EMPLOYMENT TRIBUNALS

Claimant: Mr C McPherson

Respondent: Health Vision UK Limited

Heard at: London Central **On:** 5,6,9,10,11,12 and 13 June 2025

Before: Employment Judge Forde

REPRESENTATION:

Claimant: In person
Respondent: Mr C Doherty, Managing Director of the respondent

JUDGMENT

The judgment of the Tribunal is as follows:

Notice Pay

1. The complaint of breach of contract in relation to notice pay is not well-founded.

Unfair Dismissal

2. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

3. The claimant's remedy on dismissal shall be limited to a basic award and a compensatory award not exceeding four weeks net pay. In the event that the parties are unable to come to agreement as to the amount due to the claimant, the tribunal will schedule a remedy hearing to take place with a time estimate of 3 hours.

Direct discrimination

4. The complaint of direct **age** discrimination is not well-founded and is dismissed.

5. The complaint of direct **religious or belief** discrimination is not well-founded and is dismissed.

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

Harassment

7. The complaint of harassment related to age is not well-founded and is dismissed.

Reasons

Background

8. Because of matters that arose during the course of the hearing, it is necessary for me to set out a short background in terms of the case management of this case. On 18 June 2024 the case came before employment Judge Lewis for case management. At that time, Judge Lewis identified that the claimant's unfair dismissal claim stemmed from the respondent's finding the claimant had been dismissed for gross misconduct allegedly on the basis that he had been rude to service users, harassment of office staff and a failure to attend meetings about contrary to the respondent's disciplinary policy.

9. In respect of the claimant's claim of age discrimination, the claimant alleged that he had been made the subject of comments by one of the respondent's employees (a respondent at the time of this case management hearing) on one occasion when she told the claimant that he was getting too old because he had not provided clear information on a care plan in relation to a technological matter. The claimant also said that his dismissal was due in part to his age. At the time of his dismissal, the claimant was aged 43 and he said that the respondent had at that time been employing a few younger carers shortly before dismissing him.

10. The claimant's claim of race discrimination was related to the fact that he had been applying for British citizenship at the time and said that one of the respondents employees knew this and discriminated against him accordingly.

11. In respect of the claimant's claim of religion and belief discrimination, at the time of the case management hearing before Judge Lewis, the claimant said that he did not carry his own religion or belief we carried the ones of his siblings and loved ones namely the Pentecostal church. The claims discrimination complaint before the tribunal was that he was sent on call to his capacity as a carer by the first respondent at that time (the respondent now)

where there was a religious conflict between his own beliefs and those of the service users.

12. Judge Lewis ordered that they would be a further case management hearing to enable the respondent to provide a response to the clarify claims, to clarify his claims and to enable the claimant to pursue an application to amend his claim to include an allegation of sex discrimination.

13. It should be noted that that time, the claimant pursued a claim of disability discrimination and that the claims would had been issued against 18 individual respondents including the sole respondent that employed that remains is the respondents in this claim.

14. There was a further case management hearing before Employment Judge Spencer on 3 September 2024. Judge Spencer issued a judgement that dismissed the claim against 17 of the respondents, and which dismissed the disability discrimination claim on withdrawal.

15. In the case management order that follows the case management hearing on 2 September 2024, it can be seen that the full merits hearing was listed to take place over seven days before a judge and members. However, in the days before the hearing, Regional Employment Judge Freer determined that in the absence of available members, a significant change of circumstances had occurred which meant that the matter would be listed before a judge sitting alone. The hearing was listed as liability only with any remedy (if appropriate) to be determined at a further hearing, if required.

16. Following that hearing it was clear that the claimant had claims of unfair dismissal, breach of contract and direct discrimination on grounds of age, race and religion or belief in the claim of harassment related to age. The judge issued consequential case management directions to enable the case to reach the full merits hearing organised and ready. The case management order sets out comprehensive directions in relation to the preparation of trial bundles. For example, it directed that the party should agree documents to be used at the final hearing, that the bundle should be indexed and prepared by the respondent.

17. The claimant's application to amend his claim to include an allegation of sex discrimination was dismissed. Judge Spencer determined that the application dated 18 June 2024 was insufficiently clearly pleaded that the allegations contained within it were vague and non-specific. The judge recorded that the claimant had not included the claim for sex discrimination in his original claim because he only realised that this was six discrimination after the claim form had been presented. Accordingly, and in my view correctly, judge Spencer determined that this was not the case when new information, could not have been ascertained by the claimant before he submitted his claim form, had come to light after the claim form had been presented.

18. Furthermore, I agree with Judge Spencer's reasoning that the application to amend raises a new cause of action. It raised a number of factual issues which were not contained in the claimant's claim form, would have required

the respondent to investigate significant new factual matters, and would add time and expense the hearing. I agree with judge Spencer when she says that the claimant did not provide a good reason why he did not present his claim of sex discrimination at the time the percentages claim form. At the time that he made the application, his claim of sex discrimination was significantly out of time. Judge Spencer went on to determine that balancing the hardship and prejudice between granting the amendment and or not, she determined that the balance fell on the side of the respondent.

19. I make mention of previous case management matters because the claimant raised with me at the start of the hearing a number of procedural issues which requires attention.

20. First, he told me that he had submitted an application tribunal for judge Spencer to reconsider decision in respect of the claimant's request for amendment. Leaving aside the obvious difficulty that the matter had proceeded to a full merits hearing, I explained the claimant was unable to deal with the reconsideration application on the basis that it was out of time and that it had not been addressed by Judge Spencer. It is right to say that throughout the hearing, the claimant made reference to the fact that I was not prepared to do anything about the claimant reconsideration application dated 7 September 2024. I explained to the claimant I was not able to go behind Judge Spencer's reasoning unless it was the case that something had changed between Judge Spencer's decision and the claimant reconsideration application and that the correct path for him to have taken was to appeal the decision which was now out of time. Further, I explained the claimant but it was not possible to make the amendment at such a late stage in the claim.

The Parties

21. The respondent is a home care provider covering the London boroughs of Westminster, Kensington and Chelsea, Hammersmith and Fulham, Brent and Hounslow. It employs over 400 staff, including a number of staff working within this HR department who gave evidence before the tribunal at this hearing. It was founded by its current managing director Mr Chris Doherty who also gave evidence before the tribunal mainly in his capacity as the person who heard the claimant's appeal of his dismissal.

22. The claimant was employed by the respondent as a care assistant between 30 May 2020 until his effective date of termination being 17 July 2023. In the claimant's role, visit service users (SU) at their home addresses and provide them care as required. The claimant did not have set shifts each week, but will be notified of his shifts and hours in advance stop the claimant was employed on a zero hours contract.

Procedural matters

23. I refer to a number of procedural matters that were covered at the start of the hearing and during the course of the hearing. There are two others which I will address now.

24. The claimant renewed his application for what he described was an application for specific disclosure of a number of documents that had been generated during his employment. I will not detail those documents here but save to say that the application was dismissed on the basis that upon hearing the application it became apparent that the vast majority if not all documents that the claimant was seeking disclosure of were contained in the bundle that had been prepared by the respondent in accordance with Judge Spencer's direction. It should be noted here that the claimant had prepared his own bundle and had not read respondent's bundle at all. He had informed the tribunal in advance of the full merits hearing that it was his view that the tribunal's rules allow to prepare his own bundle. That is incorrect. The tribunal's rules do not allow for an individual party to determine their own orders and directions. While I note that the claimant remained dissatisfied as to the extent of the respondent's response to the his application for specific disclosure I recorded that the claimant's dissatisfaction was localised to what he perceived as the incorrect formulation of documents generated by the respondent's database and some allegedly missing supervision records. It was clear that the claimant was seeking documentation that he had requested as a result of his subject access data request that I considered fell outside the jurisdiction of the employment tribunal therefore is not something the tribunal can address.

25. The claimant submitted an application for a number of witness summonses. The claims explained to me the rationale behind the his insistence that a number of witnesses attended the hearing. At the outset of the hearing I explained to the parties the law of unfair more dismissal the role the tribunal plays in assessing the respondent's decision to dismiss claimant at the time the claimant was dismissed. The claimant told me that he wanted Shaniel Perry, his line manager to attend the tribunal because she had failed to provide with a copy of his rota detailing were allocated to him between the months January – May 2023. He told me that it was necessary or miscarried to attend the hearing because this is important information relevant to what was said about him by service users. In my view, I doubted whether Miss Perry or indeed any of the others the claimant wanted to attend the tribunal were able to assist the tribunal meaningfully in relation to this assessment of reasonableness in terms of the respondent's investigation of and thereafter prosecution of the allegations of misconduct that the claimant was ultimately dismissed for.

26. The Overriding Objective (Rule 2 of the Employment Tribunal's Rules and Procedures) makes clear that the tribunal must consider very carefully any step that it directs which would offend the spirit and intention of the rule, such as increasing witness numbers at a late stage because the consequential effect of such a step might lead to a delay and/or increased expense on the part of one or both or both of the parties.

27. I considered that this would result here if I granted the witness orders that the claimant was seeking. I was also of the view that the proposed witnesses were unlikely to advance the claimant's case or assist the tribunal in terms of and therefore I determined that the claimant's application should fail on the basis that not only did it run counter to the overriding objective to include witnesses whose evidential value to the decisions that the tribunal had to arrange were likely to be negligible, but also because it would not enable the tribunal to fulfil its function in enabling the hearing to be run over a period of time and that such costs that was proportionate to the issues in the claim.

28. The respondent applied at the outset of the hearing for the claimant's allegations of harassment on the basis of age be dismissed on the basis that it was out of time. I was informed that the alleged perpetrator of the comment relied upon by the claimant here, somebody called 'Gloria' no longer worked for the respondent. Mr Doherty told me that he had spoken to Gloria and that she neither recalls making the comment or accepted that she had made the comment. No explanation was provided as to whether or not to provide either a witness statement or attend the tribunal to rebut or comment upon the claimant's claim.

29. The respondent's position in relation to this allegation of harassment on the basis of age is set out clearly within its response which identifies that the tribunal does not have jurisdiction to hear claims of discrimination where the accident occurred prior to 6 May 2023. This is because the respondent correctly identifies that the claimant contacted ACAS on 5 August 2023 and the ACAS certificate was issued on 16 September 2023. The dates here are important because it is the claimant's case that Gloria told the claimant on a telephone call in either September or October 2022 that he was getting too old because he had not provided clear information on a care plan in relation to a technical and/or technological matter.

30. I explained to the parties that I was not prepared to deal with the application at the start of the hearing on the basis that it was unclear to me whether or not the claimant's allegation of age-related harassment was linked to the claimant second allegation of direct age discrimination namely his dismissal. However, I have since determined that the allegation of age-related harassment should be dismissed on the basis that the claimant has failed to establish any link of ongoing discrimination on the basis of age and attributes the comment here tributes to Gloria. Taking the claimant's case at its highest i.e. that Gloria did say the comment, it is absolutely clear that the claimant has presented this allegation substantially beyond the statutory time limit of three months. In my view, the claimant has failed to set out why I should extend the just and equitable jurisdiction to extend time presentation of this allegation and therefore, I have determined that the allegation should be dismissed. I asked the claimant to set out in his submissions why time should be extended and I note that he has, in response, set out a plea that all out of time claims have their time extended and has failed to set out any specific reasons why this allegation should have time extended. Accordingly, I find that the claimant has not provided a good excuse for the delay here.

Evidence

31. the parties prepared one bundle each. The respondent's bundle had been prepared in accordance with Judge Spencer's direction in terms of order and layout. The claimants had not. The claimant's bundle contained documents that I considered were inadmissible, specifically correspondence with ACAS but which I refused to review or engage with. Therefore, for the majority of the hearing, the respondent's bundle which I found to be more reliable and comprehensive was used. However, the claimant's bundle was referred to from time to time as was therefore formally admitted into evidence.

32. The claimant gave evidence on his own behalf. I found the claimant to be an inconsistent witness and an unreliable historian. He was prepared to promote allegations in the complete absence of evidence or corroborative documentation containing bundles, was at times prone to allowing his evidence to evolve, regularly. When I pointed out to him that he had directly contradicted a point that he had only just made, the claimant would insist that the error was mine in terms of my notetaking, that I attributed his comment to the wrong factual feature, or that he simply had not said what he had said. I consider these to the archetypal examples of the unreliable witness. Accordingly, I treated his evidence with extreme care.

33. On behalf the respondent's Janet Albani HR adviser Ahmed Hassan head of HR and Mr Doherty gave evidence. Mrs Albani attempted to investigate a number of the allegations that formed the disciplinary investigation; she handed the matter to Mr Hassan who was the dismissing officer. Mr Doherty heard the claimant's appeal.

34. I found Mrs Albani's evidence to be limited to her observations of the claimant's conduct during the course of an interaction that he had with another of the respondents employees, JC on 19 May 2023, the claimant's performance during an investigation meeting that she conducted on 9 June 2023, her handover to Mr Hassan, and a number of things that occurred during the course of the claimants induction, principally around the provision of a handbook to the claimant, something that he of his employment or in his induction which occurred prior to the commencement of his employment. I found Mrs Albani's evidence to the truthful and reliable in respect of matters she could clearly remember although is also the case that they worsen critical matters that she could not remember that related to her investigation and handover as described above.

35. Mr Hassan provided clear and detailed answers to questions put to him. He was able to provide comprehensive explanations as to what had happened at various times and was able to do so by reference to documents in the bundle or witness statements. Both he and Mr Doherty had clearly taken time to familiarise themselves with the bundle. I considered Mr Hassan to be a wholly reliable and honest witness.

36. Similarly, I found Mr Doherty to be someone who would provide straightforward answers to the questions asked of him. He would try to assist

the Tribunal by being as helpful as possible with his responses. I found him to be a reliable and honest witness also.

Law

Unfair Dismissal

The law

1. The right of employees not to be unfairly dismissed is set out at s94 Employment Rights Act 1996 ('ERA').

2. By s108(1) ERA, an employee needs two years' service in order to acquire the right to bring an unfair dismissal claim under s94 ERA.

3. Potentially fair reasons for dismissal are set out at s98 ERA and include conduct, and '*some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*'.

4. If the dismissal is found to be for a potentially fair reason, the Tribunal will have regard to s98(4) ERA when considering whether the employer acted reasonably in dismissing the employee.

5. The test for a conduct dismissal is set out in the well-known case of *British Home Stores Ltd v Burchell* [1980] ICR 303:
   d) Did the Respondent genuinely believe that the misconduct had occurred?
   d) Were there reasonable grounds for that believe?
   d) Were those grounds based on a reasonable investigation?

6. The Tribunal will also consider whether dismissal was within the range of responses which a reasonable employer might have adopted (*Iceland Frozen Foods Ltd v Jones* [1983] ICR 17).

Burden of proof in discrimination claims

37. The burden of proof falls to the claimant as set out in section 136 of the Equality Act. What this means in practice is that the claimant must do two things.: First he must establish a set of facts. So in order for this to happen, he must provide enough evidence for the tribunal to determine, on the balance of probabilities that what he said happened, actually happened. In order to evaluate this, the Tribunal will take into account the evidence heard from the witnesses in this case, as well as documentary evidence contained within the bundle of documents. The Tribunal will undertake an evaluative exercise of the quality of that evidence and each of you as to. What facts it says are made out.

38. Secondly, the tribunal will then determine whether or not the claimant has established Facts. From which the tribunal can Conclude that the respondent committed an act of discrimination. If the tribunal Finds that the claimant establishes a set of facts from which the tribunal can make such a conclusion, It then falls to the respondent to prove that it did not commit the act.

39. The case of ***Igen v Wong [2005] IRLR 258 CA*** reminds us that the test is not whether C can prove facts from which the Tribunal could conclude that R ***could have committed*** the alleged act of discrimination but whether there are facts from which, absent adequate explanation, the Tribunal could conclude that R ***did commit*** the alleged act. This was reaffirmed by the Supreme Court in ***Efobi v Royal Mail Group Ltd [2021] UKSC 33.***

40. The case reminds us that treatment, which is unreasonable, unfair or incompetent is not on its own evidence of discrimination. There must be some evidential basis upon which the Tribunal can conclude that such conduct was motivated by the protected characteristic relied on (see ***Glasgow City Council v Zafar 1998 ICR 120 HL*** and ***Bahl v Law Society and ors 2004 IRLR 799 CA).***

Harassment

41. **Section 26 EqA 2010:** To constitute harassment under **s.26(1)** the unwanted conduct must be related to a relevant protected characteristic. The fact that a claimant considers that the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser. There must be some feature of the factual matrix which properly leads the Tribunal to the conclusion that the conduct is related to the protected characteristic and in the manner alleged in the claim.

1. Harassment must also have the requisite purpose or effect. ***Grant v HM Land Registry [2011] EWCA Civ 769*** at §13 *"when assessing the effect of a remark, the context in which it is given is always highly material"* and tribunals must not cheapen the significance of the words since they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

2. The claimant says that he was harassed by his line manager Miss Perry by her describing the claim as appearing old when using technology and in terms of physical demeanor.

3. The respondent says that while Miss Perry no longer works for the respondent, Mr Doherty told the tribunal that Miss Perry denied the allegation or knowledge of it. Further, the respondent points out that the claimant says this happened

for the first time when submitting his claim and not, for example, in the grievance that he raised shortly after his unsuccessful appeal. However, the claimant says that the incident, which was one off and took place sometime in the autumn of 2022, over a year before the presentation of this claim. It is discreet and self-contained in that it is unconnected to any other allegations raised by the claimant. It is substantially out of time and in the absence of an adequate explanation as to the delay I have determined that the claim should be struck out.

Notice pay

1. Section 86 of the Employment Rights Act 1996 (ERA 1996) provides that:

> "86 Rights of employer and employee to minimum notice.
>
> (1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—
>
> (a) is not less than one week's notice if his period of continuous employment is less than two years,
>
> (b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and
>
> (c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.
>
> (2) The notice required to be given by an employee who has been continuously employed for one month or more to terminate his contract of employment is not less than one week.

Polkey

42. Employment tribunals can and often make 'just and equitable' reductions under S.123(1) of the Employment Rights Act 1996 (ERA) is where the unfairly dismissed employee could have been dismissed fairly at a later date or if a proper procedure had been followed. Ever since the House of Lords' landmark decision in *Polkey v AE Dayton Services Ltd 1988 ICR 142, HL*, 'procedural unfairness' cases — in which the dismissal is held to be unfair purely on procedural grounds but compensation is reduced to reflect the likelihood that the employee would still have been dismissed in any event had a proper procedure been followed — represent by far the most common type

of reduction made by employment tribunals.i should add that the tribunal has a jurisdiction do this under s.122(2) ERA 1996 also (basic award).

43. The appellate courts recognise that there will be a degree of speculation as to the tribunal's consideration of the application of the principle particularly so around the issue of compensation.
44. In *Software 2000 Ltd v Andrews and ors 2007 ICR 825, EAT*, Mr Justice Elias, the then President of the EAT, reviewed all the authorities on the application of Polkey and summarised the principles to be extracted from them. These included:
    • in assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal
    • if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future)
    • there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal
    • however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence
    • a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

Findings of fact

45. I set out below the findings of fact that I have reached relevant to the claims that the claimant makes. I point out the parties that I have not detailed every single fact that was provided to the tribunal over the course of the seven days of evidence and submissions. What I have done is set out relevant facts that feed into the issues that the tribunal has to determine and ultimately, the decision that I have reached.

Unfair dismissal

46. The claimant's employment started on 30 May 2020. This was during the coded 19 pandemic. The claimant attended an induction at the respondent's

Kensal office on 19 May 2020. He was one of a number of people being inducted at that time. It was conducted by Mrs Albani who gave evidence here. There is a dispute between the parties as to what was provided to the claimant during the course of his induction on 29 May. Specifically, the respondent says that the claimant was provided with amongst other things a copy of the employee handbook which contains details of the standards expected of carers and details of the respondent's disciplinary and grievance policies. The claimant says that he did not receive this document. It is the respondent's case that a soft copy of the employee handbook was provided and embedded within the respondents app on all mobile telephones provided to its carers, including the claimant and the claimant was provided with a mobile phone during his induction.

47. A number of other details about himself including his religion which he has inserted into a form in the following way: '" Christian/". In evidence, the claimant's explained that what this meant was that while he holds a Christian faith he is non practicing. He also explained that he is sometimes observant as for example he will fast. This is relevant to the claimant's claim of religion or belief discrimination.

48. In his witness statement, the claimant details number of concerns that he had regarding either service users or the circumstances within which he was working. He sets out what he considers to be examples that exemplify in working to a good standard. This is not something which was disputed by the respondent at any time in these proceedings.

49. On 19 May 2023, an incident occurred at the Kensal office. The claimant had been experiencing difficulties with his mobile telephone following a recent update. Within this claim he has said that he believes three of the respondent's employees or former employees to be responsible for the update and subsequent malfunctioning of the phone and that it was their stated purpose either individually or collectively to cause the phone to malfunction and thereby frustrate the claimant from the performance of his duties as a carer..

50. For the claimant this is an important point to appreciate because he says that it was practically impossible for him to conduct his duties as a carer in the absence of a functioning app which would enable his activities to be logged as well as notes that collect the claimant had to make of service users. This is disputed by the respondent principally by Mr Doherty who says that there are alternative ways to record logs which the claimant could have found out about if he had simply enquired.

51. The claimant says that he had sent a message by way of the respondent's internal messaging portal some days in advance of the 19 May 2023 and had not received a response. In that message he indicated that he required a new mobile telephone. It was his expectation that he will be provided with a new mobile telephone because he had provided notice of his intention to exchange

his faulty one and secondly a younger group of employees who'd recently been inducted, had received mobile telephones.

52. Mr Doherty explained that the stock of mobile telephones that the respondent held at any one time was finite for reasons of cost. This fact is relevant to an aspect of the claimant's claim of direct age discrimination because the claimant states that the provision of a working mobile telephone to younger employees and thereby exhausting the stock of available mobile telephones was causative of his dismissal. This is how he explains his allegation of direct age discrimination. This is denied by the respondent.

53. As he had been directed to, the claimant approached Mr Joao Cerdeiral, and requested a new mobile phone be provided to him. A conversation took place between the two. Although the parties disagree as to the nature of this interaction, it is accepted and or indeed positively asserted by the claimant that he informed Mr Cerdeiral that he was returning the phone and until a new phone was made available to him that he would not be working. It is the respondent's case that the claimant was aggressive and intimidating towards Mr Cerdeiral. The respondent asserts that Miss Albani witnessed this interaction, something that the claimant does not accept. She says that upon the claimant's departure from the office, she approached Mr Cerdeiral and he in turn sent an email detailing a complaint about the claimant conduct.

54. Miss Albani was detailed to investigate the claimant's alleged misconduct arising not only from this incident on 19 May 2023 the others that emerged subsequently. Further allegations of misconduct emerged following the respondent's investigation, namely from its service users.

55. Mrs Albani says that the respondent had received allegations of the claimant's manner. In fact, she had witnessed the incident with Mr Cerdeiral on 19 May 2023. Following his interaction with the claimant, Mr Cerdeiral had recorded his concerns about the claimant's conduct towards him in an email dated the same day as the incident.

56. Mrs Albani convened a disciplinary investigation meeting with the claimant to take place on 1 June 2023. This was communicated by way of letter sent to the claimant 25 May 2023. Due to Mrs Albani's ill-health, the remote meeting had to be rescheduled. On 9 June 2023, Albani met with the claimant by telephone. The purpose behind the call was to discuss the concerns raised and to understand what the claimant's position was in respect of the allegations. There was a recording of the conversation and a transcript also. In respect of relevant, pertinent questions in relation to the claimant conduct, the claimant simply stated that he was not going to answer any questions and that he was there simply to listen. Consequently, this Albani reached the view that the claimant was frustrating investigator reprocessed and terminated the meeting.

57. In evidence, the claimant stated that he did not understand the purpose of the meeting and thought it was in relation to the process of getting a new mobile telephone.

58. The claimant was invited to attend a disciplinary hearing on 22 June 2023, to be chaired by Mr Hassan. The invitation letter for that hit meeting identified the purpose of the meeting as an opportunity for the claimant to provide next relation to matters of concern relating to rudeness towards service users, harassment towards office staff and a failure to attend an investigation meeting had been scheduled 19 June 2025 with Mr Hassan. That meeting had been communicated to the claimant by way of an letter dated 13 June 2023 and which outlined an additional allegation of alleged theft. The claimant was provided with the statement, which anonymized the names of the service users concerned and which set out three discrete allegations of fear or vulnerability on the part of the service users and one allegation of theft. The allegations stated that the claimant had come across as being very aggressive on a number of occasions, and had instilled fear, vulnerability, and stress and upset as a consequence of their interaction with the claimant.

59. On 22 June 2023, the claimant emailed Mr Doherty, Mr Albani, Mr Hassan and Gloria Ehlah that he would not be attending the meeting as he had done on 9 June 2023.

60. A further invitation to attend a disciplinary hearing with Mr Hassan was sent to the claimant by email dated 5 July 2023 inviting him to a meeting on 10 July 2023. The claimant attended this meeting.

61. Mr Hassan asked the claimant why he refused to engage with the investigation meetings and he set out that he mistrusted the reasons behind Mrs Albani's approach. The claimant did discuss the incident on 19 May 2023 and set out his position that he had attended the office for a new phone having asked for one. He then said that he provided his phone to Mr Cerdeiral and that he was not returning to work until he had received a new one. The claimant was then asked whether he wished to add anything further and address the other allegations but he declined stated that he would prefer to send a detailed email in response instead.

62. Following the hearing, the claimant did send an email to Mr Hassan with his comments on the allegations. Claimant denied the allegations in relation to service users. In relation to the allegation of his failure to attend a formal meeting twice, the claimant blamed Mrs Albani stating that he wasn't settled with her approach or behaviour and citing the fact that the meeting scheduled for 1 June 2023 had to be cancelled due to miss Albani's ill-health. He alleged that Mrs Albani had withheld information from him.

63. In relation to the incident on 19 May 2023, the claimant highlighted that he had been refused a work phone twice, questioned why there was not a replacement phone in place for him and other carers, why Miss Perry had updated the phone with a faulty or outdated programme causing him

frustration and setting out a series of further questions relating to the provision of the phone or its performance.

64. The claimant did not accept during the course of that meeting he had been rude or obstructive.

65. Following the meeting, Mr Hassan found that three out of the four allegations were upheld in respect of the allegation of theft of client property. Mr Hassan considered that there was insufficient evidence to confirm either way whether the claimant had committed any such act finally that it was one word against another's. However, in relation to the other allegations he considered that there was evidence to support the allegations concerned. In relation to the failure to attend meetings, it was found that the claimant admitted his non-attendance and refusal to attend. Mr Hassan found this to be an act of insubordination and misconduct. In relation to the incident on 19 May 2023, Mr Hassan found that the claimant had acted in an aggressive manner towards staff members which amounted to harassment under the respondents discipline policy. In relation to the allegations of aggression and intimidation towards service users, Mr Hassan found that the claimant had accepted that his manner could be aggressive or in the claimant's words firm.

66. Mr Hassan considered that as a carer or care assistant required the claimant to uphold certain standards and expectations in order to support service users and to act in a fair, compassionate and understanding manner. He did not consider that the claimant had acted in such a way and considered that the consequential effect of that conduct was serious and amounted to gross misconduct in accordance with the respondent's policies and procedures.

67. Mr Hassan went on to consider the appropriate sanction and points out that his decision here is not influenced by the claimant's age or race but that the allegations that his mind amounted to gross misconduct. In evidence, Mr Hassan pointed out that due to the regulatory regime that the respondent works, and due to the nature of the concerns raised about the claimant, respondent had no alternative but to undertake a prompt investigation of the claimant's conduct and take appropriate action to safeguard service users.

68. Mr Hassan considered that the claimant's approach to a reasonable instruction to attend the meeting was amounted to serious misconduct only. It appeared to him that the claimant was demonstrating a lack of respect for the respondent's management.

69. Mr Hassan wrote to the claimant on 17 July 2023 to confirm the decision to terminate his employment with immediate effect.

70. The matter went to an appeal which was heard before Mr Doherty. In his evidence, Mr Doherty identifies that as a care provider, the respondent is assessed in terms of its suitability to provide personal care by the care quality commission. The CQC is the independent regulator of health and social care in England and Wales. The CQC regulates health and adult social care

services organisations. He points out that the respondent is rated as good by the CQC.

71. In terms of his role, he has oversight of all departments and oversees the strategic direction of the respondent. He explains that he has conducted several appeal meetings during his career and points out as he did in evidence that this is the first time the respondent has been involved in tribunal proceedings.

72. Mr Doherty says that in order to prepare for the appeal meeting he reviewed and considered the notes of the investigation meeting, evidence generated as part of the investigation which runs to 3 pages and was before the tribunal, the invite to the disciplinary meeting pack (two pages) notes of the disciplinary meeting (two pages) and the outcome letter as well as the claimant's letter of appeal.

73. In relation to the harassment of staff members, Mr Doherty found that the claimant did not dispute that he may have acted inappropriately but to Mr Doherty's mind, the claimant suggested that his behaviour was on account of frustrations with his mobile phone not working. He found that the claimant had acted aggressively and threateningly to staff and aggressively to service users. He also found that the claimant had not acted in a way which is consistent with the standards and expectations with regards to conduct expected of the respondent's employees.

74. In respect of mitigating conduct, Mr Doherty says the following: *'my concern given the nature of his role work with vulnerable service users was such that as he worked along, I had serious concerns in him providing care given the allegations made by service users and their families. '*

75. He confirmed the dismissal by way letter dated 4 August 2023.

Harassment on the basis of age

76. This is an allegation which the claimant describes in simple terms as set out in the issues that were available to the parties. I complained about a back pain I had (from 2022 2023), a foot, ankle sprain (April 23), the issues which did get a major swelling (2023). This may be one of the reasons why miss Ehlah said I am, I am getting old.' Further, the claimant says this: you are getting old' is was said to him by Miss Ehlah more than once during his three years with the respondent. The claimant isolates these comments to the autumn of 2022.

Direct discrimination on the basis of age

77. Although this is not stated in the claimant's witness statement, he does make submissions around the impact of his age on his submissions. Orally, he submitted that he believed that he was treated differently the younger members of the respondent staff by being dismissed as a consequence of the allegation raised against him. In written submissions he seeks to enhance the

allegation by stating that it is a failing to accommodate his difficulty in remembering the logged information which was caused by the lack of a working phone.

Direct discrimination on the basis of race

78. In respect of direct race discrimination, the claimant says this in submissions: *"the respondent discriminated against me by treating the claimant differently because they were studying to become a teacher and apply for British citizenship"* However, the claimant has failed to identify what the treatment was what the consequences of the treatment that he alleges was. Accordingly, this claim must fail on the basis that it is not properly made out.

Breach of contract

79. Respect of his claim of breach of contract, the claimant identifies a number of factors. First, that he was issued an identity badge which identifies him as being a level II care assistants when in fact he is only a level I qualified. He says that this amounts to a breach because it failed to recognise his actual job role. He goes on to say that this was a unilateral change of his job title and resulted in him being assigned care visits requiring a higher qualification level. The respondent failed to comply with its disciplinary capability procedures and thirdly, it changed his employment type what he describes as an ongoing step status of employment to a permanent one without proper consultation. He also goes on to say that the respondents failed to provide any holiday entitlement rights during his period of employment, however eyes I pointed out to the course of the hearing, the claim is that net no point ever had as part of a claim for unlawful deductions from wages and holiday pay.

Findings and reasons

Unfair dismissal

80. The principal reason for the claimant's dismissal was misconduct. Mr Hassan had found the claimant had committed acts of gross misconduct namely in relation to his conduct towards a staff member and service users. Mr Doherty upheld Mr Hassan's finding.

81. I find that there were reasonable grounds for that belief that the claimant had committed the acts alleged against him in relation to the service user and staff member allegations which formed the bedrock of the allegations of gross misconduct made against him.

82. I find that at the time the respondent formed its belief it had carried out a reasonable, but by no means optimal investigation. There was a witness to the conduct alleged against the claimant arising from the incident on 19 May 2023. The claimant's conduct towards Mr Cerdeiral was consistent with his subsequent presentation during the course of the disciplinary investigation meeting with Mrs Albani. It was also consistent with the allegations of him

being confrontational and aggressive by service users. Accordingly, I find that it was entirely reasonable for Mr Hassan to form the reasonable view that he did in respect of the claimant conduct.

83. Mr Doherty's view was that the statement from service users was very serious and suggested conduct contrary to the respondent's values. service users were saying that they did not want to open their door to the claimant, of feeling frightened and threatened in their own homes. In his mind, there was no reason for him to believe that the allegations represented nothing but the absolute truth and that in his view no amount of training or coaching or suspension could resolve that position. I note that the claimant did not challenge Mr Docherty or Mr Hassan as to the authenticity of the accounts made by the service users, instead preferring to provide reasons as to why the services users would are untrue statements about him such as seeking to rely on an unsubstantiated belief that, for example, a conflict between his religion and that of a service user lay behind this adverse reporting.

84. I found the claimant's reasons on all grounds that he relied upon here to be evidentially weak, speculative and unsupported by evidence. The claimant may complain that he required more evidence from witnesses and, that by refusing his various applications for witness summonses, I prevented him from advancing this line of attack. I disagree and note that the claimant was speculating here as to what a potential witness might say about him and the service user. In other words, the claimant did not know what the witness would say.

85. Mr Doherty's decision to uphold the claimant's dismissal was based upon the disciplinary hearings finding on dismissal and the fact that the claimant had not presented any evidence which could lead him to change his view. In support of his view as regards the claimant conduct, he identified that the claimant had described his conduct or behaviour towards service users as "firm", a description which Mr Doherty said was contrary to the values of the respondent because it was not in keeping with its expectations as it demonstrated a lack of sympathy and empathy towards service users and he was of the view that this amounted to gross misconduct. In my view, confronted with the conduct reported of the claimant and following a fair and reasonable investigation, I find that Mr Doherty was entitled to reach this view on the facts available to him, particularly in light of his finding that the claimant's admitted conduct in the regard was incongruous and incompatible with the duties of a residential carer generally and one employed by the respondent.

86. I do not find that respondent otherwise acted in a procedurally unfair manner. I reject the claimant's position that he did not receive the employee handbook. I accept the evidence of all of the respondent's witnesses that a soft copy of the employee handbook was placed upon the claimant's mobile telephone. In this regard, I prefer the evidence of my own eyes and the repeated examples before me of the claimant failing to read **key** or core documents in this claim. I find that it was highly unlikely that the claimant would have read the document were it available to him.

87. That said, it is clear from at least the 19 May 2023 claimant did not have a copy of the respondent's employee handbook. The respondent would have known this because the claimant no longer had possession of his phone.

88. I reject the claimant's evidence that he did not receive a handbook. He signed a handbook form on 29 May 2020 stating that he had read and understood standards of conduct expected by the respondent and agreed to act in accordance with the standards of conduct as a condition of his employment. The declaration that he signed told him that a soft copy of the employee handbook had been uploaded to his company mobile. During cross-examination, claimant said that he thought he was signing another document in relation to training. I find this to be highly unlikely and that it was more likely that he knew what he was signing. I note that the contract of employment that is signed on 30 May 2020 makes reference to the employee handbook.

89. That said, it is clear that the respondent has not conducted a fair procedure. During the course of his considerations, Mr Hassan had access to a voice recording of a telephone call between the claimant and someone known as Angela. That call was not provided to the claimant during the course of the disciplinary investigation process. Within it, the claimant speaks to Angela in a rude way and can clearly be heard to shout at her. While Mr Hassan states that the content of the call did not form any part of his consideration to dismiss the claimant, it is nonetheless highly irregular that this is a document that he was able to listen to and not share with the claimant. I accept Mr Hassan's evidence that he did not allow the call recording to affect his decision making and findings.

90. By the time the matter reached Mr Doherty, he had been provided with a series of comments or statements in a document which was more detailed and inconsistent with the anonymized version that was before Mr Hassan and had been provided to the claimant. While the difference between the two documents was essentially the allegation made by Mr Cerdeiral, it is nonetheless another departure from a fair procedure.

91. Third, the document before Mr Doherty had further allegation which Mr Doherty said he did not consider as part of his reasoning to uphold the claimant's dismissal but was a matter that he put the claimant during the course of the appeal hearing. When cross-examined, Mr Doherty was at a loss to explain how that allegation had managed to reach the table of allegations that formed the basis of his questioning.

92. Mr Doherty's view here was that the claimant had seen the statement and was aware of the allegations regarding the altercation with Mr Cerdeiral. The claimant asked him cross-examination why he had not been provided with the statement and it was accepted by Mr Doherty that not. In response Mr Doherty said that he was aware the allegations that there had been an altercation (something denied by the claimant) but in any event, the most important aspect Doherty's mind was the allegations made by service users.

However, I do find it again irregular and a departure from a fair procedure that the claimant was not provided with the opportunity to scrutinise in the details of the conduct reported about him respect of this allegation.

93. In addition, I have concerns about the interplay between the investigation, disciplinary and appeal processes. Those concerns arise from what I consider to be a distinct lack of documentation recording how the various actors reviewed and reasoned their decisions. I find the lack of documentary evidence here to be concerning and indicative of a faulty procedure, despite my finding that the final outcome of both the disciplinary and the appeal are evidentially sound.

94. Accordingly, I find that the respondent breached its procedures both at the disciplinary and appeal hearing. Therefore it must follow the claimant succeed in his claim of unfair dismissal.

Polkey

95. I am required to consider whether or not the unfairness that I have found in the procedure would have affected the claimant's dismissal. I have set out above the considerations that I must review in reaching a decision with regards to the effect of the Polkey case. Specifically, employment tribunals have a just and equitable jurisdiction or in other words a wide discretion to reduce any amount of the award is made to the claimant by way of sections 122 and 123 ERA 1996, in other words in respect of the basic and compensatory awards. I have found that the decisions reached by the disciplinary and the appeal to have been evidentially sound. In other words, I see no reason why the findings of gross misconduct reached against the claimant could be undermined. Furthermore, I conclude that the respondent's finding that the claimant had committed serious misconduct by way of his behaviour throughout the disciplinary investigation through non-engagement was serious.

96. I find that it was reasonable for both Mr Hassan and Mr Doherty to find that the totality of the claimant's conduct breached the implied duty of trust and confidence, the most important of all contractual clauses and that it was within the range of reasonable responses to have dismissed the claimant for his conduct.

97. However, I have found that the respondent has not conducted a reasonable process. I find that had it done so, the process would have lasted longer but inevitably have led to the claimant's dismissal for the reasons found by Messrs Hassan and Doherty. I find that had a fair process had been undertaken it would have involved a careful compilation and documentation and of the complaints to the claimant, that the claimant would have been afforded time to review what he considers to be essential documentation relevant to the allegations concerned (whilst being mindful of the need of proportionality). I find that the claimant would have been dismissed had all of these processes being undertaken four weeks after his actual date of dismissal.

98. Therefore, I find that the claimant is entitled to receive a basic award for unfair dismissal and a compensatory award totalling no more than four weeks net pay for the period it would have taken for a more comprehensive and fair procedure to have taken place.

Harassment on the basis of age

99. I have already dismissed this claim. Please see above.

Breach of contract

100. Given my finding that the claimant in any event would have been dismissed for gross misconduct, it follows that the respondent was entitled to dismiss the claimant upon its finding that the claimant acts of misconduct were so serious that it was entitled to dismiss him without notice. Therefore this head of claim is dismissed.

101. In respect of the claimant further claims of breach of contract namely that his contract was changed to a permanent one without his consent, this allegation is dismissed as a matter of law because it is my finding the claimant was a permanent employee. As I explained during the course of the hearing, regulation 1(2) of the fixed term worker regulations defines a permanent employee as someone who doesn't work on a fixed term contract and that is the situation here. Moreover, the claimant is unable to point to a consequential loss arising from what he perceives to be in the breach here.

102. It is also said that the respondent's failure to provide the claimant with a name badge describing him as a level one carer amounted to a breach of his contract but it is difficult to see how this could be a breach of contract and in any event, this does not form one of the list of issues therefore are not prepared to consider it part of the claim. Even if it were among the issues, this claim would have failed because the claimant failed to establish any consequence of the breach. It is also the case that the claimant was issued with the ID badges bearing the incorrect title at the start of his employment yet had not raised any issue with the respondent and therefore it is arguable that that claimant accepted this breach in any event.

Direct age discrimination

103. The claimant asserts and I find that he falls within the over 40 group of employees. He asserts that he has been treated less favourably than those employees in the 18-30 group by being dismissed for a reason related to his mobile phone. It is my finding that the claimant has been dismissed for a different reason which is entirely unconnected to his age, namely his conduct. Further, I accept the uncontested evidence of Mr Hassan that the claimant's age group is the most populous age group of the respondent's employees. This means that the claimant fails to establish a set of facts that supports his claim of direct age discrimination on the balance of probabilities. In other

words, this allegation fails to meet the standard as set out in the case of **Igen** (see above).

Discrimination on the grounds of religion or belief

104. This allegation fails on the balance of probabilities to be proven and therefore fails to **Igen** test as well. The claimant has set out in the very vague terms the details of instances where he is coming into conflict with service users arising from what he perceives to be a difference in religious observance between him and a number of service users of different faith to his own. Not only do I accept the respondent's evidence that it had no knowledge of his own particular branch of Christianity or observance but also I find that this allegation is set out in very vague and non-specific terms, lacking cogency, detail and is made without reference to date, time, place or participants. In other words, and despite the direction to the claimant from EJ Spencer that he clarify this claim, the claim is not properly articulated.

105. Given my findings above, the next stage will be to list this matter for a remedy hearing although it is hoped the parties will be able to agree what should be paid to the claimant arising from my findings within this judgment.

Approved by:

Employment Judge Forde
13 June 2025

Judgment sent to the parties on:

24 June 2025
……
For the Tribunal: