



EMPLOYMENT TRIBUNALS

Claimant: Mr A Yeboah

Respondent: Care UK Community Partnerships Limited

Heard at: Midlands West

On: 5,6,7,8,9 August 2024

Before: Employment Judge Bansal

Members – Mrs S Bannister & Mrs J Whitehill

Appearances:

For the Claimant: In Person

For the Respondent: Mrs J Callan (Counsel)

JUDGMENT having been given orally at the hearing and a judgment been sent to the parties on 12 August 2024, these written reasons have been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013. Therefore the following reasons are provided.

WRITTEN REASONS

Background

1. The claimant commenced his employment as a Registered General Nurse with the respondent on 21 August 2019 and was dismissed for gross misconduct on notice effective on 6 June 2023.
2. The claimant commenced early conciliation on 23 August 2023, which ended on 3 October 2023.
3. The claimant presented a claim form (ET1) on 3 October 2023, claiming unfair dismissal, direct race discrimination and victimisation. The respondent submitted a first response (ET3) on 6 November 2023, and an amended response on 14 May 2024. The respondent contested the claims asserting the claimant was fairly dismissed for gross misconduct, and not for a discriminatory reason, and also denied the race discrimination and victimisation complaints.
4. At this hearing the claimant represented himself. The respondent was represented by Mrs J Callan of Counsel.

Preliminary Issue

5. In preparation for this hearing, the Judge noted the hearing of this case was expedited because the claimant and his family are required to leave England on 13 August 2024 because the claimant's visa to remain in the UK has been revoked.

6. At the beginning of the hearing, the Tribunal had to deal with the claimant's application to amend his claim to include a whistleblowing claimant. The application was made on 29 July 2024. The respondent objected to this amendment. In discussion the Judge informed the claimant that if the application to amend is granted then it is highly likely that the respondent will apply for an adjournment of this hearing, which if granted will inevitably mean the hearing will have to be postponed to a later date. Therefore the claimant was given the opportunity to reconsider this amendment application. Given the claimant's personal circumstances he decided to withdraw this application.

List of issues

7. At a Preliminary Hearing held on 23 April 2024 before EJ Platt, the factual and legal issues were discussed and clarified. These agreed List of Issues were again discussed with the parties. These were accepted without amendment. These are attached at the end of this Judgment.

Hearing

8. For this hearing the Tribunal was provided with an agreed bundle of documents of 391 pages, and witness statements from the claimant and for the respondent from, Mrs M Spooner (Operations Support Manager), Mrs N Cahill (Regional Director) and Mr M Doolin.(Regional Director Scotland) On the second day, the claimant produced an additional document which was added to the bundle.
9. All witnesses gave live evidence and were cross examined. The Tribunal also asked questions of the witnesses for clarification.
10. At the conclusion of the parties' evidence, both parties provided written submissions which they expanded orally.

Findings of fact

11. It was not necessary and neither was it proportionate to determine each and every fact in dispute. Hence, only relevant findings of fact pertaining to the agreed legal issues and those necessary for the Tribunal to determine have been made. Also the Tribunal has not referred to every document it read and was referred to in our findings.
12. Having considered all of the evidence, on the balance of probabilities the Tribunal made the following findings of fact. Any reference to a page number is to the relevant page number in the bundle.
13. The respondent is one of the largest independent providers of residential care for elderly people in Great Britain. It employs over 12,500 employees in over 150 Care Homes, providing care services from residential and nursing care, respite care, dementia care and end of life care. It is regulated by the Care Quality Commission.
14. The claimant is Black African and is from Ghana. He is a family man with young children. He commenced his employment with the respondent as

a Registered Nurse on 21 August 2019. Although we were not shown any documentary evidence the claimant confirmed the respondent was his employment sponsor for immigration purposes. This was not disputed by the respondent.

15. In evidence the claimant confirmed he commenced employment at the respondent's Care Home in Leatherhead in Surrey, and at the date of dismissal he was based at Ambleside Care Home, Stratford Upon Avon. He transferred to Ambleside on 21 April 2021. He worked nightshifts. We were informed the Nursing Unit at Ambleside had some 6 nurses. The ethnic mix of the staff working on the Unit was, 1 White British and the others were of black ethnic origin.
16. The claimant's Contract of Employment issued to him on 21 April 2021, confirms his working hours to be 45 per week, and his notice period of 2 months. (p77-90) His Line Manager at Ambleside was the Home Manager Mrs. Julia Joy, who the respondent did not call to give evidence. We were informed she retired some months before the claimant's dismissal.
17. The claimant's employment was subject to the terms and conditions as set out in his contract of employment; the duties as set out in the Job description signed by the claimant on 25 June 2021. (91-93); the Respondent's Medication Policy, and Disciplinary Policy, and the rules of conduct of the professional body the NMC.
18. In particular, these were;
 - (i) The requirement to be registered with the NMC and comply with their Code of Conduct. (p86)
 - (ii) To liaise with GP's and other health professionals to ensure that residents receive the medical and clinical support they require; (p91)
 - (iii) To be responsible for the safe and appropriate management, administration and recording of medication, including controlled drugs and oxygen in accordance with NMC requirements and Care UK policies and procedures.
19. The Medication Policy required the claimant and those administering medication to;
 - (i) work within the Code of Practice of their professional body (where applicable) (p109);
 - (ii) Administer the medication in the prescribed manner and as the medication profile dictates. (Para 5.4.9) & (Para 10.4.)(p115 & 121)
 - (iii) report the incorrect medicine or dosage to the resident, Person in Charge and the residents GP/Consultant or out of hours, and the Pharmacist should be contacted for advice.(p125)
20. In terms of the Disciplinary Policy, the policy provides that if gross misconduct has occurred the result may be dismissal with immediate effect. Examples of misconduct include persistent behaviour which causes offence to fellow colleagues;
21. In terms of gross misconduct;
 - persistent refusal to obey a lawful or reasonable instruction or a serious act of insubordination;

- breach of any applicable professional Code of Conduct;
 - serious act which breaks the mutual trust and confidence or which brings or is likely to bring the company into disrepute.(p101-102)
22. The Disciplinary Policy is a detailed and comprehensive policy, in summary it provides that;
- no disciplinary action will be taken without a full investigation;
 - employees may be suspended on full pay while investigations are carried out;
 - the employee will be given reasonable notice of disciplinary hearings;
 - the employee will be entitled to be accompanied at the hearing;
 - will be given advance notice of the disciplinary hearing with information in support;
 - entitled to an appeal process
 - that the appeal shall be heard at an appeal meeting as soon as reasonably practicable by a Senior Manager, with the decision made in the appeal to be a final decision. (p95-108)
23. As a Registered Nurse, the claimant was also required to comply with and adhere to the code of conduct imposed by the NMC. In particular, for the purposes of this case, the relevant provision is 18.2 of the Rules,
- to keep to appropriate guidelines when giving advice on using controlled drugs and recording the prescribing, supply, dispensing or administration of controlled drugs.
24. The Tribunal was informed that at the date of the claimant's dismissal he had a second job with another Care Home provider Barchester Health Care, where he worked day shifts.

Claimant's Issues

25. By way of background the Tribunal noted the claimant's disciplinary record between the period April 2021 to 17 March 2023, as set out below.
- (a) On 30 June 2021 he received a letter of concern about using foul language. (p132)
 - (b) On or about August/September 2021 he was suspended and subject of a disciplinary relating to an allegation of causing physical abuse to a resident on 31st August 2021. Following a hearing on 15 October 2021, no formal action was taken and the suspension was lifted.
 - (c) On 24 November 2022, the claimant was issued with a final written warning for misconduct in relation to three matters namely;
 - Failure to complete appropriate documentation for residents welfare and safety;
 - Failure to follow direct instruction that call bells were not to be placed outside residents bedrooms;
 - Failure to improve on work performance following management consultation this involving supervisions and appraisal. This included using

foul language and behaviour and attitude;

The claimant's appeal against this final written warning was considered by Mrs Cahill and was not upheld. (p222-225)

Medication Error Report – 16/11/2022

26. On 16 November 2022, the claimant made a complaint about a work colleague Mrs Georgina Canning, a Clinical Lead, and in a senior position to the claimant. He completed an Accident & Incident Form (p194-195) The complaint was that on 16 November 2022 Mrs Canning made a medication error in that the prescribed medication was not given to the resident in accordance with the direction. According to the claimant, the direction was that Two Capsules were required to be given as a start dose, and that Mrs Canning only gave one capsule as a start dose, with the second capsule given 3 hours 54 minutes apart. (p194)
27. The complaint was investigated by Home Manager Mrs Julia Joy. She recorded this was not a medication error. The note states, "*spoke to julie sadler advance nurse practitioner from bridge house, she is happy how the medication was given, directive on medication box didn't state take 2 as stat dose, medication was given in the patients working hours to ensure she got the first dose (2 tablets) on the first day. All medication given correctly this A&I to be deleted, sent to quality and Care UK to check.*" (p195)
28. On 21 December 2022, in a letter to Mrs Canning sent by Mrs Joy, she re-confirmed that the complaint made by the claimant was not considered as a drug error, and the A&I Form had been deleted having been scrutinized by the Quality Team. (p206)
29. The Tribunal asked Mrs Spooner, her view about this as she is an experienced nurse with clinical experience. In her professional opinion Mrs Canning had not committed a medication error for the same reason as stated in the report. She also confirmed that the drug prescribed to the patient was not a controlled drug. The Tribunal gave consideration to the written instructions on the medication label, and as a finding of fact, concurred with the respondent's conclusion that no medication error had occurred. The label states "*Two to be taken on the first day then one to be taken each day*" (p373) Contrary to the claimant's interpretation, it does not state that the two tablets should be taken at the same time. We find the claimant is mistaken in his interpretation and/or understanding.

A&I – 24/11/2022

30. On 24 November 2022, the claimant made a complaint alleging falsification of medication records, discriminatory racism, and inappropriate words. (p198-199) In summary, the complaints concerned;
 - (a) Mrs Julia Joy – falsified information from the GP Practice relating to Mrs Cannings administration of medication on 16/11/2022; and that she wrongly defended her.
 - (b) He was taken through a disciplinary process and harassed because he was black, whereas white employees for example like Mrs Canning

were being defended;

(c) His racism concerns were disregarded by Julia Joy telling him that they were “rubbish”.

31. The complaint was closed by Mrs Julia Joy on 12 December 2022, without any investigation or action. In evidence the claimant explained that he received no acknowledgement and despite raising this at his subsequent disciplinary, and with Mrs Cahill, nothing was done by the respondent. Understandably the claimant showed his frustration to the respondent and in his evidence to this Tribunal. It is apparent to the Tribunal that Mrs Julia Joy took it upon herself to close the complaint.
32. The Tribunal noted Mrs Cahill in her disciplinary outcome letter dated 31 March 2023 to the claimant, stated,
“On investigation I can confirm there is a record of the A&I entered by yourself on 24/11/22 and I could not find a clear response that was confirmed back to you on this. However both the medication issue raised by yourself in a previous A&I dated 15/11/22 and this Syringe Driver issue were investigated”. (p224)
33. The Tribunal found this to be an unsatisfactory response. Mrs Cahill gave no explanation if Mrs Julia Joy was questioned about this. A reasonable and concerned employer would have made enquiries about this, more so because the complaint raised a serious issue about racism. The Tribunal find this complaint was clearly one which even Mrs Cahill was not prepared to investigate. We also find it surprising, how Mrs Cahill could conclude that even though the claimant did not receive a response to the A&I she was satisfied that he had not been treated detrimentally.
34. The claimant relied upon this complaint to be a protected act for the purposes of his victimisation claim. The respondent has conceded this complaint amounts to a protected act.

A&I – 09/12/2022

35. On 9/12/2022 the claimant made another complaint alleging Organisational/Institutional Abuse (p204). This complaint was dealt with by Mrs Julia Joy who closed it on 12/12/2022 – noting, *“this is not an appropriate way to raise concerns and has been actioned”*

A&I – 17/03/2023

36. On 17/03/2023 at about 15.00hrs the claimant raised another complaint alleging physical abuse of a resident. It related to the transfer of the resident to the nursing unit. In that complaint the claimant stated, *“The Home Manager (JJ) has always surrounded herself with incompetent people influencing her decisions. The Home Manager is not capable of making any meaningful decision and she must go with immediate effect.”* (p216)

Incident 21/03/2022 – Medication underdose

37. On 21/03/2023 – the claimant gave an underdose of medication to a resident who was at end of life. The Doctor had prescribed the dose to be given between 5.0-10mg. The claimant unilaterally determined that the resident should be given a lesser dosage of 2.5mg. He explained he exercised his clinical judgment which in his belief he was allowed to do. In evidence the claimant was adamant that he could do this, and has done this in the past. He also claimed this was allowed by the EMar App used by the respondent for their medication to the Home. In evidence, Mrs Spooner explained the claimant is mistaken about the use of the Emar App. She explained it is a toolkit used by the respondent to record information and medication for their residents. It does not give any user the authority or discretion to administer medication as claimed by the claimant. As a finding of fact, the Tribunal without any hesitation accepts Mrs Spooner's explanation and firmly rejects the claimant's assertion.
38. It is noted on the form, the Doctor (Dr Khan) wanted to know why his Instructions were not followed and that he had left his contact number, which the claimant could have called him on if he felt it was not the correct dosage for the resident. Dr Khan was not happy that his instructions were not followed by the claimant. (p234)

23/03/2023

39. From the timeline of correspondence, it appears that at 10.21am, the claimant was sent a letter by Mrs Julia Joy. She wanted a discussion with the claimant on Teams. This letter was not disclosed in the bundle- we assume it may have related to the medication error issue. However, the email exchange confirms, that in reply the claimant stated, "*I will not attend any meeting. You need a psychiatrist assessment because you are sick in the head.*" (p218)

Suspension

40. On 24/03/2023 the claimant was suspended pending investigation into allegations of refusal to obey a lawful instruction, serious acts of insubordination and giving the incorrect dose of medication and not in the prescribed manner on 21/03/2023. (p220)
41. The investigation to these allegations of conduct was carried out by Shirley Gibbs (Home Manager) on 6 April 2023. The claimant was interviewed on 11 April 2023. Shirley Gibbs recommended the claimant be subject of a formal disciplinary meeting to discuss the allegations. (p232)

Disciplinary Hearing

42. Mrs Spooner, Operations Support Manager (North Central) was appointed to conduct the disciplinary hearing. She had not met or had any previous involvement with the claimant. By letter dated 27 April 2023, the claimant was given notice of the hearing and sent the relevant documentation. The letter confirmed the hearing to take place by Teams on 4 May 2023. The letter also confirmed the allegations and the possible sanction could be

dismissal. The claimant was given the right to be accompanied by an employee or a trade union representative. (p258-259)

43. The hearing took place on 11 May 2023. The claimant was accompanied by his Union representative Vikki Panting. Minutes of this hearing were taken and were contained in the hearing bundle. (p262-267) At the start of the hearing Mrs Spooner withdrew the first allegation of refusal to obey a management instruction.
44. During the hearing the claimant was given full opportunity to make his representations in relation to the two outstanding allegations. In respect of the comments made by the claimant about Mrs Julia Joy, were not denied. His explanation for making the comments was that none of the complaints he had made had yielded any results. He also believed that Mrs Julia Joy had surrounded herself with incompetent people. By incompetent people he highlighted that it was unethical for Managers to manage and supervise their family members working at the Home. This was in relation to the Deputy Manager.
45. The claimant did not see anything wrong with his comments made about Mrs Julia Joy. He remained of the view that he was being discriminated against because he still believed that Mrs Canning made a medication error and that Mrs Julia Joy defended her, whereas he was being disciplined for making a medication error. (p265)
46. In relation to the giving a lower dosage of medication to the resident, the claimant's explanation was that he exercised a clinical judgment. He did this because in his experience had a higher dose been given the resident would have died. The claimant also stated he had in the past made clinical decisions without contacting the doctor.
47. The claimant also said he did not see the Doctor's details on the Kardex, although the copy in the bundle clearly showed the Doctor's contact details.
48. Mrs Spooner confirmed her decision by letter dated 5 June 2023 (p291 - 294) She upheld the two allegations. On the allegation of insubordination, she decided the claimant had admitted making the remarks in the email and report. Mrs Spooner was of the view that, notwithstanding his issues over the last two years as a nurse and a professional member of the team she did not expect these comments to have been made in a public forum and did not accept the explanation that this was due to the way the claimant had been treated by Mrs Julia Joy. She found because he did not acknowledge or accept that his e-mail to Mrs Julie Joy was inappropriate and unacceptable she did not have confidence in the claimant that such misconduct would not re-occur in the future. She considered the claimant breached the respondent's code of conduct. Also she considered the claimant had breached the NMC Code of Conduct 20.6 & 9.3 which require nurses to "*stay objective and have clear professional boundaries at all times and to deal with differences of professional opinion with colleagues by discussion and informed debate respecting their views and opinions and behaving in a professional way at all times.*"

49. In respect of the undisputed medication issue, of giving a dosage not in the prescribed manner without consulting the Doctor, Mrs Spooner concluded the claimant admitted he was aware of the process to first call the Doctor for further direction and in the absence of the Doctor to call the out of hours service, which he did not do. The giving of a lower dose without the Doctor's authorisation was a breach of the respondent's Medication Policy which states that a controlled drug is to be administered in the prescribed manner and that he did not do this. Also it was a breach of the NMC Code 18.2 which states, nurses are required *"to keep to appropriate guidelines when giving advice on using controlled drugs and recording and prescribing, supply, dispensing or administration of controlled drugs."* (p292-293)
50. Mrs Spooner confirmed that in reaching her decision she was mindful of the consequences of dismissal and the impact that would have on the claimant's future livelihood and professional career. She carefully considered this. She was not satisfied that he was truly reflective of the events and also he would not change the dosage of a controlled drug again without following the guidelines and process. Accordingly, she considered that her only option was to dismiss the claimant on notice with effect from 2 June 2023. The claimant was given a right of appeal.

Appeal

51. By email dated 8th June 2023 the claimant appealed the decision to dismiss him. The basis of his appeal was that the decision was too harsh as none of his concerns were factored in the final decision. He was of the view that Mrs Spooner was biased in her decision by ignoring his concerns. (p295)
52. On 12 June 2023, the claimant sent another email about his appeal. In this email he wrote,
*"The decision was very harsh and unfair.
As humans as we are, we are all fallible and I admit my words were not appropriate for which I do apologise. It was genuinely out of frustration after being suspended and been through a disciplinary meeting multiple times. With the allegation about medication error I only applied best interest as I believed the prescribed dose was too lethal for the resident concerning her age and weight. I understand am not legally/professionally allowed to make such a decision.....I am a Care Sponsored Nurse which will affect my visa should I lose my job. I should have considered that before my actions but for the sake of my little kids please temper justice with mercy. I assure you I would work on myself so such an incident is not repeated. I am very sorry for everything."* (p298-299)
53. There was a delay in arranging the appeal. It was held on 19 June 2013 and conducted by Mr Michael Doolin a Regional Director based in Scotland. He also had no previous involvement with the claimant.
54. The claimant attended without his Union rep who was on annual leave. From the notes of this meeting, it is noted that in respect of the insubordination finding, he said he was sorry for the comments made. In relation to the medication issue, the claimant confirmed he made the decision in the best interest of the patient. He apologised for this also. (p310-311)

55. There was a delay in Mr Doolin confirming his decision. He explained this was because he went on annual leave as did the HR colleague Kerri Grey who was involved in the policing of the disciplinary process and assisting in giving guidance and in the preparation of the letters of outcome. All three respondent witnesses explained that all correspondence are reviewed by their HR Dept, which is not an unusual process followed by large employers. Whilst the Tribunal can understand the claimant would have been anxious to know the outcome, he was not prejudiced by this delay. This delay does not make the process procedurally unfair.
56. Mr Doolin dismissed the appeal on the basis that the claimant admitted the breaches which were serious failures. This outcome was confirmed by letter dated 21 July 2023. (p315-317).
57. Following the claimant's dismissal he continued to work at Barchester Health Care. The claimant has alleged that his employment with Barchester was terminated in September 2023 following a call made by Mrs Cahill sometime in May 2023 reporting this issue and subsequently of his dismissal. In evidence the claimant confirmed that Barchester Health Care terminated his employment because they were not prepared to take over his employment sponsorship from the respondent, and therefore the claimant did not have the legal right to continue in paid employment. The claimant did not disclose his letter of termination. In evidence Mrs Cahill refuted the allegation that she made any contact with Barchester Health Care as alleged by the claimant.

Relevant Law

58. **Section 98(1) and (2) of ERA** provide that:
“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show;
(a) the reason (or, if more than one, the principal reason) for the dismissal;
and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it -(b) relates to the conduct of the employee.”
59. **Section 98(4) of ERA** provides that:
“(4) Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
(b) shall be determined in accordance with equity and the substantial merits of the case.”
60. In conduct cases the tribunal must have regard to the test set out in the case of **British Home Stores Ltd -v- Burchell [1978] IRLR 379** EAT, namely:

- (i) did the employer believe that the employee was guilty of misconduct;
- (ii) did the employer have reasonable grounds for that belief;
- (iii) had the employer carried out as much investigation into the matter as was reasonable in all the circumstances.

61. The first question goes to the reason for the dismissal. The burden of showing a potentially fair reason is on the employer. The second and third questions go to the question of reasonableness under Section 98(4) ERA and the burden of proof is neutral.
62. It was held in the case of **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA** that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason.
- 63 **In Shrestha v Genesis Housing Association Ltd [2015] EWCA 94** it was made clear that the investigation should be looked at as a whole when assessing the question of reasonableness. I remind myself that it is not for the tribunal to substitute its own view of what was the right course for the employer to adopt. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band, it is unfair (**Iceland Frozen Foods Ltd v Jones 1982 IRLR 439 EAT**).
64. In the case of **Taylor v OCS Group Ltd [2006] EWCA Civ 702** tribunals were reminded they should consider the fairness of the whole of the process. They will determine whether, due to the fairness or unfairness of the procedures adopted the thoroughness or lack of it of the process and the open-mindedness or not of the decision –maker the overall process was fair, notwithstanding any deficiencies at an early stage. Tribunals should consider the procedural issues together with the reason for dismissal. The two impact on each other and the tribunal's task is to decide whether in all the circumstances of the case the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.
65. The ACAS Code of Practice :Disciplinary and Grievance Procedures (2015) ('the Code') which tribunals are required to take into account when considering relevant cases states, at Paragraph 5 that 'It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of a investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing. 'It also says that in misconduct cases ,where practicable ,different people should carry out the investigation and disciplinary hearings. Paragraph 24 says that 'Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct .These may vary according to the nature of the organisation and what it does, but might include things such as theft or fraud, physical violence, gross negligence or serious

insubordination.’ It also states at Paragraph 27 that in relation to appeals that any appeal ‘should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case.’

Race Discrimination

66. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, subjecting him to a detriment.
67. Section 13 of the Equality Act 2010 provides that a person (A) discriminates against another (B) if, because of a protected characteristic (race in this case) A treats B less favorably than A treats or would treat others.
68. Section 23 of the Equality Act 2010 provides that on a comparison of cases for the purposes of s13, there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual.
69. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator.- **Bahl v Law Society 2004 IRLR 799 (CA)** Unreasonable behaviour alone cannot found an inference of discrimination but if there is no explanation for the unreasonableness, the absence of an explanation may give rise to this inference of discrimination. The Court of Appeal said that proof of equally unreasonable treatment of all is one way of avoiding an inference of unlawful discrimination, but it is not the only way. At paragraph 101 Gibson LJ said quoting from Elias J in the EAT in the same case; “ *The inference may also be rebutted – and indeed this will, we suspect, be far more common – by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made.*”
70. The fact that a claimant has been treated less favourably than an actual or hypothetical comparator is not enough to establish discrimination. Something more is required, In **Madarassy v Nomura International Plc (2007) ICR 867**, Mummery LJ said; “ *The base facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, a sufficient material from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*”
71. In determining whether discrimination has taken place, the tribunal must enquire as to the conscious or subconscious mental processes which led the alleged discriminator to take a particular course of action in respect of the claimant, and to consider whether a protected characteristic played a significant part in the treatment. (**Nagarajan v London Regional Transport and others (1999) ICR 887 (HL)**)

The burden of proof

72. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.
73. In **Barton v Investec Henderson Crosthwaite securities Ltd (2003) IRLR 332**, the EAT set out the guidance to tribunals on the burden of proof rules then contained in the Sex Discrimination Act 1975. This was approved by the Court of Appeal in **Igen Ltd and others v Wong and others (2005) ICR 931**
74. The conventional approach involves a two stage approach by the tribunal. At stage 1 the question is; can the claimant show a prima facie case? If so, then the tribunal moves onto stage 2 and asks itself; is the respondent's explanation sufficient to show that it did not discriminate.?

Victimisation – s27 Equality Act 2010

75. Section 27 of the Act provides;
- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
 - (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
 - (2) Each of the following is a protected act—
 - (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.
 - (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
 - (4) This section applies only where the person subjected to a detriment is an individual.
 - (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.
76. The treatment must be by reason of the protected act. The Tribunal must consider the employer's motivation (conscious or unconscious); it is not enough merely to consider whether the treatment would not have happened 'but for' the protected act. **(Martin v Devonshires Solicitors (2011) ICR 352, Panayiotou v Kernaghan (2014) IRLR 500)** approved in **Page v Lord Chancellor and another (2021) IRLR 377**.
77. Victimisation claims under the Equality Act are subject to the same shifting

burden of proof set out in section 136 Equality Act 2010. Thus, the claimant is required to show evidence which could suggest that he has been subjected to less favourable treatment because he had made a protected act.

Conclusions

78. We applied the relevant law to the findings of fact to determine the issues, and reached the following conclusions.

What was the principal reason for dismissal

79. The respondent has admitted dismissing the claimant on the grounds of his conduct.
80. The Tribunal is satisfied that the respondent has shown the principal reason for the claimant's dismissal, namely conduct which is a potentially fair reason falling within s98(2)(b) ERA.
81. We find allegations of insubordination and the administration of medicine proven on the facts. The insubordination is a breach of the respondent's Code of Conduct, and also the NMC's Code of Conduct. The medication underdose is a clear breach of the respondent's Medication Policy and NMC's Code of Conduct (18.2) which the respondent say is a failure of its disciplinary rules and thereby amount to misconduct.
82. The Tribunal rejects the claimant's argument that because the Disciplinary Policy does not expressly refer to medication error or failure to administer medication as prescribed as an example of misconduct, his conduct cannot amount to misconduct and therefore the disciplinary policy is not applicable to him. That argument is nonsense. The Disciplinary Policy clearly refers to the requirement to adhere to the NMC's Code of Conduct which refers to the practice of administration of medicine as stated above in our findings.

Reasonable grounds for belief

83. We find that the respondent did have reasonable grounds to hold the belief that the claimant has committed the act of misconduct. This reasonable belief was held on the claimant's own written evidence in the form of his emails and comments in the A&I Report. There is no dispute as to what was written. In respect of the medication dose, the claimant has not disputed the under dosage given. The respondent was entitled to reject his explanation. The fact is the claimant's express admission in his appeal email of 12 June 2023 corroborates this reasonable belief.

Reasonable investigation and procedure

84. In assessing the fairness of the dismissal, the Tribunal had regard to the requirements in the Burchell test (Para 53 above). We considered the initial investigation. The onus is on the respondent to carry out as much investigation as is reasonable before deciding whether dismissal is a reasonable response in the circumstances. The investigation need not be to the standard of a police forensic investigation but must be a reasonable one.

85. On the facts, the Tribunal is satisfied Shirley Gibbs carried out a reasonable investigation. Given the documentary evidence and the claimant's own admission the Tribunal did not find that the respondent missed any enquiries in relation to the disciplinary allegations. The Tribunal conclude looking at the investigation as a whole, it was within the range of reasonable responses.
86. In terms of the procedure followed, the Tribunal finds no procedural irregularity. The claimant has not argued procedural irregularity. Nonetheless, the Tribunal is satisfied that from the outset the claimant was made aware of the basis of the complaints; that he understood the reason for the investigation and disciplinary action; he was given full and fair opportunity to make his representations; he understood fully the seriousness of the process; he was warned he may face dismissal; was given the right to be accompanied and was afforded the right of appeal following his dismissal.
87. Therefore the Tribunal conclude that the overall procedure adopted by the respondent was fair.

Dismissal within the range of reasonable responses

88. In accordance with the respondent's Disciplinary rules, insubordination, and the failure to follow its Medication Policy, specifically to administer prescribed controlled drugs according to the directions of the Doctor (i.e NMC Code 18.2) are gross misconduct offences.
89. At the disciplinary hearing and to this Tribunal the claimant has continually maintained that he had the authority/discretion as a Nurse to make a clinical judgment as he did. The claimant did not produce any documentary evidence to show the basis for this authority/discretion in respect of a controlled drug, although he has relied on the Emar App, which the Tribunal has rejected. The fact is the claimant admitted at the appeal that he did not have the legal or professional authority to use his clinical judgment as he did. Sadly, in this respect the claimant has been disingenuous in arguing this issue in these proceedings.
90. Even on the insubordination conduct issue, there is no dispute what he has written. The claimant's explanation for writing what he did lacks any justification or credibility. The claimant, in his appeal letter acknowledged his conduct.
91. On the facts, the Tribunal finds that dismissal fell within the range of reasonable responses available to a reasonable employer in the circumstances. We came to this conclusion for the following reasons. The claimant is an experienced Nurse. He was fully aware of the gravity and consequences of his conduct particularly concerning the administration of the medication. His own admission at the appeal stage reinforces the point he knew full well about his professional and standard of conduct required of him.
92. The Tribunal rejects the claimant's assertions that any of the decision makers were influenced by others within the respondent, so as to render the dismissal unfair. The claimant's assertion are unfounded and have been

based on pure speculation.

Race discrimination

93. In relation to the racial discrimination complaint the claimant makes two specific complaints. Firstly, in relation to his dismissal the Tribunal do not find that his dismissal was discriminatory, for the following reasons.
94. To simply assert that he was dismissed because he is black is not sufficient. The claimant must show "*something more than his race*" to shift the burden of proof to the respondent for an explanation for dismissing the claimant. The Tribunal accepts that it is usually difficult to provide direct evidence of discrimination. However, we find there is no evidence from which we could draw an adverse inference.
95. The claimant relies on a comparator Mrs Canning. We do not consider Mrs Canning is an appropriate comparator for the following reasons.
- She was a clinical lead and senior to the claimant;
 - She did not commit a medication error or give an underdose unlike the claimant.
96. The Tribunal therefore considered a hypothetical comparator would be the correct comparator. The Tribunal conclude that the NMC Code on administering controlled drugs and the respondent's medication policy is sacrosanct. A registered Nurse cannot under any circumstances, without the required authority deviate from this obligation. The claimant did so unilaterally knowing that it was not permitted as admitted in his appeal. We therefore find that a Nurse not sharing the claimant's race, who did what the claimant did, would not have been treated any differently. We therefore fail to see how his dismissal could amount to race discrimination.
97. In respect of the claimant being subjected to disciplinary action and not Mrs Canning, the difference in treatment is distinguished by the fact that Mrs Canning did not make a medication error or deviate from the prescription. However we are satisfied, given the strict policy, any employee of whatever race would not have been treated any differently to the claimant in the same circumstances. This complaint therefore fails.

Victimisation

98. The Tribunal noted the respondent's concession that the A&I report dated 24/11/2022 amounts to a protected act. That is a sensible concession as the report clearly satisfies the legal requirements under s26 of the Equality Act 2010.
99. The principal victimisation complaint is directed at Mrs Cahill. The claimant has claimed Mrs Cahill made telephone calls to his second employer Barchester Health Care between May & July 2023 about his disciplinary and subsequent dismissal. The claimant has relied upon a verbal conversation he had with the Home Manager Debbie Osbourne who informed him that the calls were made to her by Mrs Cahill.

100. Firstly regarding the alleged calls made by Mrs Cahill. The claimant has provided no supporting evidence about these calls. Mrs Cahill refuted this allegation. In the absence of any evidence in support the Tribunal accepts Mrs Cahill's denial. We did not find that Mrs Cahill would have had a motive in making these calls. If anyone may have a motive, it could possibly have been Mrs Julia Joy. It is possible calls were made but without any direct evidence the Tribunal cannot find this claim is made out. The claimant could and should have obtained a statement from Debbie Osbourne. He has not done so. The allegation is unsubstantiated and therefore this complaint fails.
101. Similarly, the claim that Mr Doolin failed to deal with his appeal in good faith and in effect falsified the outcome fails for the following reasons. Firstly, the claimant has not established that Mr Doolin had knowledge of the protected act. Even, if the claimant had establish knowledge, the Tribunal would have been satisfied that Mr Doolin dealt with the appeal in good faith and that he did not falsify the outcome. There was no motivation for him to do so. The fact is that by the date of the appeal hearing, the claimant admitted his wrongdoing and this was re-confirmed by the claimant at his appeal hearing. This complaint also fails.
102. For the reasons stated above, the claimant's complaints are not well founded and are therefore dismissed.

**Employment Judge Bansal
Date: 27 August 2024**

LIST OF ISSUES

Mr Augustine Yeboah v Care UK Community Partnerships Ltd
Case No. 1306305/2023

The Complaints

The claimant is making the following complaints:

- (i) Unfair dismissal;
- (2) Direct race discrimination;
- (3) Victimisation.

The Issues

Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 24 May 2023 may not have been brought in time.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010?

The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?.

Unfair dismissal

2.1 Was the claimant dismissed?

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

2.3 If the reason was misconduct, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant?

The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:

- 2.3.1 there were 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 otherwise acted in a procedurally fair manner;
- 2.3.4 dismissal was within the range of reasonable responses.

Remedy for unfair dismissal

3.1 Does the claimant wish to be reinstated to their previous employment? 3.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

3.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.5 What should the terms of the re-engagement order be?

3.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.6.1 What financial losses has the dismissal caused the claimant?

3.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.6.3 If not, for what period of loss should the claimant be compensated?

3.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.6.5 If so, should the claimant's compensation be reduced? By how much?

3.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.6.7 Did the respondent or the claimant unreasonably fail to comply with it?

3.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

3.6.9 If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

3.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.6.11 Does the statutory cap of fifty-two weeks' pay or £105,707 apply?

3.7 What basic award is payable to the claimant, if any?

3.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Direct race discrimination (Equality Act 2010 section 13)

4.1 The Claimant is Black African.

4.2 Did the respondent do the following things:

4.2.1 Subject the claimant to a disciplinary process when he gave a smaller dose of prescribed medication (morphine) to a patient.

The claimant says that the disciplinary policy was not applicable and should not have been applied to him.

4.2.2 Dismiss the claimant for misconduct.

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 they were treated worse than Georgina Canning (who is a White nurse) who gave a patient antibiotics at the wrong dosage in November 2022. The claimant rectified the error and reported it. The report was later deleted by the Home Manager. The claimant's position is that he made a similar error and was subjected to the disciplinary process. The claimant also compares himself to Julia Joy (who is White), who he alleged falsified documents and was not subjected to disciplinary process as a result.

4.4 If so, was it because of race?

4.5 Did the respondent's treatment amount to a detriment?

Victimisation (Equality Act 2010 section 27)

5.1 Did the claimant do a protected act as follows:

5.1.1 The claimant made a report on 24 November 2022 raising concerns regarding race discrimination and falsification of records. He never got a response to this report. He met with the Regional Manager in January 2023 during which meeting the claimant was critical of her for not dealing with his report.

5.2 Did the respondent do the following things:5.2.1By the actions of the Regional Director, have a conversation with Barchester Health Care Limited to sabotage his job with them resulting in him ultimately losing his role. The Claimant was called on 4 May 2023 by the Barchester Home Manager and who told him that anonymous call had been made.

5.2.2 Before dealing with the Claimant's appeal against his dismissal(therefore before 21 July 2023) by the actions of the Regional Director, inform Barchester about the claimant's dismissal. The claimant's position is that no communication should have been made before the appeal outcome was known. The claimant became aware of this during a meeting with Barchester on 24 July 2023.

5.2.3 By the actions of the Regional Director fail to deal with his appeal in good faith, in effect falsifying the outcome.

5.3 By doing so, did it subject the claimant to detriment?

5.4 If so, was it because the claimant did a protected act?

5.5 Was it because the respondent believed the claimant had done, or might do, a protected act?

Remedy for discrimination or victimisation

6.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

6.2 What financial losses has the discrimination caused the claimant?

6.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

6.4 If not, for what period of loss should the claimant be compensated?

6.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

6.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

6.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

6.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.9 Did the respondent or the claimant unreasonably fail to comply with it?

6.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

6.11 By what proportion, up to 25%?

6.12 Should interest be awarded? How much
