EMPLOYMENT TRIBUNALS

Claimant: **Miss Blessing Nnona**

Respondent: **Home from Home Care Limited**

Heard at: **Lincoln**

Heard on: **10, 12, 13 February 2025**

Before: **Employment Judge McTigue**

Members: **Mr K Rose**
Mr J Purkis

Appearances:

Claimant: **Mr O Ngwuocha, Solicitor**

Respondents: **Mr S McCrossan, Counsel**

JUDGMENT

1. The complaint of direct race discrimination is not well-founded and is dismissed.

2. The complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

3. The Claimant worked for the Respondent as a Personal Support worker from 27 June 2022 until 29 December 2022. The Respondent is a Care Quality Commission registered Care Provider operating 11 residential homes across Lincolnshire.

4. A significant part of this case involves what happens on the night of 11 December 2022 between the Claimant and a resident of the Respondent's care home. That

resident is a vulnerable individual with complex care needs. Consequently, we shall refer to them as 'J' from this point onwards.

5. The Claimant commenced Early Conciliation with ACAS on 13 February 2023. The Early Conciliation Certificate was issued on 21 March 2023 and she presented her complaint to the Employment Tribunal on 21 April 2023. She lacks 2 years continuity of employment but claims automatic unfair dismissal relying on Section 100(1)(e) of the Employments Right Act 1996 ("ERA"). She also claims direct race discrimination. That claim is brought on the basis that she is a Black African.

6. Following the delivery of the Tribunal's oral reasons, both the claimant and respondent requested written reasons at the conclusion of the final hearing on 13 February 2025. What follows represents the unanimous decision of the Tribunal.

Claims and Issues

7. The claimant has brought claims for unfair dismissal and direct race discrimination. In advance of the hearing, the Respondent had prepared a draft list of issues. The Claimant's representative objected to that list of issues. Consequently, the Tribunal resolved to determine and agree a list of issues with the parties before any evidence was taken.

8. The Tribunal observed that the matter was case managed by Employment Judge Heap on 11 July 2023. At that hearing, Employment Judge Heap specifically clarified what acts of discrimination the Claimant relied on for the purposes of her direct race discrimination complaint. Judge Heap did this as it was not clear from the claimant's pleadings what were the relevant acts. Those are recorded at paragraphs 8, 9 and 10 of Judge Heap's Orders. There, Judge Heap recorded the following relevant information:

> *"8. In respect of the complaint of race discrimination I had understood from the Claim Form that the complaint of discrimination was the comment which it is said was made by the registered manager about the Claimant which were said to be "She shouldn't work for us anymore, don't want her back in here anyway" …*
>
> *9. However, the acts of discrimination which are complained of are not in fact this comment but as Mr. Ngwuocha has told me today the decision to investigate the Claimant over what occurred in respect of the service user and her subsequent dismissal.*
>
> *10. Mr. Ngwuocha confirmed that the Claimant relies on her ethnicity for the purposes of this part of the claim and that she describes herself as Black African. He also confirmed that the Claimant is complaining of direct discrimination only in respect of both the decision to investigate and the decision to suspend."*

9. On that basis a list of issues relating to the issue of liability was agreed with the parties at the outset of the hearing on Day 1.

10. The Claimant's representative indicated on Day 1 that he also wanted the conduct of the investigation into the Claimant to be recorded as an act of less favourable

treatment. The Respondent objected to that on the basis that was not how the case had previously been advanced before Employment Judge Heap. It was clear to the Tribunal that the Respondent was correct in relation to that matter and that was not how Mr. Ngwuocha had advanced the claimant's claim before Employment Judge Heap. Consequently, it was explained to Mr. Ngwuocha that an amendment application would be required if he now wished to proceed on that basis. The Claimant's representative however chose not to make an amendment application.

11. The agreed issues relating to liability were therefore as follows:

Unfair Dismissal

12. *Was the reason or principal reason for dismissal that the Claimant took appropriate steps to protect herself and a service user from circumstances of danger which she reasonably believed to be serious and imminent. If so, the Claimant will be regarded as unfairly dismissed.*

Direct Race Discrimination

13. *The Claimant's ethnicity is Black African.*

14. *Did the Respondent do the following things:*

    (i) Decide to investigate events involving the Claimant and 'J' at the Oaks Care Home on 11 December 2022.

    (ii) Suspend and dismiss the Claimant following events at the Oaks Care Home on 11 December 2022.

15. *Was that less favourable treatment?*

16. *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 she was treated worse than someone else would have been treated.

    The claimant says she was treated worse than Lillie Cram.

17. On the issue of comparators, although Mr. Ngwuocha had previously stated to Employment Judge Heap that he solely wished to rely on Lillie Cram as a comparator for the direct discrimination claim, on Day 1 he indicated that he also wished for the Tribunal to consider an actual comparator. Although the Respondent objected to that approach, the Tribunal determined that it would consider the position of an actual comparator in addition to Lillie Cram.

Procedure, documents and evidence heard

18. We had an agreed bundle running to 159 pages. The number of pages in the bundle was in fact greater than 159 as some documents had been added at a late stage and

slotted into the bundle between existing documents i.e. pages 153A to 153X.

19. On Day 1 the Claimant's representative raised that some documents in the bundle were not accurate. He cited the email which appeared at 153Q page together with the relevant attachments, and the email at page 65 together with its relevant attachments. Mr. Ngwuocha provided no evidence or reason to support that assertion and the Tribunal is satisfied that the documents in the bundle are accurate and have not been tampered with in anyway.

20. We understand there are videos from fact-finding meetings, indeed there is reference to them in the bundle index. Although there was a discussion on Day 1 about those videos we were not supplied with those videos or asked by either party to watch them.

21. Mr. Ngwuocha spoke over and interrupted the Judge on several occasions on Day 1. Unfortunately, to the number of times this happened, he was warned about his conduct towards the end of Day 1. His conduct on Days 2 and 3 was however much improved. We should make clear that Mr. Ngwuocha's conduct formed no part in our decision-making process but, for the sake of transparency, it is only right that we record it here.

22. The claimant commenced evidence on Day 1. At the end of Day 1 her evidence was part-heard and so she was given the standard warning by the Tribunal that she should not discuss the case with anyone else. At the start of Day 2 the respondent's representative informed the Tribunal that he had seen the Claimant and her representative alone together in an interview room outside the Tribunal room. This was also observed by the representative's instructing Solicitor, Mr A Rahman. Mr. Ngwuocha accepted that he had been in a room alone with the claimant but said that he was not discussing the case but was instead discussing the weather. We accepted what Mr. Ngwuocha told us and so proceeded as normal. Again, we should make clear that this incident has also formed no part in our decision-making process but, for the sake of transparency, it is only right that we record it here.

23. On Day 3 the Tribunal received an email indicating that the Respondent had disclosed two more documents to the Claimant. The Claimant's representative objected to those being added to the bundle. Those documents were not added into the bundle.

24. The Tribunal heard evidence from the Claimant. For the Respondent we heard evidence from:

    24.1. Folake Iyanda, a Night Support Worker, who witnessed the Claimant's interaction with 'J' on the11 December 2022;

    24.2. Lillie Cram the Registered Manager at the Oaks Care Home, who also witnessed the Claimant's interaction with 'J' on the11 December 2022;

    24.3. Beth Newbold, the Senior Locality Manager at the Respondent who undertook a first fact finding meeting with the Claimant about the events of 11 December 2022;

24.4. Emily Freeman, an Insight Manager at the Respondent who undertook a second fact finding meeting with the Claimant;

24.5. Clair Louise Hanson, the Respondent's Assistant Locality Manager at the material time who chaired the Claimant's disciplinary hearing and took the decision to dismiss the Claimant;

24.6. Madalynn Dockerty the Locality Manager for the Respondent who heard the Claimant's appeal against dismissal.

25. Generally, where there is a conflict between the claimant's recollection, and that of witnesses for the respondent, we preferred the latter. We say this as we found the Respondent's witnesses to be credible and reliable. By contrast the Claimant was not credible or reliable she frequently evaded the questions put to her. She was an unreliable historian and her account of what happened on the night in question was inconsistent when giving evidence to the Tribunal.

Findings of Fact

26. We have not sought to set out every detail of the evidence which we heard, nor to resolve every difference between the parties, but only those which appear to us to be material. Our material findings are set out below in a way that is proportionate to the complexity and importance of the relevant issues before the Tribunal.

27. On 27 June 2022 the Claimant commenced work as a Personal Support Worker with the Respondent. The Respondent owes a number of obligations to the Care Quality Commission with regard to the safeguarding of vulnerable individuals. Those obligations include protecting service users from abuse. Care Quality Commission providers, such as the Respondent, must have a zero tolerance approach to abuse, unlawful discrimination and restraint as is apparent from page 149 of the bundle.

28. The contract that she entered into with the Respondent made clear at clause 7 that the Respondent had no obligation to provide the Claimant with any work. A copy of her contract is in the bundle at pages 41 to 47. She received training regarding the NAPPI model in July 2022. The objective of the NAPPI model is to use the least restrictive option necessary when faced with challenging situations or individuals, to consider different levels of escalation and to always act with the aim of de-escalation. The model appears in the bundle at pages 153A to 153D.

29. The next and possibly most important finding of facts relate to the events of 11 December 2022. We find that the Claimant commenced her shift at approximately 9.00pm. On the night in question the Claimant was wearing a necklace contrary to the Respondent's Dress Code Policy which appears in the bundle at pages 51 to 59. Shortly after arriving at work she approached Lillie Cram for a handover. Lillie Cram indicated at that point in time that she could not do the handover immediately as she was attending to other tasks at that point in time. That was an entirely appropriate response by Lillie Cram as evening handovers usually take place at 10.00 pm. Miss Cram certainly did not ignore the Claimant and, despite the lack of a formal handover, the claimant's shift had commenced and so she assumed responsibility for the care and safety of the residents of the Oaks Care Home including 'J'.

30. Shortly, thereafter, there was an incident with resident 'J'. 'J' is a vulnerable individual with complex care needs who is at increased risk of choking. That is apparent from her care plan which appears in the bundle at pages 153K to 153P. The claimant knew that 'J' was at increased risk of choking due to her prior knowledge of 'J's' care needs.

31. It was 'J's' birthday on the night in question and although most of the other residents were in bed 'J' was still up. 'J' approached the Claimant and grabbed hold of the Claimant's necklace which at that point in time was visible. The Claimant then grabbed 'J' by the neck. We do not find that she did this maliciously. The Claimant was probably in a state of shock but she did put her hand around 'J's' neck. We have reached that finding as we prefer the evidence of Lillie Cram and Folake Iyanda on this matter. Both of those individuals witnessed the incident, both gave credible and consistent evidence and both have no reason to lie. In addition, Folake Iyanda provided a near contemporaneous witness statement recording what she saw at approximately quarter past ten that evening which appears at page 64 of the bundle. Lillie Cram also produced a near contemporaneous statement on the night in question and took photos of 'J'. The statement and pictures are in the bundle at pages 153Q to 153X.

32. The Claimant putting her hand around 'J''s neck was contrary to the NAPPI training that had been provided to her.

33. Craig Robinson, an Assistant Manager at the nearby Hawthorns Care Home, then attended at the Oaks Care Home to assist. At 11.07pm that evening he sent an email which summarised the actions he had taken and attached pictures he had taken to various individuals including Clair Hanson. The email and pictures are in the bundle between pages 65 to 69. Shortly after the incident the Claimant was instructed to work at a nearby Care Home operated by the Respondent. She was sent there in a taxi and after the 11 December 2022 she never worked for the Respondent again.

34. The next day, 12 December 2022, Beth Newbold held an investigatory meeting with Lillie Cram. Emily Freeman was also present and took notes. The notes appear at pages 70 and 71 of the bundle. In the investigation meeting Lillie Cram stated that the Claimant had her hands around 'J's' neck. Lillie Cram also said *"she shouldn't work for us anymore, don't want her back in here anyway"*. The Tribunal finds that the "us" that Lillie Cram was referring to, was the organisation in question i.e. the Respondent. Lillie Cram did not want the Claimant working at the organisation due to what she had witnessed on 11 December 2022.

35. On 13 December 2022, Beth Newbold held an investigatory meeting with Folake Iyanda. Again, Emily Freeman was also present and took notes Folake Iyanda in that meeting stated the Claimant had her hand by 'J's' neck, The notes of that meeting appear in the bundle at pages 72 to 74.

36. On 13 December 2022 the Claimant was invited to a fact-finding meeting. She was invited to that meeting by Emily Freeman. The relevant document is at pages 75-76 of the bundle.

37. The fact-finding meeting took place on 15 December 2022 and was chaired by Beth Newbold. Emily Freeman was present as a minute taker and the notes appear at

pages 77-81 of the bundle. A second fact finding meeting with the Claimant then took place on 19 December 2022. That second fact finding meeting was chaired by Emily Freeman. The notes of that meeting appear in the bundle between pages 82-88. Following those two meetings, Beth Newbold and Emily Freeman concluded that there was a disciplinary case to answer as there were two independent witnesses who had described seeing the Claimant having hold of 'J's' neck which was contrary to the Respondent's approved restraint techniques. They also took into account that the Claimant had been wearing jewellery contrary to the Respondent's Dress Code Policy.

38. On 21 December 2022 the Claimant was invited to a disciplinary hearing. That disciplinary hearing was scheduled to take place on 23 December 2022. The letter inviting the Claimant appears in the bundle starting at page 89. The letter made clear that the Claimant could be accompanied and that the meeting could result in her dismissal. That letter also supplied the Claimant with the minutes of previous meetings including the minutes of the fact-finding meeting with Lillie Cram where the allegedly racially discriminatory comment had been made i.e. "*she shouldn't work for us anymore, don't want her back in here anyway"*.

39. On 22 December 2022 the Claimant requested that her disciplinary hearing be rescheduled. That was done and so on 27 December 2022 the Claimant was invited to a second scheduled disciplinary hearing. That hearing was scheduled to take place on 29 December 2022. Again, the Claimant was informed of her right to be accompanied and that meeting could result in her dismissal. The relevant documentation is at page 94 in the bundle.

40. The disciplinary hearing took place on 29 December 2022. The disciplinary hearing was chaired by Clair Louise Hanson. The Claimant was dismissed for gross misconduct that same day. Clair Louise Hanson made that decision. The notes of the meeting appear at pages 97-103. At the disciplinary hearing, no mention was made by the Claimant of the fact that she felt the earlier comment by Lillie Cram was discriminatory.

41. The following day, 30 December 2022, the Claimant received a letter advising her that she had been dismissed without notice for gross misconduct following the disciplinary hearing. The letter is at pages 104-105. The letter made clear that the reason for dismissal was the Claimant's conduct specifically inappropriate use of restraint techniques and placing a vulnerable adult at risk. The letter made clear that placing a hand on 'J's' neck was in the Respondent's opinion not reasonable or proportionate or indeed in line with the NAPPI model. The Claimant was informed of her right to appeal.

42. On 9 January 2023 the Claimant gave notice of her appeal against dismissal, it was a short letter which appears at page 106. She initially mentioned three grounds of appeal. The first was length of notice, second was lack of opportunity to face the witnesses and ask questions and third was effectively the lack of medical evidence in relation to the allegation of holding 'J's' neck despite her unequivocal denial. Again, in that appeal letter no mention was made by the Claimant that she felt or perceived Lillie Cram's earlier comments in the fact-finding meeting to be racially discriminatory.

43. On 12 January 2023 the Claimant was invited to an appeal hearing it was scheduled

to take place on 16 January 2023. The relevant document is at pages 107-108.

44. On 15 January 2023 the Claimant wrote confirming her grounds of appeal to the Respondent, she expanded on her earlier grounds of appeal. In this letter she specifically mentioned Lillie Cram's comment and indeed quoted the comment verbatim. No mention was made however of that comment being racially discriminatory. That letter of appeal is at pages 109-112 of the bundle.

45. Later that day, the Claimant raised a grievance relating to the manner in which the disciplinary proceedings had been conducted. Again, in this letter she quoted Lillie Cram's comment but no mention was made however of that comment being racially discriminatory. The grievance letter is at pages 113-114.

46. After some delay, the Claimant's appeal hearing eventually took place on 31 January 2023. It was Chaired by Madalynn Dockerty and Emma Kent, an HR Manager of the Respondent was present to take notes. The Claimant attended that meeting as was accompanied by a member of the Respondent's Wellbeing Team. The notes of that meeting are at pages 122-137 of the bundle. Although the meeting primarily dealt with the Claimant's appeal, the Claimant's grievance was also discussed with her.

47. Prior to Miss Dockerty making her appeal decision the Claimant was offered the opportunity to review the photos which she had previously requested and provide her comments in relation to the same. The photos shown to the Claimant were those which appear in the bundle at pages 65 to 68.

48. On 2 February 2024 the Claimant provided commentary on the photos that had now been provided to her, her comments appear in an email at page 138 of the bundle. The Claimant's position was effectively that she did not have her hand around J's neck or chest area. She also disputed that 'J's' neck was marked and raise observations about the clothes 'J' was wearing in the pictures. Ultimately, the Claimant's appeal was not upheld and she was informed of that fact by means of a letter from Emma Kent dated 8 February 2023. That letter appears in the bundle at pages 143 and 144.

Law

Burden of proof in relation to the Unfair Dismissal complaint

47. Where an employee who alleges that he or she was dismissed for an 'automatically unfair' reason has sufficient qualifying service to claim unfair dismissal in the normal way (i.e. two years), then the burden of proving the reason for dismissal is on the employer, as it is in an ordinary unfair dismissal claim under S.98 ERA — **Maund v Penwith District Council 1984 ICR 143, CA**. However, where the employee lacks the requisite continuous service to claim ordinary unfair dismissal, he or she will acquire the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason — **Smith v Hayle Town Council 1978 ICR 996, CA**.

Unfair Dismissal – s100(1)(e) Employment Rights Act 1996

48. Section 100(1)(e) Employment Rights Act 1996 provides as follows:

100. - Health and safety cases.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

…

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

49. Section 100(2) and (3) ERA 1996 then provide:

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

50. According to the EAT in **Oudahar v Esporta Group Ltd 2011 ICR 1406, EAT**, a two-stage approach is appropriate under S.100(1)(e). First, the tribunal should consider whether the criteria set out in that provision have been met as a matter of fact. Were there circumstances of danger that the employee reasonably believed to be serious or imminent? Did he or she take or propose to take appropriate steps to protect him or herself or other persons from the danger or — following the EAT's decision in **Balfour Kilpatrick Ltd v Acheson and ors 2003 IRLR 683, EAT**— take steps to communicate these circumstances to the employer by the appropriate means?

Burden of proof - Discrimination

51. Section 136(2) and 136(3) EqA 2010 provide that the tribunal must take the following approach to the 'shifting burden of proof':

51.1. the initial burden is on the claimant to prove facts from which the tribunal could decide, in the absence of any other explanation, that the respondent contravened the provision concerned (i.e. a 'prima facie case');

51.2. the burden then shifts to the respondent to prove that it did not contravene the provision concerned. If the respondent is unable to do so, the tribunal is obliged to uphold the claim.

52. The claimant must show a probability, rather than a mere possibility, that the respondent has committed the unlawful act: **Igen v Wong [2005] ICR 931, CA**. As Elias P put it in **Laing v Manchester City Council and anor [2006] ICR 1519**, "it is

for the employee to prove that he suffered the treatment, not merely to assert it, and this must be done to the satisfaction of the tribunal after all the evidence has been considered" (para. 64). As Mummery LJ said in **Madarassy v Nomura International plc [2007] ICR 867**, "[*t]he bare facts of a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*" (para. 56).

53. As was confirmed by the Supreme Court in **Efobi v Royal Mail Group Ltd [2021] ICR 1263**, the initial burden is on the Claimant to establish facts from which the tribunal could conclude, in the absence of an adequate explanation, that an unlawful act of discrimination, harassment or victimisation had been committed. In establishing the facts, the claimant can rely on both primary facts and also inferences that can be properly drawn from those facts.

54. The approach was summarised by the EAT in **Qureshi v Victoria University of Manchester and another [2001] ICR 863** per Mummery J at 875C – H; "The process of making inferences or deductions from primary facts is itself a demanding task, often more difficult than deciding a conflict of direct oral evidence. In **Chapman v Simon [1994] IRLR 124**, 129, para 43 Peter Gibson LJ gave a timely reminder of the importance of having a factual basis for making inferences. He said, "*Racial discrimination may be established as a matter of direct primary fact. For example, if the allegation made by Ms Simon of racially abusive language by the headteacher had been accepted, there would have been such a fact. But that allegation was unanimously rejected by the tribunal. More often racial discrimination will have to be established, if at all, as a matter of inference. It is of the greatest importance that the primary facts from which such inference is drawn are set out with clarity by the tribunal in its fact-finding role, so that the validity of the inference can be examined. Either the facts justifying such inference exist or they do not, but only the tribunal can say what those facts are. A mere intuitive hunch, for example, that there has been unlawful discrimination is insufficient without facts being found to support that conclusion*."

55. Where a claimant compares his treatment with that of another person, "it is important to consider whether that other person is an actual comparator or not. To do this the Employment Tribunal must consider whether there are material differences between the claimant and the person with whom the claimant compares his treatment. The greater the differences between their situations the less likely it is that the difference of treatment suggests discrimination": **Virgin Active Ltd v Hughes [2023] EAT 130**.

56. The burden of proof rule "*need not be applied in an overly mechanistic or schematic way*": **Khan and anor v Home Office [2008] EWCA Civ 578, CA**.

57. An employment tribunal may consider all relevant evidence at the first stage of the burden of proof test: **Commissioner of Police of the Metropolis v Denby EAT 0314/16**.

58. If a tribunal can make positive findings as to an employer's motivation, it does not need to make use of the burden of proof test at all: **Hewage v Grampian Health Board [2012] ICR 1054, SC**.

59. In **Leicester City Council v Mrs B Parmar [2024] EAT 85** the EAT confirmed that it is not necessarily an error of law for the tribunal to take a blanket approach to multiple allegations of discrimination rather than apply s136 EqA 2010 individually to each one.

Direct discrimination (s.13 EqA 2010)

60. Section 13(1) EqA 2010 provides that: "*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."*

61. The question of whether a person is treated less favourably is a question of objective fact that necessarily involves a comparison with others. The comparator can be either an actual comparator (where there is no material difference in the circumstances of the comparator to that of the Claimant) or as is usually the case, a hypothetical comparator.

62. The key issue in every direct discrimination case is the following question of fact: "*why did the alleged discriminator act as he did? What, consciously or unconsciously, was the [alleged discriminator's] reason?*": **Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] ICR 1065**, at para. 29, per Lord Nicholls. As Underhill LJ said in **Reynolds v CLFIS (UK) Ltd & others [2015] ICR 1010** (at para.11):

> *"As regards direct discrimination, it is now well established that a person may be less favourably treated "on the grounds of" a protected characteristic either if the act complained of is inherently discriminatory (eg the imposition of an age limit) or if the characteristic in question influenced the "mental processes" of the putative discriminator, whether consciously or unconsciously, to any significant extent: we were referred in particular to the discussion in **Ahmed v Amnesty International [2009] ICR 1450**. The classic exposition of the second kind of direct discrimination is in the speech of Lord Nicholls of Birkenhead in **Nagarajan v London Regional Transport [1999] ICR 877; [2000] 1 AC 501**, which was endorsed by the majority in the Supreme Court in **R (E) v JFS Governing Body [2010] 2 AC 728**."*

63. Once it is established that the treatment is because of a protected characteristic, unlawful discrimination is established and the respondent's motive or intention is irrelevant (**Nagarajan v London Regional Transport [1999] IRLR 572 HL**).

64. The protected characteristic does not need to be the only reason for the less favourable treatment, or even the main reason, so long as it was an 'effective cause' of the treatment: **O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372, EAT**.

65. In **Network Rail Infrastructure v Griffiths-Henry [2006] IRLR 865**, EAT, Elias P (as he then was) said, "*If there is a genuine non-discriminatory reason, at least in the absence of clear factors justifying a finding of unconscious discrimination, that is the end of the matter*."

66. In some cases it is necessary to consider and exclude subconscious or unconscious

discrimination when deciding the reason why an alleged discriminator did a particular act – see, e.g. **Geller v Yeshurun Hebrew Congregation [2016] ICR 1028** – but "*it does not follow from this that in every case an employment tribunal must expressly refer to the possibility of subconscious discrimination in its Reasons and consider this as a separate matter*": **Kohli v Department for International Trade [2023] EAT 82**, para. 48, per Linden J.

Legal Submissions

67. Both parties provided written submissions to the Tribunal which they supplemented by oral submissions. The Claimant's submissions ran to 10 pages and the Respondent's to 8 pages. We incorporate those submissions by reference here. The Tribunal gave these submissions careful consideration before reaching its decision.

Conclusions

68. In order to reach our conclusions we return to the agreed issues.

69. The first issue was:

Was the reason or principal reason for dismissal that the Claimant took appropriate steps to protect herself and a service user from circumstances of danger which she reasonably believed to be serious and imminent? If so, the Claimant will be regarded as unfairly dismissed.

We again note that the Claimant relies on Section 100 subsection 1(e) of the Employments Right Act 1996.

70. The Tribunal concludes that the Claimant has provided insufficient evidence to demonstrate that the reason for dismissal was for the reason as set out in Section 100(1)(e). In addition, it is clear to us that the steps taken by the Claimant on the night in question were not appropriate. The Claimant knew that 'J' was at increased risk of choking as she had read her care plan. Despite that, the Claimant put her hand around 'J's' neck. To employ such force against a vulnerable individual with complex care needs and a risk of choking was not reasonable or proportionate. It certainly went against the NAPPI model that the Claimant had received training in relation to. The steps taken were clearly not appropriate in order to protect herself and/or a service user. They were disproportionate steps. We also note that the Claimant was wearing a necklace contrary to the Respondent's policies and at this incident may have been avoided had the Claimant not been wearing a necklace. The claim of unfair dismissal is not well-founded and is dismissed.

71. We now turn our attention to the claim for direct race discrimination.

72. The first allegation is whether the Respondent investigated events involving the Claimant and 'J' at the Oaks Care Home on 11 December 2022. It is not in dispute between the parties that the Claimant was investigated for the events which occurred on 11 December 2022. The Tribunal also finds that investigating the Claimant amounted to less favourable treatment. However, the key question for the Tribunal is whether or not that less favourable treatment was due to race. To answer that we are required to use a comparative approach.

73. In respect of comparators it is clear to the Tribunal that despite Mr Ngwuocha informing Employment Judge Heap that Lillie Cram is an appropriate comparator, she is not. We agree with the Respondent's submission that Ms Cram's actions were different from the Claimant. Lillie Cram did not wear a necklace, or grab 'J's' neck as alleged. The Tribunal is satisfied that had allegations of a similar nature to those faced by the Claimant been levelled at Lillie Cram, the Respondent would have adopted the same approach.

74. The appropriate comparator here is somebody who is not Black African, for example a White British worker, who was also suspected of inappropriate restraint of a vulnerable resident with complex care needs. Had such an individual been similarly accused they would also have been investigated by the Respondent. We reach that conclusion as it is clear to the Tribunal that the Respondent owes obligations to the Care Quality Commission with regard to the safeguarding of vulnerable individuals. Those obligations appear in the bundle at pages 148-153.

75. We note the comments of Lillie Cram. We accept that on 12 December 2022 Lillie Cram said "she shouldn't work for us anymore, don't want her back in here anyway". Those comments were made to Beth Newbold in the presence of Emily Freeman. We do not accept or infer that Lillie Cram's comment was racially discriminatory. The Tribunal concludes that the "us" that Lillie Cram was referring to, was the organisation in question i.e. the Respondent. Lillie Cram did not want the Claimant working at the organisation due to what she had witnessed on 11 December 2022. We reject the assertion made that the "us" meant White people. Lillie Cram's comment was not a racially discriminatory comment. Even if it were racially discriminatory, it could not have formed part of the decision to investigate the Claimant as those comments were made after the investigation process started. The allegation that the Claimant was investigated because of her race is not well-founded.

76. We now move to the next allegation which is whether the Respondent suspended and dismissed the Claimant following events at the Oaks Care Home on 11 December 2022. We shall deal the Claimant's suspension first. With regard to the suspension there is no correspondence from the Respondent to demonstrate that the Claimant was suspended. On the night in question the Claimant was withdrawn from the Oaks Care Home and then proceeded to work for the rest of her shift at a neighbouring Care Home. We agree with the Respondent's submission that that is the most natural course of events and one which is not prejudicial to either party, protects the Claimant from further possible events and also protects fellow colleagues who were witnesses of fact to serious allegations.

77. It is also apparent to the Tribunal that there was no suspension of the Claimant because the reality of the situation is that the Claimant worked under a zero-hours contract. The fact that the Claimant was not allowed to work for the Respondent after the incident involving 'J' had nothing to do with race. In addition, as Lillie Cram's comment was not racially discriminatory, either overtly or otherwise, it cannot be said that the claimant not being offered work whilst the matter was being investigated was due to race.

78. The matter in question was serious, needed to be investigated and once the

investigation and subsequent disciplinary and appeal procedures were ongoing the Claimant needed to be kept away from residents and witnesses. A White British employee suspected of inappropriate restraint of a vulnerable resident with complex care needs would also not have been allowed to work during the relevant time frame.

79. Moving then to the dismissal. There is no dispute between the parties that the Claimant was dismissed. There is also no dispute that Lillie Cram made a comment about the Claimant on 12 December 2022. We have already concluded that comment was not racially discriminatory. We do not therefore draw an inference from that comment. However, even if we were prepared to draw such an inference Miss Cram did not investigate or have any part herself in the Respondent's decision to dismiss the Claimant. The decision to dismiss the Claimant was made by Clair Louise Hanson following a fair and thorough investigation.

80. The reason for the Claimant's dismissal is set out in the letter dated 30 December 2022. That letter states the reason for dismissal was the Claimant's conduct on the night in question. We accept that was the reason for the Claimant's dismissal. By the point of dismissal the Respondent had undertaken a thorough investigation which concluded that the Claimant had her hands around the neck of 'J' and had used force that was neither reasonable or proportionate. A White British employee who also put their hand around the neck of a vulnerable service user would also have been dismissed in these circumstances. Race played no part in the Claimant's dismissal.

81. The entirety of the claim is not well-founded and is dismissed.

Approved by Employment Judge McTigue

Date: 28 February 2025

JUDGMENT SENT TO THE PARTIES ON

.....02 March 2025.....

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FOR THE TRIBUNAL OFFICE

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