EMPLOYMENT TRIBUNALS

Claimant: Mr C Lindo
Respondent: Hats Group Ltd

Heard at: Watford
On: 31 March, 1, 2 and (panel only) 24 April and 8 May 2025

Before: Employment Judge Dick
Mr D Bean
Mrs S Boot

Representation
Claimant: In person
Respondent: Mr Overs (litigation consultant)

RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well-founded. The claimant was not unfairly dismissed (constructively or otherwise).

2. The complaints of direct race discrimination as set out at paragraphs 5.1.3, 5.1.4, 5.1.5 and 5.1.7 of the list of issues are well-founded and succeed.

3. The remainder of the complaints of direct race discrimination are not well-founded and are dismissed.

4. Remedy will be decided at a later hearing.

REASONS

INTRODUCTION

1. The claimant was employed as an ambulance driver by the respondent, which provided transport services to NHS trusts. He was based at Hillingdon Hospital. In August 2023 the respondent received a complaint by email that one of its drivers had threatened a woman ("the complainant") at a petrol station. Following a disciplinary process, the respondent found that, to oversimplify somewhat, the claimant had done what was alleged and was therefore guilty of gross misconduct. The claimant, who had denied threatening the woman, was

summarily dismissed. He then appealed successfully against the decision using the respondent's internal appeal process. However, he was not allowed to return to work at Hillingdon, instead being offered work elsewhere. The claimant did not accept that offer. It was the claimant's case that he was dismissed unfairly by the respondent and that his dismissal, as well as certain aspects of the disciplinary process, were acts of direct race discrimination. The respondent considered that it was unable to offer the claimant work at Hillingdon because the NHS Foundation Trust ("the Trust") which ran Hillingdon, and which employed the woman who had made the complaint, had said that it was not prepared to allow the claimant back on the site.

CLAIMS AND ISSUES

2. The factual and legal issues which we were to decide had been set out in a list of issues forming part of a Case Management Summary prepared by Tribunal Judge Peer following a preliminary hearing on 30 August 2024. We discussed that list with the parties at various points during the hearing. Mr Overs agreed on the respondent's behalf that the claimant had been employed by the respondent and that the claim was in time – there was therefore no need for us to consider issues 1 and 2. We also indicated that any issues about remedy would be decided if necessary at a future hearing. Subject to that, and to what we say in the next paragraph, we made clear that, in the absence of any application and ruling from us, the list of issues set out every complaint (i.e. each part of the claim) that we would decide. Although the claimant indicated at one or two points that he might also have wished the Tribunal to consider a complaint of victimisation (which was not raised in the claim form) we gave the claimant an opportunity to reflect upon that overnight and he did not make any application to amend either the claim or the list of issues.

3. In the Appendix below we set out the parts of the list of issues which remained in dispute. As will be seen, the complaints were of unfair dismissal and race discrimination. As to the latter, the claimant describes his race for the purposes of s 9 of the Equality Act 2010 as black. He identified an number of aspects of the disciplinary investigation, and also his dismissal on 19 September 2023, as acts of direct race discrimination.

4. As to the unfair dismissal, we also raised the following with the parties. Where an employee is dismissed but then reinstated on appeal, the law is that there was no dismissal (*J Sainsbury Ltd* v *Savage* 1981 ICR 1). It was therefore a live issue in this case whether the claimant was dismissed by the respondent and that is something we would have to consider. We were able to confirm with the claimant that it was his case that his refusal to accept the respondent's offer of reinstatement was because of a combination of the respondent's failure adequately to resolve some of the points in his appeal (see *Folkestone Nursing Home Ltd* v *Patel* 2019 ICR 273) and the unsatisfactory nature of the work that he was offered on reinstatement. On that basis his case appeared to be that, if he was not dismissed in the conventional sense, he was nevertheless constructively dismissed. This appeared to us to be a fair reading of the

pleadings and the case as summarised in writing by TJ Peer. Alternatively, it might be that if the offer of new work was in fact the unilateral offer of a new contract, there might have been a dismissal of the type identified in *Hogg* v *Dover College* 1990 ICR 39, or, put another way, if what the claimant was offered was in reality a new job, there was no reinstatement. All of this law is dealt with in more detail below, but what is significant for present purposes is that Mr Overs agreed on the respondent's behalf that we could fairly consider dismissal and, in the alternative, constructive dismissal, without the need for any application from the claimant to amend the claim. We therefore did so.[1]

PROCEDURE, EVIDENCE etc.

5. We explained to the parties that before the evidence was called we would read the witness statements and those parts of the bundle which were identified on the "key documents" list with which we were provided, but otherwise they should be sure to refer us to any other documents of relevance in the agreed bundle during the course of the evidence or submissions.

6. After taking time to read the statements, we heard evidence from the witnesses. In each case the usual procedure was adopted, i.e. their written statements stood as their evidence-in-chief and they were then cross-examined. The respondent called:
    - Mr Kurt Villaroeal – the claimant's line manager, who conducted the initial disciplinary investigation.
    - Miss Joanne Small – Head of Projects and Procurements at the respondent's head office, who conducted the disciplinary hearing and dismissed the claimant.
    - Miss Jodiene Grinham – the respondent's Patient Transport Services Operations Director for Northwest London, who conducted the appeal hearing.

7. The claimant also gave evidence. (In this case the parties had originally been timetabled to present their cases the other way round but the claimant had no objection to the respondent's suggestion of hearing from the respondent's witnesses first for reasons of their availability.)

8. At the conclusion of the evidence we heard submissions and reserved judgment. On 24 May the panel met to complete our deliberations. Shortly before then, Mr Bean had a chance encounter with the claimant in the street. Nothing which gave rise to any concern occurred, though we thought it best to write to the parties to explain what had happened and invite them to provide what representations, if any, they might have before we concluded our

[1] Though we did not explicitly raise it with the parties, we had in mind *Mervyn* v *BW Controls Ltd* [2020] EWCA Civ 393. The claim there was for unfair dismissal and the claim form had set out facts which could support a claim for constructive dismissal, but the list of issues prepared at the preliminary hearing concentrated on whether the claimant had been "actually" (as opposed to constructively) dismissed by the respondent. In deciding whether the Tribunal at the final hearing should have considered whether there was a constructive dismissal, the Court of Appeal held that the Tribunal should have amended the list of issues and considered constructive dismissal.

deliberations. In the event no such representations were received, so we finished our deliberations as planned on 24 May. Employment Judge Dick apologises for the time it has taken him since then to provide this reserved judgment.

FACT FINDINGS

9. We find the following facts on the balance of probabilities. Where facts were not in dispute we simply record them. Where we have needed to resolve disputed facts we make that clear. We have not made findings on every fact presented to us, but merely on those which assist us to come to a decision bearing in mind the list of issues.

Nature of the work & contractual terms

10. The respondent provided, amongst other services, non-emergency patient ambulances for NHS trusts. The claimant started work for the respondent in June 2021. His job title was Ambulance Care Assistant ("ACA") – he was an ambulance driver. As Miss Small put it in her statement: "The Claimant's duties in his role were to transport patients to and from their homes and healthcare facilities within the London Borough of Hillingdon. This specific contract is based at Hillingdon Hospital." The claimant's written terms and conditions of employment ("the Terms") in fact said the following:

> 4. Place of Work
>
> a) Your usual work base is Pield Heath Road Uxbridge UB8 3NN [*all agreed that this was the hospital's address*] however, you may be based or required to work from any of the Company's other locations or those of its clients as required.
> b) You are required to perform your duties at client sites or at any place or location that the Company may require.
> c) You are required to drive to various locations throughout the United Kingdom as required by the Company.

11. The claimant's evidence, which we accept, was that he worked for most of the time at Hillingdon Hospital, although he was asked to work considerably further afield from time to time and was willing and able to do so. He did however have particular reasons for preferring to work at Hillingdon, which we deal with below.

12. So far as is relevant to this case, the Terms further read as follows:

> 19. Discipline, Grievance & Appeals Procedures
>
> a) Disciplinary rules, discipline, grievance, and appeals procedures have been established by the Company... You should note that these Procedures do not form part of your terms and conditions of employment.
> b) The Company reserves the right to suspend you from work pending investigation of any such circumstances …

c) If it is determined that you are guilty of any gross or persistent misconduct or any act of dishonesty (whether or not in the course of your employment)… your contract of employment may be terminated forthwith without notice or any payment in lieu of notice.
d) If you wish to appeal against a disciplinary decision you may apply in writing to your Manager in accordance with the disciplinary procedure…

20. Termination of Employment

…
b) The Company provides services to third parties and your duties involve working on a third party's site. It is a term of agreement between your Employer and its third parties that the third party has the right to approve or disapprove your employment or continued employment. Where the third party disapproves of your continued employment, this may result in the termination of your employment.

We note the use of the word "may" in the final part of clause 20(b) – the respondent did not suggest that it had an absolute right to terminate the claimant's employment where a third party (i.e. the hospital Trust in this case) disapproved of his continued employment. We also note that, regardless of the assertion that that the disciplinary procedure itself was non-contractual, the Terms clearly gave the claimant a contractual right to an appeal (and thus to reinstatement upon a successful appeal).

13. At the time the complaint was made, Kurt Villaroel was the contract manager for the respondent at Hillingdon Hospital and was the claimant's direct line manager. At the end of August 2023 Mr Villaroel's employment with the respondent ended and he began working for the Trust as the Transport Manager at Hillingdon Hospital. In her oral evidence Miss Small explained that there was a period when Mr Villaroel was "sort of working for both". Miss Small took over Mr Villaroel's former role on a temporary basis ("babysat" it, as she put it) after the August 2023 bank holiday. It was a role she had done in the past.

14. There was no suggestion that, before the complaint was made, any other complaints had been made about the claimant, nor that the respondent had any grounds for concern about the quality of his work. To the contrary, the claimant was able to show us a number of letters in which people had positively praised his work, including one from the respondent's CEO dated 4 April 2023.

The claimant's complaints and grievances

15. We were provided with evidence about some complaints or grievances which the claimant raised and about some other issues. For reasons which we explain below we considered that these were of little relevance, but we do consider it appropriate to record the following.

16. In April 2023 the claimant injured his arm when he went to assist a woman who was stuck in her car outside the emergency department of Hillingdon Hospital.

The claimant told us, and we accept, that he was asked to assist by a nurse; he was not obliged to help and the fact he did reflects positively on his character in our judgment. There was a dispute between the claimant and the respondent about whether he was technically working at the time, although it appears to be agreed that he was driving one of the respondent's ambulances in uniform. Given the issues in this case we did not need to resolve the dispute. The claimant was treated at Hillingdon for the injury he had sustained, and on 23 May 2024 he made a formal complaint about the standard of the medical treatment he had received. A response dated 6 July 2023 acknowledged some miscommunication between doctors and relayed an apology from two doctors about the care and treatment the claimant had received. The claimant escalated that complaint, formally complaining to the Parliamentary and Health Service Ombudsman. In a response dated 21 September 2023 the Ombudsman declined to consider the complaint on the basis that it was prioritising what it considered to be more serious complaints given the impact of the COVID-19 pandemic. Part of the reason we considered this all to be of limited if any relevance was that the Trust was not the claimant's employer.

17. Following his injury the claimant spent some time off work, though precisely how long was not made clear to us. We were shown an email from the respondent's OH administrator to Mr Villaroel dated 19 June which explained that they had been contacted directly by the claimant following his injury, but they did not accept self referrals so would require a referral from Mr Villaroel before taking any action. The claimant suggested during the course of the case that Mr Villaroel had ignored this. That suggestion was not made in the claimant's written case although on his claim form he did complain that his managers' attitudes towards him had changed after the injury and further complained that the respondent had not provided him with financial help, although in his oral evidence the claimant clarified that he had meant support rather than financial help. Mr Villaroel accepted that he taken no action upon the email from OH, but said that there were reasons for that. Given that it had not formed part of the claimant's case and that it did not assist us in coming to conclusions on the issues before us, we did not consider it appropriate to make findings on whether it was appropriate for Mr Villaroel not to have taken action. We do however accept that the claimant felt aggrieved at what he saw as the respondent's lack of action. Similarly, though the claimant told us in evidence that he had "put in a claim for workplace injury" and suggested that the respondent's treatment of him changed after that, none of that formed part of his written case and none of it was put to the respondent's witnesses. The most we thought it appropriate to conclude from this was, again, that the claimant felt a genuine sense of grievance about it.

18. We were provided with transcripts of two voicemails which the claimant left for Mr Villaroel. They were complaints about Magda, who was the supervisor of the controllers, i.e. the people who directed the ambulances. Magda worked remotely from abroad. The first message, on 25 May 2022, began with a complaint that Magda had not remembered the claimant's birthday. She was, the claimant said, "discriminating me". The substance of the complaint was that the claimant was having to work later than other drivers (an in particular had been asked, despite his request not to, to do so on his birthday) and that Magda

was communicating poorly with him. There was no further explanation of "discriminating". In the second message, on 26 May 2022, the claimant complained that Magda had told him he did not work hard. The claimant said that he wanted better communication. Magda had not asked after his father's health even though her had asked her for help.

19. The claimant suggested to Mr Villaroel that he had ignored these complaints. Mr Villaroel accepted that he had received the voicemails and said that he had not taken any formal action essentially as they were just two of many messages he received from the drivers complaining about the controllers. It is certainly correct to say that Mr Villaroel did not initiate any formal complaints process. We consider that given the informal nature of the complaints it was reasonable of him not to do so, though we do consider that it would have been better had the decision not to take formal action been communicated to the claimant.

20. The claimant submitted a formal grievance against Magda some time later, on 15 September 2023. This was the day after he was invited to a disciplinary hearing – i.e. after the complaint was made against him and after the investigatory meeting which we come to shortly; the grievance can therefore have had no influence on the investigation that preceded the disciplinary meeting and so we deal with it in more detail later.

21. Given that there was no complaint in this case of victimisation, the evidence we have summarised on the preceding six paragraphs was in our judgment of marginal relevance. The claimant said nothing about any of it in his witness statement and we reject his suggestion in evidence that he did not realise that he should include anything apart from what happened on 11 August in his statement. This suggestion was palpably absurd given the written case preparation orders made by the Tribunal and a later email we saw from the respondent, which we allowed into evidence, in which the respondent on 27 Feb 2025 drew the claimant's attention to deficiencies in his statement – which dealt solely with the events of 11 August which were the subject of the complaint – in very clear terms. It suffices to say the following. There was no suggestion that Ms Small, who conducted the disciplinary hearing, or Miss Grinham, who conducted the appeal, had any knowledge of any of these points (except as we set out below). We find neither were influenced in any way by any of the above points.

The complaint

22. On Tuesday 15 August 2023 an email was sent to Mr Villaroel. Although the claimant described the email as fake at various points in the proceedings, we did not understand him to be suggesting that Mr Villaroel did not receive the email; rather, his point was that there was no proper investigation into its source. We accept Mr Villaroel's evidence that he received the email. We were provided with an unredacted copy of the email, which came from a Hillingdon Hospitals NHS Foundation Trust email address and which showed the name of the sender (i.e. the complainant). We accept on the balance of probabilities that it came from who it said it came from. The complainant, as is clear from the email signature, worked at the Hillingdon Hospital Booking Centre.

23. The email stated that it was a formal complaint about one of the respondent's drivers and then said:

> On the 11th August 2023 at around 8:35am I went into the petrol station on Ducks Hill Road, Northwood, to fill my car. As I was in the shop, this man verbally abused me because according to him, I was taking a long time and he needed to use the pump even though there were other pumps available for use.
>
> I paid for the items and petrol I had purchased, at this point he had gone to a different pump and as I felt threatened by his behaviour, I wanted to keep a record of the vehicle he was driving so I could make a complaint to the company. I took a photograph of the number plate and as I was walking back to my car he said "***I will fucking shoot you to death"*** [*complainant's own use of bold and italics*]***.*** This is a serious threat to anyone, especially to a woman on her own.

24. That was all the complainant said about what had actually happened. She went on to express her concern that someone who worked with vulnerable individuals could behave in that way "especially when on duty wearing the company's uniform". She said that it had caused her a "feeling of anxiety" as she worked for the Trust and was a carer in the evenings which at times involved interacting with the respondent's drivers. We make findings about what actually happened on 15 August below (para 82). Before doing so we make findings about the disciplinary and appeal processes.

25. The photograph referred to in the email seems to us to be the one at page 93 of the bundle, though it is not clear how and when this was provided to the respondent as it does not appear to have been attached to the email. It shows the front of an ambulance, including the numberplate, and there is an M&S hoarding in the background; as is clear from other photographs of the scene, the shop attached to the petrol station is an "M&S Simply Food". There was no dispute that this was the ambulance driven by the claimant at the relevant time. We reject the claimant's suggestion that the complainant must have taken the photograph of his ambulance on a different occasion.

The investigation (meeting 23 August 2023)

26. At no point in the investigation, disciplinary or appeal stages did anyone speak to the complainant about what she said had happened. Nor did anyone otherwise seek further detail from her or try to test her account. Although the complainant was not an employee of the respondent, she could of course have been asked to cooperate, particularly given the link between the respondent and the Trust. There was some contact with her as we explain below when she made a further complaint.

27. The respondent's initial investigation was conducted by Mr Villaroel. His report records the investigation as beginning on 15 August. It further records that the investigation process consisted of two actions.

28. The first action was confirming the driver and vehicle by pictures provided by the complainant and the "Quartix system". In his evidence to us Mr Villaroel explained that he knew which vehicle the complainant was referring to from seeing the picture. He checked the numberplate against the respondent's logs and found that the vehicle had been assigned to the claimant that day having spoken to the control team, i.e. Magda and Lee, who had identified the claimant as the driver through looking at the "telemetrics". To the extent that the claimant suggested it was inappropriate for Mr Villaroel to have consulted Magda and Lee for those purposes, we reject that suggestion.

29. Mr Villaroel's second action was conducting a "fact finding/version of events meeting" with the claimant. The letter inviting the claimant to this meeting was not produced by either party. There was no suggestion that the claimant received any information or material other than the letter prior the meeting. The claimant's evidence to us was that he had gone in to the meeting expecting it to be about his complaints about Magda and he said the same in the interview; we accept that. A "transcript" of the meeting, taken automatically by Teams, was in the bundle. Although the record is far from perfect, we accept that it conveys the gist of what was said. (There was no issue that, despite the transcript attributing a different person's name to the claimant, it was he who was speaking.) Towards the beginning Mr Villaroel summarised the allegation against the claimant and said that it was definitely the claimant as the complainant "even took a picture". He read out most of the relevant parts of the complainant's statement and then, after some technical difficulties were addressed, asked for the claimant's account. The claimant recalled parking behind the complainant and the complainant doing her petrol then going inside. He was approached by another man as his vehicle was blocking other vehicles' movements. After 10 to 15 minutes he decided to go and see to see if the lady was okay. The claimant recalled her coming out and taking photos, which he said he had no problem with. He said he did not say one single word to her; the only time he uttered a couple of words was when he went inside the shop after 10 to 15 minutes and realised she was shopping; he had then realised he needed to move his vehicle. All he did was say to himself that she was shopping and that was it. He denied saying anything like what the complainant alleged he had said. When asked whether he had spoken to the woman directly he said that he had not. The claimant referred to seeing the woman in the shop when he was "literally at the door of the shop". A later passage implies, although he mentions coming "out" of the shop, that he may in fact only got as far as the doorway. When the claimant asked about the photograph taken by the complainant, Mr Villaroel said that the picture was of the ambulance and did not show the claimant. The claimant said that he had been in the vehicle when the complainant took the photograph, though we note that the photograph fairly clearly shows the front seats of the ambulance were empty. The claimant was not asked about his grievance against Magda; the only mention of her was when, as we have said, the claimant said that he had thought the meeting would be about his complaints about her.

30. On the subject of CCTV footage from the petrol station, the transcript records Mr Villaroel as saying:

> No. So basically the there is a camera footage at the gas station and the purpose of that was just to make sure to corporate [*sic*] that you will also there. So obviously at the gas station, I'm not going to inquire or ask them to send me any video footage to hear any conversation, not going to do that. My old [*sic*] point was just the whole purpose of that was to be able to make sure again that it was you and you were in that.

This passage gives some indication of how, despite the inaccuracies, the record does convey the gist of what was being said. Mr Villaroel is clearly recorded as saying that he believed there to be CCTV footage from the petrol station and that he was not going to ask for it. Mr Villaroel's report says "Ambulance CCTV footage not in operation (faulty SIM card)" (the claimant did not dispute this – i.e. all agreed there was no footage from the ambulance's camera) and "petrol station footage not in operation". We say more about CCTV below (para 75).

31. Under the heading "Facts established" Mr Villaroel's report says: "Both parties present at the time of incident. Female Staff member facts confirmed via E-mail. Hats Driver (ACA) account of events during above mentioned H.R. meeting…." Under the heading "Facts that could not be established" it said: "What was said by either party as there is no CCTV footage or other witnesses." Despite this, under the heading recommendation the report says:

> Formal action required
> …
> [The claimant] has brought the company into disrepute due to his unprofessional display in public during his working hours and in a Hats uniform.
> Aggressive behaviour towards a Female Staff member of the Trust is unacceptable.

32. In his written evidence Mr Villaroel said that he decided that the evidence should be tested further and progressed to a disciplinary hearing. In his oral evidence we understood him to be saying that he had found that the claimant had been present but that it was not his role to determine facts beyond that, though he did then suggest that in the mere act of getting out of the ambulance the claimant had breached the respondent's code of conduct. We consider that Mr Villaroel had a confused understanding of the role of investigator, at times appearing to suggest it was simply to gather evidence but at other times suggesting it was to find facts in the sense that we are now finding facts. This confusion is also demonstrated in his report as we have set out above – in one part the it is said that what was said could not be established yet another part then appears firmly to conclude that the claimant brought the respondent in to disrepute.

33. In his written evidence Mr Villaroel denied that his decision to initiate the investigation or his conduct of it had anything to do with the claimant's race. Indeed, during the course of the case the claimant himself accepted that, whatever were his criticisms generally of Mr Villaroel's conduct. We too accept

it. Notwithstanding the serious flaws in the investigation which we identify below, we further accept that Mr Villaroel's actions were not done as part of some conspiracy with Magda or others – we reject the suggestion that he or his investigation were "influenced by others". For the reasons set out above, we decline to make any findings on whether his actions were motivated by the previous complaints the claimant had made – this was not one of the issues in the case. During cross-examination the claimant suggested to Mr Villaroel that at some point Mr Villaroel had been provided with a photograph taken by an unnamed person of a screen showing CCTV footage from the petrol station which showed that someone other than the claimant had been responsible for what the complainant complained about. In other words, it was suggested that Mr Villaroel saw evidence which exonerated the claimant, ignored it then lied to us about it. Mr Villaroel denied that and we accept that denial without hesitation – the suggestion was made without any evidential foundation whatsoever, apparently for the first time at trial.

Complaints about the claimant (8 and 13 September)

34. At 10:46 a.m. on 8 September 2023 the respondent received an email complaint from the Hillingdon Hospital about one its drivers sitting in the "secretary office" and "mocking" one of the secretaries. It is not entirely clear whether the incident is said to have happened that day, though that is the most natural reading; the email says: "I have been asked to put this in an email to you today… Today, I feel he has overstepped the mark." It did not specifically name the claimant. It was not made clear to us precisely *why* the respondent had concluded that the email related to the claimant, though clearly it *did* so conclude. The claimant showed us evidence that he had a medical appointment at 9.10 a.m. on 8 September and we accept his evidence that the appointment had not been at Hillingdon.

35. On 13 September 2023 an incident report was logged on the respondent's "Datix Cloud IQ" system. There did not seem to be any dispute that this log would have been created by Magda and no dispute that the incident involved the claimant. The log showed a phone call received complaining that a driver had dropped a patient off at the wrong clinic; the log writer had checked and the driver was the claimant. She called him to clarify and he said he had made a mistake. She then called him two hours later about collecting a patient and asked him to refresh his PDA; she said he had sworn at her then called again and told her he should not be at work that day and was going home. We note that a transcript of a call produced by the claimant is not inconsistent with the record, since it clearly related only to the last of the calls recorded in the log. The transcript simply records the claimant saying, "Magda, I do not think I am fit to be here today so I am gonna go home" and Magda replying, "OK, bye bye".

36. We did not find it necessary to decide any disputed fact about the incidents of 8 and 13 September. What is relevant is that the reports/complaints were made and were known to the respondent. There was no dispute that the claimant went off on sick leave after 13 September.

Invite to disciplinary hearing

37. On 14 September 2023 the claimant was emailed a letter from an "HR Business Partner" inviting him to a disciplinary hearing on 19 September. So far as is relevant it said:

> I write further to the Investigation Meeting held on 23/08/23. After careful consideration the decision has been taken that the evidence should be tested further at a disciplinary hearing.
>
> …
>
> At the hearing you will be asked to respond to the following allegations;
> - Offensive, aggressive, threatening, or intimidating behaviour.
> - Actions that bring the Company into serious disrepute.
>
> These allegations relate to a complaint received from a member of Trust staff. These alleged actions were in breach of HATS procedures and if proven constitute gross misconduct.

38. The letter therefore appears to make clear (notwithstanding Mr Villaroel's findings above) that the respondent considered that the facts had yet to be established. We note that the letter does not purport to summarise any of the factual basis of the allegations against the claimant; we consider that it should have done, even though the claimant would by now have had some knowledge of them. The letter did explain that the claimant had the right to be accompanied.

The claimant's 15 September 2023 grievance

39. The claimant sent his grievance by email on 15 September. He said that Magda had belittled and bullied him by shouting and putting the phone down on him. He made some more specific complaints about her conduct and also said that he had asked his manager (i.e. Mr Villaroel) for help with the situation but "no joy". The grievance contained no complaint, express or implied, about discrimination and made no mention of any protected characteristic.

The disciplinary hearing and outcome (meeting 19 September 2023)

40. The disciplinary hearing took place on 19 September. It was conducted by Miss Small. We were shown a Teams "transcript" and again we accept that it conveys the gist of what was said.

41. At the start of the hearing he claimant complained that CCTV footage had not been obtained from the petrol station. Miss Small explained that it had been emailed to him the week before as part of the investigation pack (we accept that) and the claimant said that he could not open it on his phone. It is apparent from the record that he was able to read it on his screen during the hearing and he said that he did not need it read out to him.

42. The claimant was then asked for his version of events. He said that he had gone inside, seen the lady was shopping and he came back out; he later explained that she had been at the pump when he first arrived, which was how he knew who she was when he saw her in the shop. She then took pictures of him and that was it. When asked why he got out of his vehicle to go in to the petrol station he said because he had waited about 10 minutes, the guy with the big truck had shouted at him, he was wondering where she was; if she was not in the queue (i.e. at the till) he would have to go to a different pump. He had not moved to a different pump immediately because of the difficulty in performing such a manoeuvre given the size of his vehicle. The claimant later clarified that he had not gone in the petrol station but had walked to the door. Miss Small expressed scepticism about the claimant's account, considering it unusual that someone would, in the circumstances described by the claimant, get out of the vehicle and go to the shop. We disagree. In the circumstances which had been described by the claimant – i.e. having waited for 10 minutes or so behind a car which was parked at the pump – it does not seem at all unusual to us that he might have gone into or looked into the shop to see how much longer the driver might take. After about 20 minutes the HR representative suggested a break as things were getting a "bit heated". It is clear from the transcript that the claimant and Ms Small were talking over one another.

43. After the interview resumed the claimant again said that he had not approached the complainant. He pointed out that by the time the complainant said she took the photos he had already moved his ambulance to a different pump. The claimant denied that he had been frustrated with the woman saying that she had done nothing wrong. Miss Small said that she was "absolutely sensing that there was some serious frustration" from the claimant and this was shown by the fact that he had got out of his vehicle to go and see what the woman was doing". She said that she was finding it very difficult to believe that the allegation was made up. After making further observations about her views of the case, Miss Small said: "on the balance of probability, I am upholding this complaint as an interaction that happened". She went on to say: "My decision is that I believe these events happened. [W]hether that exact wording is correct or not I'm not going to uphold because it's very easy, especially if you're upset and you're in a heightened situation. You can mishear things. But I absolutely do believe that this interaction took place and that that that these events on this day did happen." The claimant expressed his dissatisfaction with this and said that he did not speak to people in that manner.

44. Miss Small then said that she needed to let the claimant know at that point that she had received two further complaints about him from members of Trust staff, which she had not presented to him as "we were already dealing with this issue". Miss Small's written evidence was that a meeting had been scheduled to take place with the claimant on 15 September to discuss the two complaints we describe above, however as the claimant was on sick leave that had not happened; this was why she had not discussed them with him prior to the disciplinary hearing. We accept that. However, we do not accept her evidence to us (which reflected what she said in her email of 25 September – see below) that she only brought the complaints up because the claimant had said that he

had an unblemished record. It is evident from the "transcript" that that did not happen. The claimant's disciplinary record had simply not been discussed at this point. Miss Small told us that she did not believe the other complaints about the claimant influenced her decision but could not rule that out on a subconscious level. We think it likely that they did subconsciously influence her decision, given that it was she, not the claimant who raised them.

45. Miss Small also explained in the disciplinary hearing that they had received the claimant's grievance about Magda, which HR would be in contact with him about. She then said:

> If we get back to the disciplinary matter today, I am upholding this complaint and I am upholding the allegations made that you did act in a manner that was offensive, aggressive, threatening and intimidating. And to that end it did bring the company into serious disrepute and for those reasons I am finding that the allegations did amount to gross misconduct and so my decision is that I will be dismissing you with immediate effect.

46. We note that this decision was made without any further pause in the proceedings and without any apparent consideration of whether, if there had been gross misconduct, there was any alternative to summary dismissal.

47. On 21 September 2023 Miss Small wrote to the claimant to confirm the outcome of the meeting. In the letter Ms Small summarised the claimant's account and said that having considered all the evidence she found the allegations proven on the balance of probability. She said that the claimant had given "a different version of accounts" by saying first that he never left his vehicle and confirming later that he did leave the vehicle. We observe that while it is true that at one point the claimant said he never left his vehicle, it was clear from the context and what was said immediately after that that he meant – and made clear – that he had not got out of his vehicle at the very start of the incident. This was not inconsistent with his account. Ms Small also said that when she asked why the claimant had been frustrated, his response changed from the complainant taking excessive time to him not being frustrated, which Miss Small considered at odds with someone exiting their vehicle to go and check on a person's progress. We do not regard that as a fair characterisation of what the claimant told Miss Small – he never said that he was frustrated. We have already observed that in our view going to check on somebody's progress would not be "at odds" with doing so whilst calm. Ms Small also said that the claimant had been unable to provide a satisfactory response when asked what he was hoping to achieve in exiting his vehicle. We disagree. The claimant gave a perfectly comprehensible account of his reasons for getting out of the vehicle. Miss Small concluded that it was "entirely probable" that when the claimant got out of his vehicle he spoke to the complainant "as per the detail in her complaint." Miss Small found the complainant's account of the claimant verbally abusing her "entirely likely based on the balance of probability". Miss Small found the claimant's actions to constitute gross misconduct and consequently decided that she had no other option but to summarily dismiss the claimant. She informed the claimant of his right to appeal the decision.

48. In her written evidence Miss Small said that on the balance of probabilities she considered that the complainant's version of events was the factually correct one and that the claimant had conducted himself in the manner complained of. Her reasons for this were: what she said was the contradictory evidence given by the claimant (see above); the fact that the logs show the claimant's vehicle had not been stationary for very long (this is something the claimant was not asked about in the disciplinary hearing); the complaints had been made by a hospital member of staff who was not known to the claimant and had taken a photograph of the claimant's number plate; and the claimant's conduct and attitude in the hearing, which she said "came across angry and aggressive". She believed the claimant had acted in an aggressive threatening and intimidating manner towards a lone female hospital member of staff, was in the respondent's uniform and as such had bought the company into disrepute. Given that, she said that she could not trust that he would act appropriately towards the respondent's patients and decided he had committed gross misconduct.

49. Miss Small denied that any of her actions had anything to do with the claimant's race, which she said did not enter into her thought processes when deciding which version of events was more likely than not to be the correct version. She said she found the suggestion upsetting and would cast herself as actively anti-racist. Our findings about that are set out below.

50. Miss Small was asked about her decision in her oral evidence. She said that she was not making a decision about whether the claimant had used the words which the complainant had alleged. We find it difficult to understand in the context of this case how it can have been possible to make a decision to dismiss the claimant without deciding what he had said. Miss Small agreed with the claimant's suggestion that she had no evidence to say the words were said (clearly what she meant was no evidence apart from the complainant's email). When asked by the claimant she said that she did not consider whether a different person could have been responsible for the interaction in the petrol station to the person responsible for the later interaction outside, for example a firefighter from the nearby fire station, whose uniform would not have been dissimilar to the claimant's. We note that that suggestion was never made to Miss Small by the claimant in the disciplinary hearing, so we do not consider that she can be fairly criticised for that.

51. Miss Small said that she had not felt the need to speak to the complainant during the course of the investigation. She agreed they had contact when the complainant later complained about the claimant making contact with her (see below). She did not make enquiries about the character of either the claimant or the complainant – she felt that the incident needed to be taken "on merit". When we asked about whether she felt there was any other option short of dismissal she said that she had had the "granny test" in the back of her mind, in other words would she have been happy with the claimant driving an ambulance for her own grandmother. She said that she had not considered whether any other factors might need to be taken into account, for example whether the claimant's conduct was out of character or whether there were

extenuating circumstances; she said that part of the reason for that was that in the claimant's role it would never be appropriate to make someone feel threatened even with extenuating circumstances. We consider Miss Small to have been engaging here in a degree of post-rationalisation – we think it more likely that if she had considered these things she would have said so in her written reasons.

52. Contrary to her initial recollection in her oral evidence, Miss Small accepted when challenged that she had been aware that the claimant had raised a grievance against Magda but she maintained that she was never sent the grievance. We accept that and accordingly also accept her assertion that the grievance had no influence whatsoever upon her actions. Miss Small denied that she and Magda had a close relationship. They had worked together until 2019, when Miss Small left her role at a London hospital but since then they had had minimal contact. We accept all of that.

53. So far as the claimant's conduct in the meeting was concerned Miss Small said in her oral evidence that when she said it had been "angry and aggressive" she meant that he had talked over her a lot and not allowed her to speak. She was alone during the meeting, in the sense that she was on her own in a room, but it was, we note, a video meeting, i.e. the claimant was not physically present. There was also someone from HR "present". On the basis of what Ms Small said we do not think it is fair to describe the claimant's conduct in the meeting as aggressive. It was therefore not right in our judgment for Ms Small to have concluded that the conduct added weight to the allegation against him.

Events leading up to the appeal hearing

54. We were shown police records which show that shortly before 1 p.m. on 19 September 2023 (i.e. immediately after the disciplinary hearing, which had been scheduled for 9 a.m. that day) the claimant made a crime report to the police. The claimant explained that he had been accused of threatening a lady with a gun. He had just been sacked so he wanted to "log this down" in case the police came for him. When asked by the police, he said that he believed the fact that he was black was a factor. We consider this adds some weight to the claimant's denials in this case – if he had done what he had been accused of, going to the police in these circumstances would have been a significant risk for him and one we consider a guilty man would be less likely than an innocent man to have taken.

55. Also on 19 September 2023, by now aware of her email address through the material disclosed to him by the respondent, the claimant emailed the complainant asking why she had made the allegation. This was plainly ill-judged, though we do not consider, having seen the content of the email, that the claimant intended to intimidate or threaten the complainant. In a later email the same day he provided his mobile number and asked her to contact him. The complainant complained to the respondent about a data protection breach, i.e. her name or email address being provided to the claimant. Miss Small informed Mr Villaroel (by now working for the Trust) about the data complaint. The email is undated though it is clear from its contents that it was sent shortly

after the disciplinary hearing. Another email shows Mr Villaroel on 29 September emailing Miss Small and Magda to enquire about the result of the complaint about the claimant contacting the complainant – by now of course the complainant was one of "his" staff members. In his oral evidence Mr Villaroel denied that it was inappropriate to have sent this email to Magda – she was the controller at the time. He denied that he had known that the claimant had raised a grievance about Magda. We accept that. Given the history, we can understand why the claimant might have been concerned about Magda being kept informed about the process (as it appears she was) but there was simply no evidence which could properly lead us to the conclusion that Magda was in any way involved in the disciplinary or appeal processes – we find that she was not directing them, influencing them or making any of the decisions.

56. Miss Small replied to Mr Villaroel's 29 September email to explain that the complainant had not requested anonymity and that identifying her was a crucial element of the disciplinary process and also that NHS.net email addresses were publicly available – anyone could search for an individual with a name or just their trust. She did say that the respondent had changed its procedures to make it clear to people that they might be identified as part of the disciplinary process.

The appeal hearing (hearing 4 October)

57. The claimant appealed by letter which is undated. The claimant made a number of particular complaints, but the substance of the appeal was that the decision was against the weight of the evidence. He complained that the wrong name appeared on a transcript (this would be of the investigatory meeting). He also pointed out that he had an unblemished disciplinary record. The letter made no complaint of discrimination. We were provided with part of the text of an email sent by the claimant on 24 September 2023 to the respondent's HR, "cc'ing" in Miss Small; the full text of the email appears later in the bundle and shows that the claimant sent his appeal letter at 11:36 p.m. on 24 September.

58. In a reply to the email, sent to HR but not to the claimant, Miss Small set out "a couple of clarifications for the appeal panel". In her oral evidence she told us that she thought she had been asked by HR to make the clarification, although we note that her response was sent at 7:46 a.m. on 25 September. First, she explained why the claimant's name was not on the transcript. This was, we note, one of the particular complaints made in the claimant's written appeal. (We consider it would have been better for a formal correction to have been made, but given that it was clear to everybody, including the claimant, who had actually been speaking we do not consider that this added an element of unfairness.) Miss Small's second "clarification" was that she attached two complaints she had received about the claimant in the 2 ½ weeks she had acted as the cover contract manager at Hillingdon. The complaints were, there seems no doubt, the two we refer to above at paras 34 and 35. Miss Small's email said they were not "directed to" the claimant as he went off sick the day before the meeting. She included a small passage from the transcript of her introducing the complaints to the claimant and said that she had done that after the claimant

had stated he had a "clean record". As we have said, the claimant had not said that in the meeting, though it was raised in his appeal letter.

59. On 2 October 2023, Tamsin Griffiths, HR Business partner, wrote to the claimant to invite him to an appeal hearing, to be chaired by Miss Grinham. On 3 October 2023, Ms Griffiths emailed Miss Grinham to say that the claimant had raised a grievance about a colleague (i.e. Magda) "immediately before he was dismissed". (As will be clear from the above, it was raised four days before the hearing at which the claimant was dismissed, so even if the word "immediately" is not literally correct, it is not misleading.) Ms Griffiths explained that the grievance was not considered as part of the disciplinary process as it did not relate to the incident which led to the dismissal and it would not be necessary to resolve the grievance unless the claimant was reinstated. Ms Griffiths suggested that Miss Grinham asked the claimant what he wanted to see done about the grievance. We do not consider there was anything unreasonable in HR informing Miss Grinham about all of this. There was no dispute that, given what happened later, the grievance was never investigated.

60. The appeal hearing took place, again over Teams and transcribed in the same way as previously, on 4 October 2023. The claimant maintained that he had been at the petrol station but had not spoken to the complainant. He suggested that the complainant had "racially profiled" him. As he had done at the other meetings, he complained that CCTV footage had not been sought. He said that he was being racially profiled by "all of them". So, although the complaint of race discrimination had not been made in the written appeal, it clearly had now been raised.

Result of appeal

61. Miss Grinham decided to uphold the claimant's appeal, after making some of her own enquiries which we detail below. As we find below, the decision was conveyed to the claimant first by telephone on 1 November 2023 and then confirmed in a letter of 14 November.

62. In her written evidence Miss Grinham said that she considered there was a lack of evidence to support the complainant's allegations; she found the claimant believable and decided to overturn the decision to dismiss him. She had also taken into account the claimant's length of service and the lack of similar complaints during that time. She decided to reinstate the claimant, but not at the Hillingdon site.

63. The claimant's case was that the respondent originally made the offer of reinstatement by email, but that email was not in the bundle. This assertion, which we reject, was contradicted by the documentary evidence which we now outline. On 1 November 2023 Miss Grinham emailed the claimant and asked him to call her to discuss the outcome of his appeal. In her written evidence Miss Grinham said that she spoke to the claimant that day and informed him which sites he could work from. He told her he would think about it and let her know. We accept that evidence given that it is consistent with the timings of

that 1 November email and an email sent by the claimant the following day, which read as follows:

> I have decided to not except your offer sorry.
>
> Evidence for me clearly shows I have been set up and I am very disappointed that this company has done this to me.
>
> I have a unblemished record here but clearly this workplace looks after the wrong doers than the hard working.
>
> Offering me my job back but at a different site is offering me another job not my actual job so on this note there is clear discrimination so thank you for your kind gesture but I will decline and go to tribunal.

64. Miss Grinham's written evidence was that she had wanted to discuss the offer of work at other sites with the claimant to get his agreement about which site before sending him an outcome letter. We find that there was a brief discussion about that in the call of 1 November, during which the claimant was told that Hillingdon did not want him back (this was his own recollection in oral evidence) and he was then told which sites he might be able to work at. However, we also find that the claimant did not explain to Miss Grinham what difficulties he would have with working at those sites. The relevant part of Miss Grinham's witness statement, which we accept, said that when she told him which sites he could work from the claimant simply said that he would think about it and let her know. The claimant's witness statement made no contrary suggestion, since he had chosen only to cover the events of 11 August, nor was any contrary suggestion put to Miss Grinham in cross-examination. Miss Grinham treated the claimant's email of 2 November as his final answer (i.e. refusing the offer of work elsewhere) and in the circumstances that was in our judgment quite reasonable. The claimant did not go on to explain his difficulties with the other sites to the respondent in any later conversation or correspondence.

65. On 7 November the claimant emailed Miss Grinham to ask if she had received his email – the only email this can have been a reference to in our judgment is the one of 2 November reproduced above. Mr Grinham replied, apologising for having forgotten to respond and said that the respondent's head of HR was in the process of preparing a letter in response. This letter (although signed by Miss Grinham) was sent to the claimant on 14 November. The letter referred to the conversation of 2 November 2023 in which Miss Grinham had informed the claimant of her decision.

66. The letter explained that in the absence of CCTV evidence Miss Grinham felt there was insufficient support for the complaint, although she felt that the process followed by Miss Small was fair and accordingly rejected the claimant's complaint of racial discrimination, for which she said there was no evidence in support.

67. During the course of the hearing before us the claimant indicated that he made no suggestion that Miss Grinham's actions were in any way to do with his race. For the avoidance of doubt, we find that what Miss Grinham did was in no way influenced by the claimant's race.

68. Miss Grinham's 14 November letter said the following about reinstatement:

> I also informed you during the telephone conversation on the 2nd of November 2023, that, regrettably, the Hillingdon Trust transport manager had advised us they were not content with you returning to work at their site, due to the incident. As an alternative, I extended an offer for a position at West Middlesex Hospital or any other trust within our service provision. You rightfully requested time to consider this alternative arrangement which I agreed to.
>
> Subsequent to our conversation, I received your email dated 2nd November 2023, declining the offer and expressing a desire to pursue this matter through legal channels. While I regret that an internal resolution was unattainable, I fully respect your decision. […]

69. The letter did not set out Miss Grinham's reasons for offering work only at another site in any more detail. In her written evidence Miss Grinham gave the following three reasons:
    a. The staff member who made the complaint worked at Hillingdon Hospital, so she considered it inappropriate for the Claimant to go back there.
    b. To protect the claimant. If he were to go back there, people may be aware of the complaint, and he may come across the staff member who made the complaint in the hospital.
    c. Hillingdon Hospital had made the Respondent aware that they did not want the Claimant back to work at the site.

    Miss Grinham's written evidence continued that there were other sites at which the claimant could have worked which were not far from his home.

70. Miss Small and Miss Grinham were asked in their oral evidence about why the claimant was not allowed to come back to Hillingdon. Miss Small was aware that someone at the Trust had said that they did not want the claimant back on site, but she did know who had said it and when. She did not think that the fact the decision to dismiss had been overturned would have changed the Trust's view. The Trust as the client had the right to decide who was allowed on its sites. There had been a similar case when the respondent had found that the incident did not happen but the person concerned was still not allowed on the site, though sometimes the Trust might take the disciplinary outcome into account. Miss Grinham said that the respondent's quality and governance director had been told verbally by the Trust that the claimant could not return to Hillingdon. They had not said why but from her previous experience with NHS Trusts she thought that the fact that in circumstances where, as here, the Trust's own staff member was the complainant it would have been "fairly

normal" for the Trust to have made the decision it did. She thought the Trust would have told the respondent after the claimant was dismissed, but it must have been before she overturned the decision. She was not aware whether anyone had asked the Trust to reconsider in light of her decision, but didn't know whether it would have made any difference – she was not aware of any similar situation in the past.

71. We conclude that the Trust was not told about the result of the appeal and was not asked to reconsider its decision after the successful appeal – there was simply no evidence that either of those things happened and the respondent would in our view have produced such evidence if it existed. We accept that the respondent could reasonably have formed a view that it would have been futile for the Trust to have been asked to reconsider, particularly given that fact that it was its own employee who made the complaint. However it is clear to us that the respondent did not in fact form that view – no consideration was given to asking the Trust to reconsider. While we accept that the Trust was the respondent's customer in this case, given the nature of the commercial relationship explained to us in evidence, we do not see that making such a request in a tactful manner would have caused any damage to the relationship.

The claimant's reasons for refusing the respondent's offer of reinstatement

72. In oral evidence the claimant explained that in November he had his arm in a sling because of the injury he had sustained in April. He was therefore not fit for work. He was, however optimistic about making a recovery and in particular was hoping to be declared fit when he was due to see his doctor again in February 2024. We therefore accept that the claimant's decision not to accept the offer of work at other sites had nothing to do with any concerns he might have had about being fit to return to work.

73. We accept the claimant's evidence that, had Miss Grinham explained to him why Hillingdon did not want him back (i.e. the three reasons we have set out at para 69 above) he would have accepted that he could not go back. We also accept his evidence that Miss Grinham had told him work at Chelsea or Middlesex was likely to be available although she had not formally confirmed that. Both options would have significantly increased the claimant's travel time. This would not simply have been a personal inconvenience to him. We are sorry to record that the claimant's mother died in December 2023, but before that the time, the claimant was a carer for her and the extra travel time would have made it significantly more difficult for him to fulfil those responsibilities. However, the claimant did not explain any of this to Miss Grinham, either orally or in his email of 2 November. Although the respondent had been aware in general terms through Mr Villaroel that the claimant had caring responsibilities, and we accept the claimant's evidence that he had first accepted work at Hillingdon because of that, the claimant did not explicitly accept the job on that basis, nor did he ever make a flexible working request or similar. The respondent was not aware that the claimant's position was that he felt able only to work at Hillingdon because of his caring responsibilities. The claimant

accepted that requiring him to work somewhere else was not a breach of his contract; our own analysis of this is set out below.

74. We find that the claimant declined the offer of work elsewhere for a combination of two reasons. First, the caring responsibilities as we have set out above, although as we have said he accepted that if the respondent's decision had been explained more fully he would have accepted that it was fair that he could no go back to Hillingdon and would have been prepared to discuss alternative sites. Also, the claimant could have, and did not, seek reasons for the move, either orally in writing, before communicating his decision on 2 November. Second, the claimant believed that he had been subjected to racial discrimination during the disciplinary process; we accept his evidence that he genuinely believed this, even though it was not raised in his written grounds of appeal. The claimant raised a third reason, which we do not accept influenced what we find to be his final rejection, on 2 November, of the respondent's offer of work elsewhere. The claimant told us of his concern that although Ms Grinham had overturned the initial decision, she still referred to an "incident" and he suggested that Miss Grinham did not adequately address his complaint of race discrimination. However, even if he was right about that, he did not know it on 2 November – on 2 November all he knew was that his appeal had been successful and that he was being offered alternative work. He did not ask for the reasons for the appeal being granted before making his decision. It was only later, after he declined the offer of work elsewhere, that he was told in writing that his complaint of race discrimination had not been upheld. His rejection of the respondent's offer can therefore not have influenced his decision to decline to work elsewhere.

CCTV

75. It will be recalled that in the investigatory interview Mr Villaroel appeared to say that he thought there was CCTV from the petrol station but that he would not try to obtain it, though in his report he had recorded: "petrol station footage not in operation". In his written evidence Mr Villaroel said that he contacted the petrol station but was told there was no CCTV footage as the camera was not working. In his oral evidence he said that he had spoken to someone at the petrol station on the phone and had been told that the CCTV was not recording at the time; he did later say that he may have been told that there was no coverage of the incident rather than that the system was not working. He could not remember when that conversation had taken place.

76. In Miss Small's written evidence she said that she was aware that someone had visited the petrol station to get CCTV but that it was not available. Towards the end of her oral evidence she said that she believed that Lee had gone to the petrol station to get the CCTV footage but had been told there was none to share – we note the difference between "none to share" and "none". She had been told this by Lee in a conversation at some point before the disciplinary hearing.

77. In Miss Grinham's written evidence she said that after the appeal hearing she contacted the petrol station three times and was told each time that the CCTV was not working that day. In her oral evidence Miss Grinham recalled that in one of those conversations the petrol station had told her that somebody, who she believed to be Lee, had attended to get CCTV. As far as she knew he had been told there was no CCTV available; she thought that it was Mr Villaroel who had told her that Lee went to the petrol station. In her written reasons for the decision to overturn the appeal, Miss Grinham wrote:

> Upon investigating, I personally contacted the petrol station. Regrettably, the station confirmed that the recording, which could have provided valuable evidence, was no longer available. The manager also conveyed that, upon their review of the footage previously, they did not find your interaction with the woman to be disruptive. However, they did observe you engaging in conversation with her.

78. To the extent that it conflicts with Miss Grinham's written and oral evidence, we prefer what she wrote at the time in the passage reproduced above – we think it more likely than not that the above passage, being contemporaneous, is correct. It is regrettable, to say the least, that footage which was known to exist and, on the basis of what Miss Grinham was told, had the potential to at the very least undermine the allegation against the claimant (albeit that on the basis of the description it may also have undermined his account) was not obtained.

79. As to what happened regarding CCTV before Miss Grinham became involved, the accounts we received were so varied and confused that we are unable to come to any conclusion other than that somebody told someone that there was some footage which may have been relevant to the incident and that footage was never obtained by the respondent.

80. We do actually consider that it would not *necessarily* have been unreasonable for the respondent not to have sought to obtain CCTV, given that the footage was held by a third party on whose premises the relevant event had happened, *if*, for example the other available evidence had been properly tested. That assessment changes, however, where (as we go on to find) that did not happen and where the respondent was or should have been aware that the footage could have been of assistance to the claimant. Given the relative ease with which Miss Grinham obtained what information she did, the respondent was or should have been aware of that.

Findings on the incident of 11 August 2023

81. We did consider whether it was necessary for us to make findings about what actually did happen on 11 August, since the principal question on the complaint of unfair dismissal would be the reasonableness, rather than the correctness, of the respondent's belief about what the claimant had done. But we considered that whether the claimant had in fact done what he was accused of would at least be capable of assisting us on some of the questions we had to answer.

82. There was no real dispute that the claimant was present and was the only person driving one of the respondent's ambulances at the material time and in the material place. There did not seem to be any dispute that that the respondent's logs (which were in evidence) showed his ambulance at the petrol station between 8.35 and 8.43, stationary save for moving a short distance at 8.37, though we were careful of drawing any further conclusions from the logs in the absence of any proper analysis.

83. The claimant's witness statement was broadly consistent with the accounts he gave during the investigatory and disciplinary processes, though there were arguably some minor inconsistencies. He said that he had pulled up behind the complainant's vehicle. After she had filled her car she went inside, he assumed, to pay for her fuel. 10 to 15 minutes later she had still not come out. A man driving a tipper truck who was also waiting to move forward to a pump had gone to check on her but come back with "no joy". After another 10 minutes the claimant thought that he would have to move from the pump so walked to the front of the shop and formed the view that the lady was shopping, so he went back to his vehicle to see if it was possible to move to another pump. At that point there was not room to complete the manoeuvre but after another 10 minutes there was room and so he used another pump. He denied speaking to the woman or going anywhere near her. The claimant maintained this account in his oral evidence.

84. The claimant's account of the events of 11 August was inconsistent with some of the other evidence, such as the photo showing the cab of his ambulance being empty. His recollection of the timings conflicted somewhat with the "telemetrics" data, though the same might be said of the complainant's account. What difficulties there were with the claimant's evidence, however, emerged as the evidence was examined under oath in an adversarial process. The same cannot be said of the evidence against the claimant, which came in the form of one email which was never tested during the investigatory, disciplinary, appeal or Tribunal processes. We will never know whether inconsistencies might have emerged had that been done, so we consider that it was not fair to hold the claimant's inconsistencies against him, particularly where they were not in our judgment particularly significant.

85. On balance, we preferred the claimant's account on oath and we accept it as we have summarised it above.

LAW

Unfair dismissal – Conduct

86. Section 94 of the Employment Rights Act 1996 "ERA" confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that they were dismissed by the employer (see s 95 ERA).

87. Assuming for the moment that there was a dismissal, s 98 ERA deals with fairness in two stages. First, the employer must show that it had a potentially fair reason for the dismissal within section 98 (1) and (2). Second, if the

employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

88. Regarding the first stage of fairness, S 98 ERA provides, so far as is relevant:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it— …
>
> (b) relates to the conduct of the employee…

89. So in this case if there was a dismissal would be for the respondent to prove that the principal reason for the claimant's dismissal was misconduct or some other substantial reason.

90. The second stage of fairness is governed by s 98 (4) ERA:

> (4) … the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

91. In deciding fairness, we would have regard to the reason shown by the respondent and to the resources etc. of the respondent. In general, the assessment of fairness must be governed by the band of reasonable responses test set out by the EAT in *Iceland Frozen Foods Ltd* v *Jones* 1983 ICR 17. In applying s 98(4), it is not for us to substitute our judgment for that of the employer and to say what we would have done. Rather, we must determine whether in the particular circumstances of this case the decision to dismiss the claimant fell within the band of reasonable responses open to a reasonable employer.

92. In a misconduct case, the Tribunal starts with the test set out by the EAT in *British Home Stores Ltd* v *Burchell* 1980 ICR 303. Broadly, the question is whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. The employer must show that:
    a. it believed the employee guilty of misconduct;
    b. it had in mind reasonable grounds upon which to sustain that belief; and

c. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

93. The *Burchell* test also applies to the question whether it was reasonable for the employer to treat the reason as a sufficient reason to dismiss (although again the burden is not on the employer at that stage). In *Sainsbury's Supermarkets Ltd* v *Hitt* [2003] I.C.R. 111 the Court of Appeal held that the range of reasonable responses approach applies to the conduct of investigations as much as it applies to other procedural and substantive aspects of the decision to dismiss for a conduct reason.

94. Other points relevant to whether the employer acted within the band of reasonable responses may include: the nature of the allegations, the position of the employee and the size and resources of the employer. A meticulous investigation of the kind that would be done in a criminal enquiry is not required.

Third Parties

95. Where, instead of misconduct, a respondent argues that it had no choice but to dismiss because of the stance of a third party, the dismissal could be fair, there being some other substantial reason etc. under ERA 92(1)(b). An employer in such circumstances must do everything it reasonably can to avoid or mitigate the injustice brought about by the stance of the third party, and in a case of "patent injustice" may have to "pull out all the stops" (*Henderson* v *Connect South Tyneside Ltd* 2010 IRLR 466, where the respondent employer had dismissed the claimant, who drove a minibus for his employer, which provided a service to the local council, the latter having exercised an absolute right to veto the employment of particular individuals providing the service, albeit in very different circumstances to the case before us).

Reinstatement on appeal

96. It is clear from *J Sainsbury Ltd* v *Savage* 1981 ICR 1 that, where an employment contract incorporates a right of appeal, if such an appeal against dismissal is unsuccessful then the effective date of termination is the original date of the dismissal. Although strictly *obiter*, there is no doubt that the case is also authority for the proposition that where an appeal in such circumstances is allowed and the employee returns to work, then the employee will be treated as not having been dismissed – there can be no claim for unfair dismissal.

97. In *Folkestone Nursing Home Ltd* v *Patel* [2019] ICR 273 the claimant was dismissed for gross misconduct. His appeal against the dismissal was successful, but he did not return to work as he was dissatisfied with the way the disciplinary procedure had been conducted and in particular because the appeal had failed to resolve the most serious of the allegations against him. The Court of Appeal held that (i) the successful appeal had extinguished the original dismissal but that (ii) on a fair reading of the claimant's claim it included a complaint that he had been constructively dismissed by reason of the unsatisfactory way in which the employer had dealt with the outcome of the disciplinary appeal and that on the facts of the case he had been constructively

dismissed. This case would therefore appear to be authority for the proposition that there is a reinstatement, extinguishing the dismissal, even where the offer of alternative work is not accepted. Where in such circumstances the Tribunal is considering whether there was then a constructive dismissal, the following principles would apply.

Constructive unfair dismissal

98. The right not to be unfairly dismissed only applies if there was a dismissal. Generally, then, it will not apply to resignation. However, by s 95 ERA, a resignation is to be construed as a dismissal (and therefore may engage the right not to be unfairly dismissed) if the employee terminates the contract under which they are employed in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct. The employer's conduct here is a "fundamental" or "repudiatory breach", in other words a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract (*Western Excavating (ECC) Ltd* v *Sharp* 1978 ICR 221). A resignation which amounts to a dismissal by operation of s 95 is known as a constructive dismissal.

99. In every employment contract there is an implied contractual term as to trust and confidence, formulated in *Malik and Mahmud* v *BCCI* [1997] ICR 606 as an obligation that the employer must not "without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee." A breach of this term will inevitably be fundamental (*Morrow* v *Safeway Stores plc* 2002 IRLR 9). Merely acting in an unreasonable manner is not sufficient. The strength of the implied term is shown by the fact that it is only breached if the employer demonstrates objectively by its behaviour that it is abandoning and altogether refusing to perform the contract; this is a "demanding test" (*Frenkel Topping Limited* v *King* UKEAT/0106/15/LA). In practice the Tribunal proceeds by asking: (i) was there reasonable and proper cause for the employer's action and (ii) if not, when viewed objectively was the conduct calculated or likely to destroy or seriously damage trust and confidence?

100. Simply establishing a breach of contract is not enough. In order to succeed in a claim for constructive dismissal, a claimant must prove that they resigned as a direct result of the respondent's breach and not for some other reason; there has to have been a causal connection between the breach of contract and the resignation (*Ishaq* v *Royal Mail Group* [2017] IRLR 208, EAT). If there was a fundamental breach by the employer, it must be a (though not the only) reason for the employer's resignation – see for example *Wright v North Ayrshire Council* [2014] IRLR 4, in which the EAT held that the crucial question, in establishing whether an employee who had more than one reason for resigning had been constructively dismissed, was whether a repudiatory breach of contract had played a part in the resignation.

101. There is a considerable amount of caselaw dealing with whether a breach can be affirmed by an employee who continues in employment after the breach,

including consideration of the "last straw" doctrine but none of that is relevant to this case.

102. A constructive dismissal is not necessarily an unfair one (*Savoia* v *Chiltern Herb Farms Ltd* 1982 IRLR 166). If there was a constructive dismissal, just as with any other form of dismissal, under ERA the Tribunal must consider whether it was fair, following the two-sage process set out above. In a case of constructive dismissal, the reason the reason for dismissal is the reason for which the employer breached the contract of employment (*Berriman* v *Delabole Slate Ltd* 1985 ICR 546). However, if an employer does not attempt to show a potentially fair reason at all in a constructive dismissal case but instead simply relies on the argument that there was no dismissal, a Tribunal will be under no obligation to investigate the reason for dismissal (or its reasonableness) for itself — *Derby City Council* v *Marshall* 1979 ICR 731.

Changes in contract terms and mobility clauses

103. If an employer simply announces a unilateral change in contractual terms, this will be a breach of contract. This breach may or may not be so serious as to amount to a fundamental breach of contract (and so amount to a constructive dismissal).

104. Where a contract contains a mobility clause, there will be no breach (and therefore no constructive dismissal) where the employee is moved in accordance with that clause. In contrast, where there is no such clause, such a term may be implied along the lines of what the parties would probably have agreed had they considered it (*Jones* v *Associated Tunnelling Co Ltd* 1981 IRLR 477, where the implied term in that case was held to be that the employee could be required to work anywhere within a reasonable commuting distance from his home). In a later case (*Courtaulds Northern Spinning Ltd* v *Sibson and anor* 1988 ICR 451) the EAT implied a term that the employer could require a change of workplace for "genuine operational reasons" but the Court of Appeal decided that the term that should have been implied was one enabling the employer to direct the employee, a driver, to work, for any reason, at any place within reasonable daily reach of his home.

105. Alternatively, there can be an actual (as opposed to constructive) dismissal where the change can be said to amount to termination of the old contract and the introduction of a new one (*Hogg* v *Dover College* 1990 ICR 39, where the claimant teacher had been demoted from his role of head of department, losing 50% of his salary such that there were "wholly different terms"). In *Jackson* v *University Hospitals of North Midlands NHS Trust* 2023 IRLR 796, the EAT confirmed that the correct test is whether the purported variation is such as to amount, in reality, to a termination of one contract and its replacement by another.

Discrimination Generally

106. The Equality Act 2010 ("EqA") prohibits discrimination on the grounds of various "protected characteristics", set out at sections 5 to 18. An employer

must not discriminate against (or harass or victimise) an employee by (amongst other things) dismissing them or by subjecting them to any other detriment (sections 39 and 40). There was no dispute here that the claimant was the respondent's employee within the meaning the Act. Nor was there any dispute that the respondent would be liable under s 109 for any contraventions of the Act done by other employees (e.g. the claimant's managers). The Tribunal's jurisdiction to hear complaints about contraventions of the provisions prohibiting discrimination in employment is established by s 120.

107. The Equality and Human Rights Commission Employment Code ("the EHRC Code" provides a detailed explanation of the EqA. The Tribunal must take into account any part it that appears relevant to any questions arising in proceedings (s 15 Equality Act 2006).

Direct discrimination because of race

108. Under s 13(1) EqA read with s 9, direct discrimination takes place where because of race a person treats someone less favourably than that person treats or would treat others.

109. By s 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case. The circumstances need not be precisely the same, provided they are close enough to enable an effective comparison: *Hewage* v *Grampian Health Board* [2012] UKSC 37. In many direct discrimination cases, it is appropriate for a Tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of a protected characteristic (in this case, race). However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the "reason why" the claimant was treated as they were (*Shamoon* v *Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; [2003] IRLR 285).

110. The protected characteristic need not be the only reason for the treatment, provided it had a significant influence on the outcome (*Nagarajan* v *London Regional Transport* [1999] IRLR 572, HL). The case law recognises that very little discrimination today is overt or even deliberate; people can be unconsciously prejudiced. A person's motive is irrelevant, as even a well meaning employer may directly discriminate. We remind ourselves that discrimination may be sub-conscious. As Lord Nicholls said in that case:

> All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn.

111. S 136 of the EqA makes provisions about the burden of proof. If there are facts from which the Tribunal could decide, in the absence of any other explanation, that there was a contravention of the Act, the Tribunal must hold that there was a contravention, unless the respondent proves that that there was not a contravention. S 136 requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another (*Hewage* above). The burden of proof does not shift where there is no evidence to suggest the possibility of discrimination (*Field* v *Steve Pye and Co (KL) Ltd* [2022] EAT 68). Guidelines on the application of s 136 were set out by the Court of Appeal in *Igen Ltd* v *Wong* [2005] EWCA Civ 142 and the importance of these was recently restated by the Employment Appeal Tribunal in *Field* v *Steve Pye and Co (KL) Ltd* [2022] EAT 68. We do not reproduce the thirteen steps of the guidance here, but we took account of all steps. One important point to note is that the question is whether there are facts from which a Tribunal *could* decide… It is not sufficient for the employee merely to prove a difference in protected characteristic and a difference in treatment. Something more is required (*Madarassy* v *Nomura International Plc* [2007] EWCA Civ 33). Unfair or unreasonable treatment on its own is not enough (*Glasgow City Council* v *Zafar* [1998] IRLR 36). If the burden of proof does shift, under the *Igen* guidance the employer must prove that the less favourable treatment was "in no sense whatsoever" because of the protected characteristic. Because the evidence in support of the explanation will usually be in the possession of the employer, tribunals should expect "cogent evidence" for the employer's burden to be discharged.

CONCLUSIONS

Unfair dismissal

112. In this case, the claimant was dismissed but his contractual appeal against dismissal was upheld. In our judgment the claimant must be treated in law as if the original dismissal was extinguished (*Savage*), unless the alternative work offered would in fact have amounted to a different employment contract (*Hogg*, *Jackson*). If it would not have so amounted, there was no dismissal unless there was a constructive dismissal (*Folkestone)*. Given our findings in this case, the potential "causes" of a constructive dismissal were the offer of alternative work (*Jones*) or the failure of the respondent adequately to deal with the appeal (*Folkestone* again) or the combination of the two.

113. The claimant's contract in our judgment contained a mobility clause. Reading clause 4 of the contract as a whole (para 10 above), although the claimant's usual "work base" was specified as Hillingdon Hospital, the contract explicitly also said that the claimant could be "based" at any of the respondent's other locations or those of its clients. In other words, the respondent was contractually entitled to change the claimant's base and the only contractual fetter to the respondent's discretion was that the new base would have to be at one of the respondent's (or its customers') sites. Since there was a clear term covering this, there is no need in our judgment to imply a further mobility clause or a further qualification to it. We do not see that, in the circumstances as we have found them to be, the claimant's personal reasons for wanting to work at

Hillingdon, perfectly good reasons as they were, were adopted as an unwritten term of the contract. We therefore conclude that there was no breach of contract when the respondent decided that the claimant could no longer work at Hillingdon and instead offered him work at two of its other sites. For the same reasons, we conclude that this was not a case of a *Hogg* v *Dover* -type dismissal – the contract was not (or would not have been) terminated and replaced by a contract with wholly different terms.

114. It therefore follows that, unless the claimant was constructively dismissed, there was no dismissal. For the reasons which will already be clear, we consider that the claimant had perfectly good reasons to be dissatisfied with the process which resulted in his dismissal. However, at the time he declined the respondent's offer of work elsewhere, he did not know whether or not the respondent had failed adequately to deal with his appeal. All he knew was that his appeal had succeeded. He did not know, and had not asked, what the reasons were, and he specifically did not know whether or not his complaint of race discrimination had been upheld. If follows in our judgment that, even had the respondent's conduct of the appeal process been sufficient to amount to a fundamental breach, it was not in fact a cause of the claimant's resignation. Further, just because Miss Grinham ultimately came to a different conclusion to us on the issue of discrimination (see below), given that two reasonable decision makers can come to different decisions on the same facts, and given also that Miss Grinham was not obliged to apply s 136 EqA as we were, we doubt that Miss Grinham's handling of the appeal could in all the circumstances be said to amount to a fundamental breach. There was, objectively, proper cause for her conduct, even if others might have reached different conclusions. (Although we stress that at this point that we are not applying the band of reasonable responses but rather considering whether there was objectively conduct which amounted to a fundamental breach.)

115. We do not accept that poor conduct of the investigation and disciplinary processes alone could in these circumstances, i.e. before the respondent had had the chance to remedy them by providing the outcome of the appeal, amount to constructive dismissal – if that were the case, then any appeal process would be rendered meaningless as an employee could consider themselves unfairly dismissed regardless of the result of the appeal, rendering the line of authorities we have summarised above otiose.

116. For the reasons we have already set out, nor can the requirement to work elsewhere have amounted to a fundamental breach – it was not a breach. We also note that at the point he sent his email, the claimant did not in fact know whether or not the respondent had asked Hillingdon to reconsider its decision. Nor had he (nor did he later) ever explain to the respondent why he felt unable to accept the offer of work elsewhere.

117. Considering it all in the round – the failings in the investigatory and disciplinary stages, the appeal process which had not quite reached a formal end, the requirement to work elsewhere and the respondent's lack of effort in challenging the Trust – and given that state of the claimant's knowledge of those various things, we find that it can not be said that the stage had been

reached where the respondent had behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the parties. If we are wrong about that, the respondent had reasonable and proper cause for requiring the claimant to work elsewhere, even if it did not for the failures in the process. The claimant did not resign in response to any failures in the appeal process (since he did not yet know about them) and also did not know about why he had been required to work elsewhere. The claimant was not constructively dismissed.

118. We can readily understand in this case that the claimant was left with a sense of unfairness. He was found to have done something which we have found he did not do, which resulted in the Trust saying he could not return to the site. We accept that it may be that had the respondent asked the Trust to reconsider its decision in light of the appeal, the answer would have been no, particularly given that the complainant was an employee of the Trust and the claimant was not. (What the chances of that were will likely need to be considered at the next hearing.) But the respondent did not actually consider asking, let alone did it ask. It did not pull out all the stops. Had we found that the claimant was dismissed, that would have been a material consideration in deciding whether the dismissal was fair. But ultimately we conclude that there was no "actual" dismissal, nor was there a constructive dismissal. The claimant's email of 2 November made clear that the claimant was not seeking any further discussion with the respondent about redeployment. It amounted to an unequivocal resignation.

119. Since the claimant was neither dismissed (given the offer to reinstate him) nor constructively dismissed, the claim for unfair dismissal must therefore fail.

Discrimination

120. Upon reflection, the claimant did not suggest that any of Mr Villaroel's actions had anything to do with his race. On that basis and on the basis of the evidence we heard we find that Mr Villaroel's actions had nothing whatsoever to do with the claimant's race. That finding alone is sufficient to dispose of issues 5.1.1 and 5.1.2, though we do now say a little more. Issue 5.1.1 concerned Mr Villaroel's decision to initiate a disciplinary investigation based upon the complaint email. Given the seriousness of the allegation, we can see no basis to conclude that any other employee would have been treated any differently. Indeed, we cannot see how the respondent could reasonably have taken any course of action other than initiating a disciplinary investigation. Issue 5.1.2 concerned the conduct of the investigation and so again therefore the actions of Mr Villaroel. We have reject the suggestion that the investigation was subject to influence from any person other than the investigator Mr Villaroel. To the extent that the investigation was unreasonable or unfair (for example in the failures to obtain CCTV footage or to get further information from the complainant) we find, as the claimant accepted, that Mr Villaroel 's actions had nothing to do with the claimant's race.

121. Issue 5.1.6 concerned an allegation that Miss Small, having a close relationship with a third person who did not like the claimant, allowed that person to be involved in the investigation and disciplinary investigation. The claimant made clear during the course of the hearing that the "third person" here was Magda. We have already explained that although Mr Villaroel (not Miss Small) consulted Magda when establishing the identity of the driver, we see nothing wrong in that, and of course when Mr Villaroel did that he was at that point unaware of the driver's race – until consulting Magda he did not know who the driver was and the driver's race is not mentioned in the complaint email. We have set out above the minimal involvement Magda had thereafter – it amounted to her being informed of what was happening. We have found that Magda exerted no influence on the process and was not in fact in a close relationship with Miss Small. To the extent that the claimant has succeeded in proving that Magda was "involved" we consider that that had nothing whatsoever to do with the claimant's race. Alternatively, there is simply no basis upon which a Tribunal could conclude that there was discrimination here. There was no reason why Magda should not have been involved to the extent that she was, and so no reason to think there was anything at all untoward about that. There was no act of direct discrimination as set out in 5.1.6.

122. We considered that it was somewhat artificial to separate Issues 5.1.3 to 5.1.5 and 5.1.7. They all ultimately concerned Miss Small's conduct of the disciplinary hearing (including the result). For the reasons we have already set out, we find that there were significant failings here. The most significant in our judgment was not to test the evidence against the claimant, which amounted to one email. No clarification was sought from the complainant, no statement was taken from her and she was not asked to be a witness at the hearing. Given the seriousness of the allegation against the claimant and the likely consequences to him should it be upheld, some or all of those things should in our judgment have been done. We do not suggest that these things necessarily had to have been done at the disciplinary stage as opposed to the investigation stage, but when they were not done as part of the investigation they should have been done as part of the disciplinary process. The unfairness was compounded when the decision-maker held "inconsistencies" against the claimant, when those inconsistencies had only emerged because of the scrutiny that his evidence was subjected to, when the complainant's evidence had been subject to no such scrutiny. Further, the supposed inconsistencies were in some cases not in reality inconsistencies – for example, the claimant was said to have changed his story from not being angry to admitting being angry, when in fact he never admitted being angry. We also consider that it was unreasonable for the decision maker to have concluded that it was implausible that someone who got out of their vehicle in the circumstances relayed by the claimant can only have been angry. Although we have said that in some circumstances a decision not to obtain CCTV might have been reasonable, in the context of the facts that we have found were known (or should have been known) to the respondent, the decision was not reasonable here. The decision maker was also unclear about whether or not she found that the claimant said the words attributed to him, yet is almost impossible to see how there can have been gross misconduct without those words. The conclusion that by merely getting out his ambulance (even if he had been angry) the claimant had

committed misconduct was illogical.

123. The decision-maker also moved straight from finding that there was gross misconduct to finding that summary dismissal was warranted, without giving any consideration to personal mitigation and to alternatives to dismissal, although we do accept that it would be somewhat unrealistic to expect any result other than summary dismissal had there been a fair process resulting in a finding that the claimant did what the complaint said he did.

124. The fact that we have come to different conclusions to the decision-maker on (broadly) the same evidence does not of itself establish that the decision was unreasonable – two different decision makers might reasonably come to different decisions. But the failures we have just outlined, taken together, do in our judgment render the original decision to dismiss the claimant unreasonable. However, as the authorities make clear, mere unreasonableness is not sufficient to establish discrimination. The question for us is, in the absence of an explanation, could a Tribunal decide that there was discrimination, i.e. on the facts of this case could a Tribunal decide that the claimant was treated less favourably than someone who was not black (but in otherwise the same circumstances) would have been treated, because of his race.

125. The allegation was about the threat to use a firearm. We consider that in the circumstances of this case a Tribunal could reasonably conclude, on the basis of the facts we have found proved on the balance of probabilities, that the decision-maker was less inclined to believe the denials of the claimant as a black person. The decision-maker jumped to a conclusion that the claimant was angry at the scene, and also in our judgment unfairly described the claimant's conduct in the interview as aggressive, where in other cases it might simply have been thought that he was being assertive. All of that could in our judgment reasonably lead a Tribunal to conclude that the decision maker, as the list of issues had it, "racially profile[d]" the claimant (albeit here that stereotyping, rather than profiling might be the more accurate word) wrongly labelling the claimant as angry and being less inclined than otherwise to accept his denials that he had threatened to use a firearm. The decision to accept the untested complainant's evidence over the claimant's, in the circumstances as we have described them, seems hard to explain unless those factors are considered. It appears to us that a higher standard of proof was applied to the claimant's evidence than to the complainant's evidence. We have also found that the reason the decision maker provided for raising the other complaints against the claimant during the course of the disciplinary hearing was not made out on the evidence. Put most simply, a Tribunal could properly conclude that an employee who was not black but in otherwise the same circumstances would have been treated materially better than the claimant was.

126. We should make clear that we have not concluded that the decision maker consciously discriminated against the claimant. Rather, we have concluded that a Tribunal could reasonably conclude that there was discrimination on the basis of the things we have set out above. Having so concluded, we must consider whether the respondent has succeeded in proving that the less

favourable treatment was in no sense whatsoever because of the claimant's race, taking into account that cogent evidence will be required to discharge the burden of proof. The respondent has not discharged that burden here. Miss Small's evidence was capable of showing that she did not consciously discriminate against the claimant, but it did not show there was not subconscious discrimination. It may be difficult to discharge the burden, particularly in "subconscious" cases, but it is not impossible. On these facts, a simple assertion that Miss Small was upset about the allegation and considered herself actively anti-racist was not sufficient, given the concerns about stereotyping and the process applied to the claimant that we have set out above.

127. We accordingly find that the respondent did do the things set out at 5.1.3 to 5.1.5 and 5.1.7 in the list of issues and that those things were less favourable treatment because of the claimant's race. They were plainly detriments (even if the September dismissal was later "cured" on appeal) and amounted therefore to discrimination.

Final remarks

128. Employment Judge Dick will send the parties separate orders about preparing for a remedy hearing. At that hearing the Tribunal will need to consider, amongst other things: (i) that the claimant was, we recall, not paid during the period when his appeal was considered, and (ii) any argument about whether the claimant might still have resigned even had the discrimination not occurred.

APPENDIX:

Edited Version of the List of Issues set out by TJ Peer following the hearing of 12 July 2024

1. Employment status

[*No longer in issue*]

2. Time limits

[*No longer in issue*]

3. Unfair dismissal

3.1 Was the claimant dismissed? The claimant was dismissed for gross misconduct on 19 September 2024 but the decision was overturned on appeal on 4 October 2024. The respondent says the claimant declined to return to work.

3.2 If the claimant was dismissed, what was the reason or principal reason for dismissal?

3.3 Was it a potentially fair reason?

3.4 The respondent says the reason was conduct or some other substantial reason capable of justifying dismissal. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

3.5 If the reason was misconduct, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:

3.5.1 there were reasonable grounds for that belief;

3.5.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

3.5.3 the respondent otherwise acted in a procedurally fair manner;

3.5.4 dismissal was within the range of reasonable responses.

[*See also para 4 above relating to constructive dismissal.*]

4. Remedy for unfair dismissal

[…]

5. Direct race discrimination (Equality Act 2010 section 13)

5.1 Did the respondent do the following things:

5.1.1 Initiate a disciplinary investigation against the claimant based on an email dated 11 August 2022 from a Hospital Trust employee alleging the claimant verbally abused her at a petrol station and threatened to shoot her to death.

5.1.2 Conduct a disciplinary investigation which was unreasonable and unfair and subject to influence from other persons.

5.1.3 Fail to consider available evidence such as CCTV footage or recordings of the alleged incident on 11 August 2022 during the investigation and disciplinary hearing.

5.1.4 Racially profile when reaching conclusions about the likelihood of the claimant having verbally abused the colleague as alleged in light of the language allegedly used.

5.1.5 Conclude that he had verbally abused the hospital employee as alleged by that employee.

5.1.6 Allow Jo Small who has a close relationship with a third person who doesn't like the claimant to be involved in the investigation and/or disciplinary decision.

5.1.7 On 19 September 2023 dismiss the claimant.

5.2 Was that less favourable treatment?

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

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

The claimant has not named anyone in particular who they say was treated better than they were.

5.3 If so, was it because of race?

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

6. Remedy for discrimination…

[…]

Case No: 3311628/2023

Approved by:

Employment Judge Dick

1 July 2025

JUDGMENT SENT TO THE PARTIES ON

2 July 2025

FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/