted by a matron on 11 May 2023 and the case was logged with HR, leading to the claimant's suspension.

62. The claimant was given an opportunity at his investigation meeting to give his side of the story after the statements of the individual allegations were read to him. The claimant provided his explanation for what happened, including denials of some specific allegations such as buying chocolates or telling nurses that he would cook for them.

63. The investigation found that there was a disciplinary case to answer. The investigator took into account the number of people involved and different scenarios described, the claimant proving as part of his explanation that he was at time joking, but this was not how things were perceived by the complainants, the length of time of the conduct and that it had continued after an informal warning, an apparent inconsistency in the claimant's explanations around why he was seeking individual nurses out, and that the complainants were unrelated and had nothing to gain from making the allegations. The investigation established that the complainants were from different wards. The investigation did not involve seeking out any CCTV although the claimant did say during the investigatory meeting that CCTV would prove his innocence. We find, however, accepting the respondent witnesses evidence, that the CCTV would not have been retained for long enough for any of the alleged incidents to have been captured. Also, the allegations did not involve specific dates or times and therefore it is difficult to see how the relevant passages of CCTV footage could have been located in any event.

64. The disciplinary hearing was carried out by the Soft Services Manager with training and experience of disciplinary hearings. He was known to the claimant but did not have a direct working relationship with him. The disciplinary manager was senior to the claimant's line manager, one level above them. The disciplinary hearing involved the manager reviewing all of the documents, the statements from the nurses, deputy sister, and the investigation meeting minutes. The claimant had union representation at the hearing. Statements were ready out and the claimant given an opportunity to explain. Following the hearing, the Deputy Sister was contacted by email to provide more information about the January 2023 meeting with the

claimant. This included her account that the claimant had apologised at that time and has assured her that he would not repeat the behaviour.

65. The claimant was summarily dismissed for reasons given as follows. There were three different accounts about the claimant's behaviour over a long period of time, and one included five incidents with a level of detail about what happened and how it made her feel. A second included nine incidents, with detail, and how it made her feel. The disciplinary manager found that the behaviour was contrary to the respondent's harassment policy and had led to the staff changing their behaviour to avoid the claimant. Also, it found that the behaviour had continued after the informal meeting in January 2023 with the Deputy Sister. The disciplinary hearing also rejected the claimant's explanations as implausible or lacking credibility. It rejected the claimant's allegation that it was a conspiracy against him because of the number and specificity of the allegations. It concluded that the seriousness of the misconduct warranted dismissal and that alternatives, such as final written warning, were not appropriate. This included the ongoing safeguarding risk that the claimant would pose and lack of remorse.

66. The appeal grounds relied on by the claimant were that the decision was harsh, biased and unfortunate. Also, that the investigation was conducted improperly, and there was not sufficient evidence to support the outcome. The appeal included a hearing with the right to be accompanied. The hearing was rescheduled to accommodate the claimant's union representative who attended the appeal hearing. The claimant was given an opportunity to expand on his grounds of appeal. The documentation was reviewed by the appeal manager and she requested the CCTV from the relevant person. The CCTV was not accessible to the respondent because it was contrary to the UCLH policy, accepting her oral evidence on this point. We did not consider the lack of documentary evidence about the exact efforts taken by the appeal officer was sufficient to doubt her oral evidence on this point.

67. The appeal outcomes were as follows. Firstly, the appeal found that the investigation and disciplinary hearing were in accordance with the respondent's policies and procedures, and all relevant evidence was considered, including that the investigator had followed up as required with the Deputy Sister. The respondent was unable to view the CCTV because it was held by the NHS and it was only kept for what the respondent understood to be 30, or around 30, days in any event.

68. Secondly, the appeal did not find that the outcome was too harsh. This is because the incidents occurred over a long period of time and continued despite the inappropriate behaviour continuing after a warning in January 2023. Also, it was contrary to the respondent's harassment procedure. The respondent considered but rejected an alternative sanction namely moving to an alternative location or using a written warning. Also, the appeal took into account a lack of acceptance by the claimant that his behaviour was wrong and the related lack of apology.

69. Thirdly, the appeal found that the detail provided by the complainants was sufficient to support the allegations made. Although there were no specific times or dates, the level of detail was sufficient in the circumstances of this particular case.

70. The claimant's comparator was named by him via his representative in correspondence. The documents showed that this individual received a final written warning for an issue relating to documents, namely signing for something which he should not have done. We do find that this individual was relocated to another working location following something to do with patient contact and social media. This was accepted by Mr Johnson in evidence. Accepting the claimant's evidence (consistent with Mr Johnson) this was in around 2021. However, the claimant admitted that it was not Mr Johnson who made that decision, consistent with Mr Johnson's evidence. Mr Johnson did not have any kind of detailed evidence about the exact circumstances of the comparator. There was no documentary evidence –

other than the final warning about the document issue – about the patient contact incident.

71. The claimant did not raise his comparator during the internal proceedings. He also did not allege racial discrimination during the internal proceedings.

Conclusions

1 Time limits

1.1 The Respondent does not dispute that the claims have been brought in time.

72. The respondent accepted that the claim was brought in time.

2 Unfair dismissal

2.1 Was the Claimant dismissed?

73. It is not in dispute that the Claimant was dismissed, in line with our findings of fact above.

2.2 What was the reason or principal reason for the dismissal? The Respondent says the reason was conduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.

74. We find that the reason for the dismissal was the claimant's conduct. This is because we accept the evidence of the respondent witnesses, particularly Mr Johnson and Ms Kingshott, that this was the case. The reason for the dismissal is clearly set out in the dismissal letter and appeal outcome. There is no good reason or evidence to find otherwise.

75. We find that the respondent had a genuine belief that the claimant had committed misconduct. This is because we accept the evidence of the

respondent witnesses, particular Mr Johnson and Ms Kingshott, that this was the case. There is no good reason or evidence to find otherwise. There is no evidential basis for this being a sham reason or that the relevant decision makers believed anything other than the claimant had committed misconduct. The outcome letter and hearing notes are corroborative of the witness' evidence of their beliefs.

76. This was not a case involving an invented reason for dismissal. There is no good reason or evidence to support such a finding.

2.3 If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

2.3.1 there are reasonable grounds for that belief;

2.3.2 at the time the belief was formed the Respondent had carried out a reasonable investigation;

2.3.3 the Respondent had acted in a procedurally fair manner;

2.3.4 dismissal was within the range of reasonable responses.

77. We find that there were reasonable grounds for the belief that the claimant had committed misconduct. This is because it followed an investigation management report completed by an investigator. This included an investigatory interview with the claimant and statements from the complainants. Also, there was the material arising from the disciplinary hearing, namely the claimant's account during that hearing. All of these documents were sufficient in the circumstances.

78. We find that at the time the belief was formed the respondent had carried out a reasonable investigation. This is because the claimant was subject to

an investigatory hearing, a disciplinary hearing, and an appeal hearing. He was invited to the relevant hearings by letter with advance notice of the allegations. He had sight of all of the relevant documents. He had a right to be accompanied and was represented at all material times by a trade union representative. There were notes taken of all hearings. All of the outcomes were provided in writing. There was a genuine, meaningful and sufficiently senior and independent appeal. The investigation, disciplinary hearing and appeal were all carried out by individuals with sufficient training, experience, seniority, and independence proportionate to the claimant's circumstances.

79. This was not a case involving undue delay. We were also satisfied that the claimant knew the case against him, was given a chance to put his case, and was given a fair hearing.

80. In the circumstance, we find that the respondent had acted in a procedurally fair manner. We equally did not conclude that any of the points made by the claimant rendered the investigation inadequate or the hearing or outcome unfair. We have taken into account the relevant features of the respondent as a large employer.

81. Specifically, we do not consider that the lack of CCTV rendered the investigation inadequate or the process and procedure unfair. The allegations were not date or time specific and it would not have been practicable for the respondent to review many months' of CCTV footage as part of a reasonable investigation. Also, the footage was held by a third party – the NHS – and we were not satisfied that it was necessarily accessible to the respondent in any event. Also, we find that it is more likely than not that the CCTV would not have been retained by the time of the investigation given the understanding of the witnesses as to its retention period. Also, some of the allegations concerned alleged comments by the claimant which the CCTV would not have assisted with. The lack of CCTV was also adequately taken into account by the respondent, particularly on appeal.

82. We also do not consider that there is a factual basis to suggest that the proceedings were rendered unfair by any possible bias by Mr Johnson. We repeat our factual findings above on this issue. There is significant period of time between the incidents and the claimant's disciplinary hearing. Mr Johnson rejected the allegation of bias. The incidents themselves which the claimant also said gave rise to bias are also not significant, namely them relating to a management instruction and a flexible working request. They have nothing to do with the alleged conduct which formed the basis of the disciplinary proceedings. Also, the Podium 1 incident, we have found, was nothing more than an ordinary management instruction, and little can be properly inferred from the flexible working request given that it was withdrawn by the claimant.

83. We do not consider that the respondent failed to take into account the claimant's previous good record. We consider that it was taken into account by the respondent because we accept the evidence of their witnesses that this was the case. We do not consider that the strength of the claimant's record when measured against the conduct the respondent found proven was such that the outcome was outside of the band of reasonable responses. This is because there's no good reason to find otherwise.

84. We do consider that the respondent took into account the claimant's explanations. They were clearly recorded in the meeting notes at every stage and we accept the respondent witnesses evidence that they were, as a matter of fact, taken into account. We consider that they were rejected by the respondent witnesses on reasonable grounds and the claimant was provided with adequate reasons in writing.

85. We do not consider that the fact that the complainants were not directly interviewed by the respondent's investigator rendered the investigation inadequate or the process and procedure unfair. This is because we accept the respondent witnesses' evidence that they did not have direct access to NHS staff as they were non-employees of the respondent. It was possible for them to clarify some elements of the case by email, and they did in fact

do this, such as with the Deputy Sister. Also, it was unclear exactly what a complainant interview would have achieved for the claimant. Finally, the complainants had provided accounts in writing with sufficient detail for the respondent to fairly form a view as to credibility and reliability and for the claimant to know the allegations made against him.

86. It was important to remember that this was not a case of employee-employee harassment. Rather, the respondent received a complaint about the claimant's conduct from its ultimate client. In those circumstances, the exact provisions of the respondent's grievance procedure would not apply because it is not a process designed for non-employees. Although there were potentially a few details which could have been elicited from the witnesses as alleged by the claimant, such as the exact type of chocolates he was said to have bought them (and he denied doing so), we consider that this omission did not take the investigatory process outside of the reasonable range. Ultimately, the evidence was of a pattern of behaviour, and the respondent took the cumulative effect of the allegations into account. This was reasonable in all of the circumstances.

87. Although the claimant also complained that the investigator effectively carried out a desk-based investigation, this did not render the investigation inadequate or the process and procedure unfair. This is because there was no important factual matter which demanded a physical presence of the investigator on the ward.

88. We do not consider that the lack of dates and times of the particular allegations rendered the investigation inadequate or the process and procedure unfair. This is because the claimant was provided with a sufficient level of detail to understand and respond to the allegations made. We reject the claimant's contention that the allegations were vague, or were sufficiently vague that they rendered the process unfair. This is because of the level of detail given in the wording we have read.

89. We do not consider that in all of the circumstances there were more steps that should have been done such that the investigation or process was outside of the range of reasonable responses.

90. We accept that the respondent did take the claimant's previous good history and the potential for lesser sanctions into account, accepting the evidence of the respondent witnesses on these points. We accept that the outcome was within the range of reasonable responses given the proper application of the respondent's policies and the nature and seriousness of the conduct.

91. We consider that there were elements where the investigation and procedure could have been improved. For example, there was a lack of follow up in the investigation meeting about the reason for seeking out particular nurses. Also, we recognise that there were some difficulties for the claimant in the lack of specific times and dates for the particular allegations. Also, there was the potential for a more detailed investigation, for example, in relation to the proper procedures around nurses providing signatures to the claimant. However, none of these points were sufficient to take the investigation or procedure outside of the band of reasonable responses given the number and range of allegations made.

92. Overall, we conclude that the respondent did act reasonably in all the circumstances in treating their belief as a sufficient reason to dismiss the claimant. All of the relevant factors are in favour of this finding, as set out above.

93. For all of those reasons we find that the claim of unfair dismissal is not well-founded and is dismissed.

4 Direct race discrimination (Equality Act 2010 section 13)

4.1 The Claimant's race is Black West African.

4.2: Did the Respondent do the following things:

4.2.1 Dismiss the Claimant

94. This is not in dispute. The respondent did dismiss the claimant.

4.3 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The Claimant says that they were treated worse than the individual named in page 293 of the final hearing bundle ('the Comparator') who he says was a white male Operative Porter who in 2020/2021 faced disciplinary action for inappropriate conduct concerning a patient. The Claimant says that his employee was cautioned and relocated to another department whereas the Claimant was dismissed.

4.4 If so, was it because of race?

95. We find that the claimant has not established any facts from which the Tribunal could find, absent any explanation from the respondent, that there was a contravention of the Equality Act 2010. According, the burden of proof did not shift to the respondent to show that the dismissal was for entirely non-discriminatory reasons.

96. We do not consider that there is any basis in the evidence or as a matter of logic from which we could infer that the dismissal was in whole or part because of the claimant's race.

97. There was no basis from which we could conclude that the Podium 1 incident was anything to do with the claimant's race. The claimant's argument here is based more on an alleged difference of treatment between NHS staff and Mitie staff, rather than identifying anything to do with race. In any event, this did not play any part in the later events.

98. We do not find that the claimant's comparator assists his case. This is because the comparator is not in the same or materially the same circumstances as the claimant. The comparator's formal action was in respect of completely different conduct relating to signatures and documents. There is a lack of reliable evidence about the behaviour incident. However, it was some time before the claimant's incident by a number of years. Also, it was not in the same circumstances as the claimant. It involved patient contact and social media but we had no reliable evidence about the extent or seriousness of the conduct. It is therefore not an appropriate comparator and we cannot infer anything from it about the claimant's treatment.

99. In any event, a mere difference in treatment and difference in protected characteristic is normally insufficient to infer that the treatment was because of race without there being something more.

100. We therefore conclude, in all the circumstances, that the dismissal was not because of the claimant's race.

101. For all of those reasons the claim of direct race discrimination is not well-founded and is dismissed.

Employment Judge Barry Smith
14 January 2025

SENT TO THE PARTIES ON

21 January 2025
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