EMPLOYMENT TRIBUNALS

Claimant: Ms B Mbonda

Respondent: Quarryfields Health Care Limited

Heard: in Sheffield 23

On: 27, 28, 29 and 30 January 2025

Before: Employment Judge Ayre
Ms N Arshad–Mather
Mr D Wilks

Representation

Claimant: Mr M Malik, counsel
Respondent: Mr S Irving, solicitor

JUDGMENT having been sent to the parties on 14 February 2025 and written reasons having been requested in accordance with Rule 60(4) of The Employment Tribunal Procedure Rules 2024, the following reasons are provided:

REASONS

Background

1. The claimant was employed by the respondent as a nurse at the Quarryfields complex needs care home, from 1 August 2015 until 9 December 2023. Early conciliation started on 7 July 2023 and ended on 10 July 2023. The claim form was presented on 17 October 2023.

2. The claim is one of direct race discrimination. The claimant describes her ethnic origin as black African.

3. A Preliminary Hearing took place on 1 February 2024 before Employment Judge

Wilkinson. At that hearing there was a discussion about the issues in the claim, the case was listed for final hearing and case management orders were made to prepare the case for final hearing.

4. The final hearing was originally listed for two days in July 2024. It was however postponed and relisted for four days.

The hearing

5. There was an agreed bundle of documents running to 473 pages.

6. We heard evidence from the claimant and, on her behalf from Louise Fennell, Unison representative.

7. For the respondent we heard from:

    1. Hannah Blundell, Operational Development Manager;

    2. Amanda Swift, Clinical Nurse Manager; and

    3. Kim Payne, Home Manager

The issues

8. The issues that fell to be determined at the final hearing were identified at the Preliminary Hearing. The parties confirmed at the start of the hearing that the issues were as follows:

    1. Did the respondent do the following things:

        1. Fail to carry out a full and fair investigation between 14 March 2023 and 17 April 2023 in respect of allegations that the claimant had been sleeping at work on 9 and 10 March 2023, by failing to speak to other members of the nursing staff on shift on those nights who were black, and only speaking to the white nursing staff;

        2. Fail to carry out a full and fair disciplinary process by failing to speak to other members of the nursing staff on shift on those nights who were black and only speaking to the white nursing staff;

        3. Give the claimant a final written warning on 20 July 2023 at the conclusion of the disciplinary process;

        4. Fail to fully consider the claimant's position during the appeal process between 26 July 2023 and 12 September 2023 by:

            1. Failing to rectify the failings of the investigation and disciplinary processes; and

            2. Failing to take into consideration the video submitted by the

claimant which showed Angela Briggs sleeping whilst at work?

2. Was that less favourable treatment? The claimant says that she was treated worse than Angela Briggs and a hypothetical comparator.

3. If so, was it because of race?

4. Did the respondent's treatment of the claimant amount to a detriment?

9. There was insufficient time during this hearing to deal with matters of remedy. A separate remedy hearing will be fixed.

Findings of fact

10. The following findings of fact are made on a unanimous basis.

11. The claimant was employed by the respondent from 16 February 2015 until the 9 December 2023 when she resigned. The claimant describes her race as Black African. The respondent is a business that is part of Exemplar Health Care, a specialist nursing home care provider that operates over 45 specialist nursing homes across England.

12. The claimant was employed as a nurse at the Quarryfields Care Home in Doncaster which cares for patients with complex needs. Her duties involved assessing the care needs of patients, ensuring the correct storage and administration of medicines, and developing and implementing programmes of care.

13. The respondent has a Staff Sleeping on Duty Policy which states that: *"staff of all designations will not sleep whilst on duty*" and that "*Any staff found sleeping whilst on duty will be subject to disciplinary action under Exemplar Health Care's disciplinary procedure as set out in the staff handbook…. the likely sanction would be dismissal for gross misconduct.*" The claimant was aware of this policy.

14. The respondent's disciplinary policy lists sleeping on duty as gross misconduct.

15. In January 2023, during a supervision meeting, the claimant made Amanda Swift, Clinical Nurse Manager at Quarryfields, aware that she was having health issues due to sleep apnoea. The claimant has used a CPAP machine when sleeping for approximately 5 years. She told the Tribunal that the sleep apnoea does not make her sleepy or cause her breathing to sound like snoring.

16. On 9th March 2023 the claimant was working a night shift as the nurse in charge on the Moonstone unit at Quarryfields. She was the only nurse on duty on that unit that night. There were 8 patients on the unit and 6 members of staff including the claimant. The other members of staff were health care assistants (HCAs). Two of them were white members of staff, Stacey and Emma, and three were black: Alice, Hannah and Abbey.

17. The claimant also worked the night shift the following evening (from 10th to 11th

March 2023). She was the only nurse on Moonstone that night, and there were 6 other colleagues on duty, one of whom was white (the team leader Dawn Deer) and the remaining five were black: Alice, Hannah, Ade, Juliet O and Juliet A.

18. Three white members of staff, Dawn Deer, Emma and Stacy, made complaints to the manager of Quarryfields, Victoria Watson, that they believed that the claimant had been asleep at work on 9 and 10 March. Victoria Watson asked Amanda Swift, Clinical Nurse Manager, to investigate these complaints. This was the first investigation that Ms Swift had carried out.

19. On 10th March Dawn Deer, the team leader who had worked with the claimant on the night shift of 10th March to 11th March, wrote a statement. She said that at approximately 12.30 am on 11th March she was sat in the lounge and could hear snoring from the treatment room where she believed the claimant was. She also wrote that she was worried about not being able to wake the claimant up if something happened to one of the service users. She said that the claimant remained in the treatment room until about 3.50 am and that "*This is a regular occurrence where Beatrice locks herself in the treatment room and remains in there for long periods of time.*"

20. On 13 March Amanda Swift telephoned the claimant, who was not at work, and asked her if she could come in to work to discuss allegations that she had been sleeping on duty and other concerns that had been raised about the claimant making medication errors.

21. On the morning of 14 March 2023 Emma Hughes sent an email to Victoria Watson, in which she wrote that on 9 March 2023 the claimant had asked an HCA, Stacey Rowbotham, to go to hospital with a service user. Stacey Rowbotham was not able to go so the claimant asked Emma instead. Emma said that she was not well and did not want to go. Emma described the claimant as becoming very loud, shouting and intimidating. She also said that she had been to the clinic room to speak to the claimant about a service user and had found the door locked. She wrote that she had knocked on the door but was ignored and heard snoring. She said she then went to tell Stacey Rowbotham, who had also heard snoring from the clinic room.

22. The claimant came into work on 14 March and met with Amanda Swift. She was accompanied at the meeting by Hannah Anaba, a black colleague who had been on shift with the claimant on both the 9th and 10th March night shifts.

23. There were three issues discussed during the meeting. The first was medication and administration. There appeared to have been 9 medication errors by the claimant during a 3 day period, and it was agreed that the claimant would be mentored and supervised in relation to medication to give her support to improve.

24. The second issue discussed was that the respondent had received written complaints of the claimant having been heard sleeping whilst on night shifts and locking herself in the clinical room, such that she was unreachable when needed because she was asleep. The claimant was told that she would be taken off night

shifts and put onto day shifts pending an investigation into sleeping on duty. Transferring the claimant to day shifts would also enable the respondent to more closely monitor and provide support in relation to medication, as the managers only worked days.

25. The final issue raised during the meeting was time management and recurrent lateness. There was no evidence before the Tribunal of any further action being taken in relation to that issue.

26. On 15 March Amanda Swift wrote to the claimant asking her to provide a detailed written statement of her account in relation to reports that she had been heard sleeping on shift on both 9th and 10th March 2023. She did not tell the claimant who had made the allegations or what the allegations were, other than in the most general terms.

27. Ms Swift sent a follow up email on 20 March chasing a response to her earlier email. The claimant replied on 21 March asking for a copy of all of the allegations of sleeping on duty and attaching a fit note certifying her as unfit to work. The fit note referred to the claimant being absent from work due to workplace bullying.

28. Amanda Swift replied to the claimant by email the following day. In her email she told the claimant that "*As you are unfit for work at the moment the fact finding meeting for the investigation will be placed on hold and will be arranged upon your return.*" In relation to the claimant's request for a copy of the allegations against her, Ms Swift wrote that "*Due to this only being at the fact finding stage and not a disciplinary hearing we are not obliged at this stage to offer you a copy of the statements as the fact finding is currently still ongoing.*"

29. The claimant was signed off work by her GP from March 2023. She returned to work briefly in May and was then signed off again until her resignation in December.

30. On 22 March Amanda Swift wrote to Dawn Deer, Emma Hughes, Hannah Anaba and Stacey Rowbotham inviting them to meetings to discuss the allegation that a nurse had been sleeping whilst on duty. Hannah Anaba was the only one of these four employees who is black. Ms Anaba told Ms Swift that she did not want to be involved in the investigation and did not provide a statement. Ms Swift did not insist that she do so.

31. On 23rd March Angela Briggs, a white nurse employed by the respondent, sent a letter to Amanda Swift in which she wrote that she was concerned that on separate occasions on different nights she had seen the claimant falling asleep very easily whilst on duty. She gave specific examples of when she had observed the claimant sleeping at work, although did not provide any dates. Ms Briggs had not been at work on the nights of either 9th or 10th March. There was no evidence before the Tribunal of what had prompted Ms Briggs to write the letter.

32. On 3 April 2023 Amanda Swift interviewed Dawn Deer the team leader. During the meeting Dawn Deer said that she had heard snoring and had got down to look under the bottom of the door to the clinic room where the claimant was. She said

that she had seen the claimant in a chair with her head back, asleep. She also said that she did not have a key to the room. She was asked whether she had made anyone aware of the fact that the claimant was sleeping and replied that she probably should have. She said that if Angie (a white nurse) had been on duty she would have made her aware, but as the other nurse on duty (in a different unit) was Tammy (a black nurse) she didn't tell her because Tammy 'already had problems'. Ms Deer did not say what the problems were, and nobody asked her.

33. Dawn Deer said that all of the staff that were in the lounge could hear the claimant snoring. When asked however whether anyone else could confirm her statement she replied 'possibly' that she could not remember who else was on shift, and that they would probably not say anything if asked. She didn't say why and was not probed further on this.

34. On 11 April Amanda Swift interviewed Stacey Rowbotham. During her interview Ms Rowbotham said that she had heard the claimant snoring through the door as she went to the toilet but hadn't seen her asleep. She said that the claimant had been 'gone' for around two hours, but she was unsure if she was asleep for all of that time. She also said that another HCA, Emma Hughes, had told her that she had tried the door to the room and it was locked. She described the shift as being a bad one, because a service user had come home from hospital and the claimant had an issue with Emma Hughes.

35. Emma Hughes was interviewed on 12 April. She was asked what her main concerns were about the 9 March and said that her main concern was that a service user had come home from hospital that night, that the claimant had locked herself in the clinic room and that Emma had been unable to get the claimant. She said that she could hear the claimant snoring but had not actually seen her asleep. She also said she thought the claimant had been asleep from around 2 am until 4 am, and that she had knocked on the clinic room door but couldn't get in because it was locked.

36. Emma also told Amanda Swift that the claimant had made her feel intimidated on that shift, had shouted at her, and followed her when she was trying to get away from the claimant. There had been an issue earlier on the shift when the claimant had asked Emma to go to hospital to accompany a patient, and Emma had refused to go.

37. On 6 April 2023 Amanda Swift wrote to the claimant inviting her to an investigation meeting on 14 April. The letter told the claimant that the allegations being investigated were that she had slept whilst on duty during night shifts. In preparation for the meeting Amanda Swift prepared a summary of the allegations and a list of questions to ask the claimant.

38. The investigation meeting took place on Friday 14 April. The claimant asked if Hannah Anaba could come into the meeting with her, but Ms Swift refused. During the meeting the claimant became distressed at times.

39. Shortly before the meeting was due to start, the claimant sent an email to Ms Swift attaching what she described as her 'sleep allegation reports'. In the reports she set out in detail her version of events on the night shifts of 9th and 10th March

2023. She wrote that on the shift of 9th March she had been called on more than one occasion by Stacey to attend a service user and that she was in between nurse stations and the clinic room throughout the night. She described checking every hour on one particular service user who had just been discharged from hospital. She also wrote that whilst she had been in the clinic room and nurse station the doors were closed but not locked, and she had been listening to music and the news on her mobile phone.

40. During the meeting on 14 April the claimant said that Dawn Deer, who had made a statement, did not want to work with her because of another issue that had arisen that night. She described what was happening as bullying and said that she was not being supported. She confirmed that she was aware of the respondent's policy on sleeping on duty, but repeatedly denied that she had been sleeping on duty.

41. The claimant denied locking herself in the clinic room, saying that the door was closed but not locked. She also said that she thought the allegations against her were retaliation for what had happened earlier in the shift. She told Ms Swift that the shift had started with staff not agreeing with the claimant because they did not want to go to hospital with a service user. She accepted that she had spent some time in the clinic room working on care plans but said she did not spend a lot of time in there.

42. Ms Swift told the claimant that she had been transferred to the day shift to support her with medication, and that she could have been suspended for being caught asleep.

43. On Monday 17 April, having reflected on the meeting on 14th April the claimant sent a lengthy email to Ms Swift. She described feeling confused after the meeting and not understanding what was happening. She asked why all staff on the shifts in question had not been questioned.

44. That same day Ms Swift decided to close the investigation. She did not reply to the claimant's email, nor did she interview any other members of staff. She forwarded the results of her investigation to Victoria Watson who considered that the allegation of sleeping on duty had been proven. Ms Swift also considered the allegation to be proven. She did not accept the claimant's version of events. She told the Tribunal that there was no evidence that the claimant had been completing checks on service users as the claimant had suggested.

45. In her evidence to the Tribunal Ms Swift said that she had attempted to speak to Hannah Anaba and another black member of staff, Juliet. She did not tell the claimant that at the time, however. Nor did she obtain any relevant evidence from either of them.

46. The claimant remained off work with work related stress. She returned to work for a short period in May. On 30 May the manager of Quarryfields, Victoria Watson, told the claimant that she was going to report her to the claimant's professional body, the Nursing and Midwifery Council (NMC), and that the claimant should not practice any more. She asked the claimant to resign with immediate effect and told her to go and write her resignation. She took the claimant's work keys off her. The claimant

was extremely distressed by these events and did not return to work after 30 May. It is understandable that, following this conversation, the claimant believed that the respondent wanted to get rid of her and did not want her to remain working at Quarryfields.

47. The very next day, on 31 May Kim Payne, manager of another of the respondent's homes, wrote to the claimant inviting her to a disciplinary hearing on 9 June 2023. In the letter she wrote that there were 3 allegations which the respondent considered gave "*grounds for disciplinary action*", namely that:

    1. On 9th and 10th March the claimant was found to be sleeping on duty, and on 9th March the claimant had locked herself in the nurses' station for over 2 hours whilst asleep;

    2. On 9th March whilst on duty she locked herself in the nurses' station alone for over 2 hours and was asleep, which was considered to be a breach of the NMC Code of Conduct and a serious breach of health and safety; and

    3. Her actions had led to a serious breach of trust and confidence and of the respondent's code of conduct.

48. The claimant was informed of her right to be accompanied at the meeting and warned that if the allegations were upheld she may be dismissed because the allegations were considered to be gross misconduct. The claimant was also informed that she could bring statements or witnesses to the hearing if she wished to do so. By that time however she was off work with work related stress.

49. The claimant was extremely distressed to receive this letter, and spoke to her trade union representative, Louise Fennell, who had been supporting her at work for a number of years. Ms Fennell wrote to Victoria Watson on her behalf.

50. The disciplinary hearing was subsequently rearranged and took place on 7 July 2023. The claimant was accompanied by Louise Fennell.

51. At the start of the hearing the claimant and her union representative raised concerns that the allegations against the claimant may be racially motivated. They pointed out that only white members of staff had been interviewed, and that 5 black members of staff who had been on shift on the 9th and 10th March had not been interviewed. They asked that the other members of staff be interviewed and that the disciplinary hearing be postponed until this had happened.

52. Ms Payne adjourned the hearing briefly to take advice from Human Resources. Having done so she decided to continue with the meeting.

53. The claimant told Ms Payne that at the beginning of the shift there had been an incident regarding sending staff to hospital with a service user. She had asked Emma Hughes to go to hospital but she declined to do so. The claimant also said that the team leader, Dawn Deer, had a second set of keys to the clinic room so could have got into the room. She again denied sleeping on shift and told Ms Payne that

she had been checking on service users during the night. She said that other members of staff, Hannah, Ade and Alice, would have seen her leaving the clinic room to check on a service user. The respondent did not speak to those staff to find out if they had in fact seen the claimant.

54. Ms Payne asked the claimant whether there had been any discrimination prior to the events of the 9th and 10th March. The claimant told her that there had been 'several times', and that a few weeks previously Dawn Deer had told her that she didn't want to work with the claimant any more. She pointed out that Dawn Deer had refused to do something the claimant had asked, and yet she was now reporting the claimant. The claimant was senior to Ms Deer.

55. There was no evidence before us to suggest that Dawn Deer was ever questioned about what were very serious allegations being made by the claimant. In effect the claimant was saying that Dawn Deer had a motive for making up her complaint about the claimant because she no longer wanted to work with her, and suggesting that there had been discrimination in the past. The respondent appears not to have investigated this or considered it at all. Rather, the respondent continued to accept without question the evidence provided by Ms Deer during the investigation over that of the claimant.

56. Both the claimant and her union representative said during the disciplinary hearing that they considered that the investigation had not been fair, and that not all staff had been interviewed. Louise Fennell pointed out that that only the white staff on shift had made the allegations, and that, despite Dawn Deer saying that other staff on shift had heard the claimant snoring, no black staff had been interviewed.

57. Despite the concerns that were raised by the claimant and her union representative during the disciplinary hearing, Ms Payne did not carry out any further interviews or go back to those who had already been interviewed in light of the claimant's version of events and of what she and her representative said during the hearing. Ms Payne accepted in her evidence to the Tribunal that she had the opportunity to carry out further interviews if she had wanted to, but she chose not to. The only reason she gave for this was that it was not normal practice to re-interview at the disciplinary stage because the investigation has already taken place.

58. On 20 July 2023 Kim Payne wrote to the claimant informing her of the outcome of the disciplinary hearing. Ms Payne upheld the first and third allegations against the claimant, and partially upheld the second allegation. She concluded that:

"*I find it necessary to issue you with a Final Written Warning as your reasons were not satisfactory and your conduct in this respect is unacceptable. You should note that sleeping on duty is considered gross misconduct under our disciplinary procedure and summary dismissal would ordinarily be a sanction imposed however I feel it would be more reasonable in your case to consider an alternative outcome.*"

59. In her evidence to the Tribunal Ms Payne said that, whilst she felt that on the balance of probabilities the claimant was sleeping, she could not say so 100% and that "*In order to dismiss I would have wanted to say conclusively at 100% that she*

was sleeping. This was not possible as the door was locked and no one could gain entry. If I had evidence to show that she was, without question, sleeping I would have dismissed her."

60. In relation to the first allegation (that the claimant was sleeping on duty on 9th and 10th March) Ms Payne referred in her conclusions to a registered nurse and a team leader having witnessed the claimant with her eyes closed. In particular she wrote "*The report from the Nurse does not state the date in which this incident of sleeping took place, however, does state that there have been separate occasions, on different nights whereby you have been sleeping on duty.*" Angela Briggs' evidence was accepted without question. It therefore appeared that Ms Payne's decision was based not just on events on 9th and 10th March, but on other dates also, which had not formed part of the allegations or the investigation.

61. Ms Payne concluded that the team leader did not have a key to the clinic room where the claimant was believed to be sleeping, so that other staff would not have been able to get entry to the clinic room without getting the claimant's attention. She also concluded that, having reviewed the documentation for the nights in question, there was no evidence of the claimant having performed any checks on service users, and that she had a reasonable belief that on the nights in question the claimant was in the nurses' station sleeping.

62. The second allegation was that the claimant had locked herself in the nurses' station for over 2 hours on 9th March and was sleeping during that time. Ms Payne concluded that this allegation was 'partially upheld' but it was not clear which part of the allegation had been upheld and which part had not been upheld. Ms Payne was not able to clarify the position during her evidence to the Tribunal. It appears that her reason for describing the allegation as 'partially upheld' was that she felt staff should have sought support from the other nurse on duty (on a different unit) on the night in question.

63. Ms Payne concluded that two health care assistants and one team leader had come to the clinic room door and found it locked, and that the team leader had knocked on the door but had no response. In fact the team leader in question was not even on shift on 9th March, and her evidence related to the 10th March. Ms Payne also concluded that the team leader did not have a key to the clinic room.

64. The final allegation was a breach of trust and confidence, and Ms Payne also upheld this allegation. She concluded that the claimant was sleeping on duty and had not acted with honesty and integrity.

65. In relation to the claimant's complaint that only white staff had been interviewed, Ms Payne wrote that:

"*Whenever formal proceedings are initiated, good practice is to only include those who you absolutely require assisting you in determining an outcome, this criteria is usually the below:*

- *They are a witness;*

- *They are implicated;*
- *They have received the initial complaint;*

Unnecessarily involving others can lead to a prolonged process, increased risk to confidentiality therefore, we spoke with those who fit the above criteria. If you felt that others could have been useful to your case, you had the opportunity to present statements or ask for witnesses to attend the hearing with you. We have received no further elaboration from you, so I hope this explanation clears up any confusion you may have had."

66. Ms Payne appears, in her outcome letter, to be placing the responsibility for the lack of interviews with other people firmly with the claimant. In reaching these conclusions Ms Payne does not appear to have considered that the claimant was off work with work-related stress at the time. The respondent also knew from comments made by Dawn Deer during her interview, and by the refusal of Hannah Anaba and Juliet to give statements to Amanda Swift, that staff may be reluctant to get involved. As their employer the respondent was in a position to insist that they gave statements, whereas the claimant was not. If staff were not willing to give statements to their employer, it was highly unlikely that they would give statements to the claimant. This put the claimant at a disadvantage.

67. In her evidence to the Tribunal Ms Payne said that "*I think there was enough evidence to suggest that there were concerns about Beatrice's practice*" and that, by 'practice' she was referring to the fact that the claimant had told her she was listening to music on her mobile telephone whilst on shift. Ms Payne said that it was against the respondent's policy for staff to have their mobile telephones with them on the unit. This allegation was not part of the disciplinary investigation however and was not put to the claimant. Despite this, it clearly formed part of Ms Payne's rationale for issuing the final written warning.

68. Ms Payne also told the Tribunal that she did not believe that interviewing any other employees would have changed the outcome of the disciplinary process. She appeared to approach the disciplinary hearing with a closed mind and did not take on board what the claimant and her trade union representative were saying. She had made her mind up and there was, in the Tribunal's view, nothing that the claimant or Louise Fennell could have said that would have changed the outcome. Ms Payne was not prepared to interview any additional witnesses or to re-interview those who had already been spoken to.

69. Ms Payne told the Tribunal that "*there was no allegation from Beatrice that any other staff member had seen her when she was carrying out her alleged checks*". This was clearly wrong. The minutes of the disciplinary hearing record the claimant telling Ms Payne "*staff would have seen me doing those checks*" and "*Hannah, Alice and Ade would have seen me*". This evidence from Ms Payne indicates that she did not listen properly to what the claimant said during the disciplinary hearing or take it on board.

70. On 26 July 2023 the claimant appealed against the final written warning. In her

appeal she wrote that:

"*I believe that both the investigation and the hearing itself were flawed. The investigation and the hearing officer failed to respond to my concerns that the allegations were racially motivated.*

There are factual inaccuracies in the rationale for the decision.

I raised on 17/04/2023 via an email concerns that all staff on shift were not interviewed. My email was not responded to by the investigating officer…this does not align with Exemplar Health Care policy of Equal Opportunities

I raised at the start of the hearing concerns that only the white members of staff were interviewed as part of the investigation. This is despite the team leader in relation to the allegation of the 10th March clearly stating in her interview that there were 4 other members of staff present who allegedly heard me snoring. Those 4 members of staff were black and none of them have been interviewed….

Furthermore the team leader (Dawn Deer) also stated that had the white nurse, Angela Swift, been on shift she would have reported this. But, as it was Tammy Fungwe, a black nurse she did not. She also stated that the other 4 members of staff could hear me snoring but probably wouldn't say anything if asked. The 4 members of staff were black and the implication is that that is why they wouldn't say anything. This has never been followed up….

The letter from the nurse Angela Briggs does not give any dates or times when I have allegedly fallen asleep mid conversation and she has not been interviewed to gain further information, so I fail to see how I can possibly answer to such allegations….

The team leader was not on shift on the 9th March….

I believe the allegations are racially motivated and unfounded…

The blatant failure to investigate these concerns appropriately amount to a further act of discrimination…."

71. Hannah Blundell, Regional Director of Operations, was appointed to hear the claimant's appeal. On 28 July 2023 Hannah Blundell wrote to the claimant acknowledging receipt of the appeal and inviting her to an appeal hearing on 2nd August. The hearing was subsequently rearranged and took place on 16th August 2023. The claimant was again accompanied by Louise Fennell of Unison.

72. In preparation for the appeal hearing the claimant had prepared a written statement which Louise Fennell read out. The statement was detailed and again raised concerns about the process that had been followed, that the allegations were racially motivated, that black staff had not been interviewed, and that the respondent had failed to actively respond to the claimant's concerns of racism. In the statement the claimant referred to the fact that the final written warning letter had stated that if the claimant had felt others could be useful for her at the disciplinary hearing, she could have taken statements from them or asked them to attend the hearing. She

pointed out that "*for a staff member to actively seek statements from other members of staff is usually a breach of confidentiality during an investigation and an act of gross misconduct. Beatrice did the correct thing by asking the employer to interview potential witnesses but this was ignored then actively refused.*" This statement was not challenged by Ms Blundell during the appeal hearing.

73. The claimant was clearly upset during the appeal hearing and had to take time to compose herself. Ms Blundell did, during the hearing, state that "*I will assure you, that interviews with other people and actions will take place, but I will not be able to make you aware of any of the outcomes of those*". There was no evidence before the Tribunal however of any action having been taken against any other member of staff, including Emma Hughes who had refused to go to hospital with a service user. The only interviews that Ms Blundell carried out after the appeal hearing were of Amanda Swift and Kim Payne. There were no notes of those interviews before the Tribunal. Ms Blundell said that she had made handwritten notes, but that they had been destroyed.

74. In July 2023 the claimant was sent, by an agency worker, a video which clearly showed Angela Briggs, a white nurse, and one of those who had made a complaint about the claimant sleeping, asleep in a chair at work wearing her uniform, whilst sitting next to a service user. During the appeal hearing Louise Fennell told Ms Blundell that the claimant had been sent videos of people asleep, and that black members of staff were too scared to speak out. Ms Blundell did not appear interested in this and did not explore it further.

75. At the end of the hearing Ms Blundell told the claimant "*I want to go through the whole process and look at all things raised. I want you to feel that you have been heard*".

76. On 18 August, two days after the appeal hearing, Ms Fennell wrote to Ms Blundell stating that she had a copy of the video of the nurse asleep and offering to forward it to Ms Blundell. Ms Blundell replied, "*Not at this time but thank you.*" She refused to view the video, which clearly showed a white nurse asleep at work. This video was in our view highly relevant to the claimant's appeal because it supported her assertion that she was being targeted because of her race. Ms Blundell demonstrated a closed mind to the appeal process and refused to consider relevant evidence which supported the claimant's position.

77. Ms Fennell sent the video to the respondent's HR department. Some two months later, on 27 October 2023 Victoria Watson interviewed Angela Briggs about the video. During the interview Ms Briggs admitted that the video showed her sleeping at work in Quarryfields. She said that she could not remember it, and that it must have been some time ago. Despite the video clearly showing her to be asleep Ms Briggs said that "*I can promise you I do not sleep at work.*"

78. The respondent decided to take no further action against Ms Briggs, and she was not even invited to a disciplinary hearing. The reason given by the respondent for this lack of action was that the video appeared to show events some two years ago. There was however no clear date on the video and the respondent's policy does not

contain a time limit on action being taken for conduct which is considered to be potential gross misconduct.

79. Approximately four weeks after the appeal hearing Ms Blundell wrote to the claimant informing her of her decision. She rejected the claimant's appeal in its entirety and did not uphold any of the claimant's grounds of appeal. In her outcome letter she wrote that:

"*The investigating officer confirmed that she did not reply to your email of the 17th of April 2023 as you were subsequently absent due to anxiety and at this point the investigation had been concluded and any further points could be addressed in your disciplinary hearing….*

On review of the investigation pack, I find that the relevant witnesses were interviewed, and it would have prolonged and/or been irrelevant to interview everyone on shift as they were not named as being involved in the allegations….

I can confirm that having reviewed both the investigation notes and disciplinary notes a full and fair process was held and there is no evidence that these allegations were racially motivated….

Whilst there are inconsistencies in the investigation, under investigation and disciplinary proceedings, evidence is included if it is felt that it supports a reasonable belief that events occurred. The witness statements received all point to the allegations that you have been asleep whilst on duty."

80. On 9 December 2023 the claimant resigned from her employment.

The Law

Direct discrimination

81. Section 13 of the Equality Act provides that:

> "*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others"*

82. When determining questions of direct discrimination there are, in essence, three questions that a Tribunal must consider:

a. Was there less favourable treatment?
b. The comparator question; and
c. Was the treatment 'because of ' a protected characteristic?

83. In a direct discrimination case the claimant must have been treated less favourably than an actual or a hypothetical comparator. Section 23(1) of the Equality Act 2010 provides that there must be "*no material difference between the circumstances*" of the claimant and the comparator. The comparator must be "*in*

the same position in all material respects" as the claimant, save that the comparator does not share the claimant's race (***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337***).

84. The Equality and Human Rights Commission Code of Practice on Employment (2011) states that:

"*…. it is not necessary for the circumstance of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator…*"

85. Where a comparison with an actual comparator can be made, there is no need for the Tribunal to construct a hypothetical comparator. Where a hypothetical comparator is required, the Tribunal must create a "*hypothetical "control" whose circumstances are materially the same as those of the complainant save that the comparator does not have the protected characteristic… The question is then whether such a person would have been treated more favourably than the claimant in those circumstances. If the answer to this question is that the comparator would not have been treated more favourably, this also points to the conclusion that the reason for the treatment complained of was not the fact that the claimant had the protected characteristic*" (***Gould v St John's Downshire Hill [2021] ICR 1, EAT***).

86. In ***Gould*** Mr. Justice Linden explained that "*The question whether an alleged discriminator acted "because of" a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the "reason why" question and the test is subjective…For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a "significant influence" on the decision to act in the manner complained of. It need not be the sole ground for the decision…[and] the influence of the protected characteristic may be conscious or subconscious.*"

Burden of proof

87. Section 136(2) of the Equality Act 2010 sets out the burden of proof in discrimination claims, with the key provision being the following:

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

(3) But subsection (2) does not apply if A shows that A did not contravene the provision…"

88. There is, in discrimination cases, a two stage burden of proof (see ***Igen Ltd (formerly Leeds Careers Guidance and others v Wong [2005] ICR 931*** and ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205*** which is generally more favourable to claimants, in recognition of the fact that

discrimination is often covert and rarely admitted to. In ***Igen v Wong*** the Court of Appeal endorsed guidelines set down by the EAT in ***Barton v Investec***, and which we have considered when reaching our decision.

89. In the first stage, the claimant has to prove facts from which the tribunal could decide that discrimination has taken place. If the claimant does this, then the second stage of the burden of proof comes into play and the respondent must prove, on the balance of probabilities, that there was a non-discriminatory reason for the treatment. So, if the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent and the Tribunal has to consider whether the respondent's explanation is sufficient to show that it did not discriminate.

90. In ***Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913*** the Court of Appeal held that "*there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage."*

91. The Supreme Court has more recently confirmed, in ***Royal Mail Group Ltd v Efobi [2021] ICR 1263****,* that a claimant is required to establish a prima facie case of discrimination in order to satisfy stage one of the burden of proof provisions in section 136 of the Equality Act. So, a claimant must prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination.

92. In ***Meister v Speech Design Carrier Systems GmbH C-415/10*** The European Court of Justice held that the failure by an employer to provide an unsuccessful candidate with information he'd asked for about the successful candidate could be taken into account, along with other facts, when deciding if a prima facie case of discrimination has been established. However, in ***Royal Mail Group Ltd v Efobi [2021] UKSC 33*** the Supreme Court found that: "*no adverse inference can be drawn at the first stage from the fact that the employer has not provided an explanation.*"

93. Where an employer gives an untruthful explanation for a difference in treatment, this could lead to a prima facie case of discrimination being established (***Base Childrenswear Ltd v Otshudi [2019] EWCA Civ 1648***). A Tribunal can also take account of inconsistent and inadequate explanations by the respondent.

94. Where there are multiple allegations of discrimination, the Tribunal should consider whether the burden of proof has shifted from the claimant to the respondent in relation to each one, rather than taking a broad brush approach.

95. In ***Glasgow City Council v Zafar [1998] ICR 120***, Lorde Browne-Wilkinson recognised that discriminators ' do not in general advertise their prejudices: indeed they may not even be aware of them'. Direct discrimination is often covert rather

than overt, and a Tribunal can look at all the material before it when determining whether there has been less favourable treatment (***London Borough of Ealing v Rihal [2004] IRLR 642***).

96. The Tribunal has the power to draw inferences of discrimination where appropriate. Inferences must be based on clear findings of fact and can be drawn not just from the details of the claimant's evidence but also from the full factual background to the case.

97. Factors that may be relevant when considering whether a claimant has made out a prima facie case of discrimination can include:

1. Unanswered questions or evasive answers to questions;
2. Conduct during the proceedings;
3. The lack of a credible explanation by the respondent; and
4. Discriminatory comments

98. It is not sufficient for a claimant merely to say, 'I was badly treated' or 'I was treated differently'. There must be some link to the protected characteristic or something from which a Tribunal could draw an inference. In ***Madarassy v Nomura International plc [2007] ICR 867*** Lord Justice Mummery commented that: "*the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

99. In ***Deman v Commission for Equality and Human Rights and others [2010] EWCA Civ 1276***, Lord Justice Sedley adopted the approach set out in ***Madarassy v Nomura*** that 'something more' than a mere finding of less favourable treatment is required before the burden of proof shifts from the claimant to the respondent. He made clear, however that the 'something more' that is needed to shift the burden need not be a great deal. Examples of behaviour that has shifted the burden of proof include a non-response or evasive answer to a statutory questionnaire, or a false explanation for less favourable treatment.

100. Unreasonable behaviour is not, in itself, evidence of discrimination (***Bahl v The Law Society [2004] IRLR 799***) although, in the absence of an alternative explanation, could support an inference of discrimination (***Anya v University of Oxford & anor [2001] ICR 847***).

Conclusions

101. The following conclusions are reached on a unanimous basis, having considered carefully the evidence before us, the relevant legal principles, and the submissions of the parties.

102. There are four allegations of direct race discrimination before the Tribunal. The first consideration in relation to each allegation is whether the alleged conduct

actually occurred or not.

103. The first allegation is that the respondent failed to carry out a full and fair investigation between 14 March 2024 and 17 April 2023 by failing to speak to other members of staff on shift on the 9th and 10th March and only speaking to the white nursing staff.

104. In relation to the investigation carried out by Ms Swift, we find that this was failing in the following respects:

1. Ms Swift accepted what she was told at face value by everyone except the claimant. No one else was challenged on their evidence nor were any probing questions asked;

2. Ms Swift did not go back to any of the witnesses to put the claimant's version of events to them. Whilst that is not necessary in every case, in a case such as this where there is a clear conflict of evidence over a matter which is at the very heart of the investigation, it would in our view have been appropriate;

3. When staff declined to get involved in the investigation Ms Swift did not insist that they give evidence or pursue their failure to do so. It would, in our view, have been a reasonable management instruction for her to insist that staff answer questions as part of the disciplinary investigation;

4. Ms Swift did not interview black members of staff who were on shift on the nights in question, and only obtained statements from white members of staff;

5. When the claimant asked why other staff had not been 'investigated' (we suspect that although she used the word 'investigated' in her email of 17 April the claimant in fact meant 'interviewed' as this was the word she used consistently later, and English is not her first language) not only did Ms Swift fail to speak to anyone else, but she did not even reply to the claimant's email. The suggestion that this was because she did not want to prolong matters and/or because the claimant was off sick is just not credible. This was not a disciplinary process that was concluded quickly, as it lasted approximately six months, nor was it one in which the respondent demonstrated any compassion for the claimant who was off sick at this time; and

6. Ms Swift did not interview other staff on shift, despite having been told by Dawn Deer that other staff who were in the lounge with her also heard snoring. Although Dawn Deer did not identify the staff by name, the respondent could easily have found out who was working on the unit that evening by looking at the rota for the night.

105. This was Ms Swift's first investigation. She was therefore lacking in experience, and there was no evidence before us to suggest that she had received appropriate training or advice on the investigation. This resulted in an inadequate investigation into what were very serious allegations. We find that the investigation carried out by Ms Swift between 14 March 2023 and 17 April 12023 was neither full nor fair.

106. The second allegation is that the respondent failed to carry out a full and fair disciplinary process by failing to speak to other members of staff on shift on 9th and 10th March 2023 who were black, and only speaking to the white nursing staff.

107. It was accepted by the respondent that it did not speak to any black members of staff during the disciplinary process, other than the claimant. This was despite the fact that both the claimant and her trade union representative asked that this be done and raised concerns that only white employees had been interviewed.

108. During the disciplinary hearing the claimant raised concerns that black members of staff had not been interviewed and that the allegations were racially motivated. Despite this complaint, which is a very serious one, the respondent did not carry out any further interviews. Nor did it re-interview any of the white employees who had previously been interviewed.

109. An allegation of race discrimination is an extremely serious one and not to be treated lightly. It is in our view surprising that the respondent did not even ask those who had made complaints whether the complaints were in any way motivated by race. It is difficult to see how the respondent could conclude that the allegations were not motivated by race unless it took steps to find out why the individuals concerned had raised complaints and given statements.

110. The allegation of race discrimination made very clearly at the disciplinary hearing was quite simply not investigated. Ms Payne paid lip service to it in her outcome letter, but it is clear that she did not properly consider it.

111. Rather, Ms Payne demonstrated a closed mind to the disciplinary process and to the suggestion of discrimination. This was demonstrated by the surprising comment in her witness statement that she didn't believe that interviewing any other employees would have changed the outcome. This Tribunal finds it difficult to understand how Ms Payne could have reached that conclusion without speaking to them. They may very well have supported the claimant's version of events that (a) she had not been sleeping; (b) the door to the clinic room was not locked, (c) she had been regularly checking on service users and (d) others had seen her doing the checks. A proper investigation should look for evidence of innocence as well as of guilt.

112. Ms Payne based her decision upon a mistaken understanding of the facts. For example, she said that the claimant had not identified anyone who had seen her working on the night shifts in question, despite the fact that the notes of the disciplinary hearing clearly record otherwise. She also relied in her conclusions about the second allegation (locking the door on 9th March) on a statement from Dawn Deer the team leader, when Ms Deer was not even working that night.

113. In addition, Ms Payne relied upon matters which had not formed part of the allegations or been put to the claimant, such as the suggestion by Angela Briggs that the claimant had been sleeping on other occasions, and the conclusion that the claimant's practice was lacking because she should not have had her phone with her on the unit or been listening to music.

114. Ms Payne failed to address any of the shortcomings of the investigation carried out by Ms Swift. This was despite the fact that the claimant and her representative made very clear that they considered there were failings in the investigation, and that Ms Payne accepted that she could have carried out further interviews or re-interviewed staff had she wished to do so. Her explanation for not doing so, namely that it was not normal practice, is not convincing.

115. There was in our view nothing that the claimant or her representative could have said during the disciplinary hearing that would have persuaded Ms Payne not to give a final written warning.

116. We find that the respondent did fail to carry out a full and fair disciplinary process by failing to speak to black members of staff, and speaking only to white members of staff.

117. The third allegation of discrimination is that the respondent gave the claimant a final written warning on 20 July 2023. The respondent admits that the claimant was given a final written warning.

118. The final allegation is that the respondent failed to consider the claimant's position during the appeal process between 26 July and 12 September 2023 by:

1. Failing to rectify the failings of the investigation and disciplinary processes; and

2. Failing to take into consideration the video submitted by the claimant which showed Angela Briggs sleeping whilst at work.

119. We find that the appeal process did not rectify the failings of the investigation and disciplinary processes, but rather compounded them. It could not have been clearer, by the time of the appeal, that the claimant and her representative were making serious allegations about the process that had been followed, and of race discrimination. The appeal letter starts: "*I believe that both the investigation and the hearing itself were flawed*" and "*the allegations were racially motivated*". Hannah Blundell accepted in her evidence to the Tribunal that one of the grounds of appeal was that there were failings in both the investigation and disciplinary processes which caused the outcome to be flawed, and that the respondent had failed to respond to concerns that the outcome was racially motivated.

120. Despite this, Hannah Blundell did not seriously consider or investigate the possibility that the investigation and disciplinary processes were flawed or the claimant's allegations of discrimination. She took no steps to investigate whether there was any merit in the allegations of discrimination other than to speak to Amanda Swift and Kim Payne and to accept, without challenge, what they said.

121. At no stage during the entire investigation, disciplinary or appeal processes, did anyone put to those white employees who were making the complaints about the claimant, the suggestion that the complaints could be racially motivated. The respondent quite simply did not take those complaints seriously.

122. Moreover, Ms Blundell refused to consider evidence which showed that the claimant was being treated differently to a white nurse, Angela Briggs, who had also been sleeping at work. The evidence in relation to Angela Briggs was stronger than that existed for the claimant. It was video evidence that showed without any doubt that Ms Briggs was sleeping on duty. The Tribunal finds it very surprising that Ms Blundell did not want to see the video. This again demonstrates a closed mind, and an employer who was not willing to properly consider the claimant's version of events, or her allegations of discrimination.

123. It appears to this Tribunal that the claimant was found guilty from the very time that the complaints were made against her, and that there was nothing she could do to change the respondent's mind about the allegations. At each stage in the disciplinary process the respondent failed to take steps to rectify the failings in the process, but rather compounded the situation and effectively rubber stamped the actions taken at the previous stages.

124. The respondent had several opportunities to put right the flaws in the initial investigation:

1. After the claimant's email to Amanda Swift on 17 April;

2. During the disciplinary hearing and following that hearing before the outcome was decided; and

3. During the appeal process.

125. The respondent failed to put right the flaws in the initial investigation at any stage.

126. We have no hesitation in finding that the respondent did fail to fully consider the claimant's position during the appeal process.

127. For the reasons set out above we find that the conduct complained of by the claimant in relation to all four allegations of discrimination did take place.

128. The next issue we have to consider is whether the conduct amounted to less favourable treatment. The claimant relies upon both an actual comparator, Angela Briggs, who is a white nurse employed by the respondent, and upon a hypothetical comparator. We have reminded ourselves that there should be no material difference between the circumstances of the comparator and of the claimant.

129. We have no hesitation whatsoever in finding that Angela Briggs was a suitable comparator in this case. Ms Briggs was employed by the respondent, at the same time as the claimant, at the same workplace, Quarryfields, and performing the same duties. She also worked nights and was subject to the respondent's sleeping at work and disciplinary policies. She did not share the claimant's protected characteristic of race because Ms Briggs is white and the claimant is black African. There was evidence to suggest that Ms Briggs had been sleeping whilst on duty. Her circumstances were therefore the same as those of the claimant.

130. We therefore find that Angela Briggs was an appropriate comparator. As we have found Ms Briggs to be an appropriate comparator, there is no requirement for us to consider a hypothetical comparator.

131. We have then gone on the consider whether the claimant was treated less favourably than Ms Briggs in relation to each of the alleged acts of discrimination.

132. We find that Angela Briggs was subject to an investigation in October 2023 when she was questioned about the video showing her asleep at work. There was no evidence before us to suggest that anybody other than Ms Briggs was interviewed about the allegation, and Ms Briggs' explanation appears to have been accepted without question. No further action was taken despite the fact that the video showed Ms Briggs to be clearly asleep on duty.

133. On balance we find that the claimant was not treated less favourably than Ms Briggs at the investigation stage. Both the claimant and Ms Briggs were the subject of a disciplinary investigation in relation to sleeping at work.

134. We do however find that the claimant was treated less favourably than Ms Briggs in relation to all of the other allegations of discrimination. Ms Briggs was not invited to a disciplinary hearing or subject to a final warning. No further action at all was taken against her following the investigation meeting. Moreover, Ms Briggs did not need to appeal against the outcome of the disciplinary process because no disciplinary action was taken. Even if it were to be said that Ms Briggs was not an appropriate comparator in relation to the appeal process, because she did not go through an appeal process, we find that, in light of the way the white comparator was treated at disciplinary stage (by not being invited to a disciplinary hearing or given a warning)

135. We have no hesitation in finding that the respondent's treatment of the claimant, at all stages, was a detriment. Subjecting an employee to a disciplinary investigation, a disciplinary hearing, a final written warning, and an appeal process will in most cases amount to a detriment, and we find that in this case it did. It was conduct that was unwanted by the claimant and which caused her considerable distress.

136. The final question for us to decide is whether the treatment of the claimant was because of race. In deciding this question we have reminded ourselves of the burden of proof provisions that apply in discrimination cases. The first stage involves considering whether there are facts from which we could decide, in the absence of any other explanation, that the respondent discriminated against the claimant. We recognise that in direct discrimination claims it is unusual to find direct evidence of discrimination, and that discriminators rarely admit to discrimination.

137. The claimant has shown on the evidence before us that she was treated less favourably than a white comparator, Angela Briggs, in relation to each of the allegations of discrimination save those relating to the investigation. Angela Briggs was not called to a disciplinary hearing, did not receive a final written warning and, as a result, did not need to go through an appeal process.

138. In addition, the claimant and her representative repeatedly made complaints of discrimination, from the start of the disciplinary hearing and continuing through the appeal process, which the respondent failed to properly consider or investigate. We take account of the fact that the respondent failed to properly investigate the allegations of discrimination at all three stages of the process, investigation, disciplinary and appeal. The respondent failed to take the complaints of discrimination seriously, to properly engage with them and to investigate them. Allegations of discrimination are extremely serious. The respondent did not give them the respect that they deserved.

139. The fact that the respondent did not consider properly the allegations of discrimination that were made by the claimant and her trade union representative, that the respondent only interviewed white members of staff and declined to interview black members of staff, as well as the fact that the appeal hearer refused to consider evidence of a white nurse sleeping on duty are, in our view, sufficient for us to conclude that, in the absence of an alternative explanation, the treatment of the claimant was because of race.

140. The claimant has in our view established a prima facie case of discrimination in relation to each complaint of discrimination except that relating to the initial investigation. The burden therefore shifts to the respondent to prove, on the balance of probabilities, that it did not discriminate.

141. The respondent has not discharged that burden. The respondent has not provided a credible explanation for treating the claimant differently to Angela Briggs. The suggestion that the decision to take no further action against Ms Briggs was justified because the sleeping on duty was historical is not persuasive. The respondent's policies do not say that gross misconduct will be disregarded after a certain period of time, and the evidence that Ms Briggs was sleeping on duty was incontrovertible. In contrast, there was no conclusive evidence that the claimant had been asleep and the claimant strongly denied having been so.

142. In addition, Ms Payne's suggestion that, whilst she had the power to carry out interviews at the disciplinary stage, she did not do so because it was not normal practice, is unconvincing. The claimant was making serious allegations of discrimination and unfairness, and it is no answer to such allegations to say 'it would not be normal practice' to take steps that it was within Ms Payne's power to take, in order to address those allegations.

143. Similarly, Ms Blundell's suggestion that speaking to Ms Payne and Ms Swift was sufficient to address the serious concerns raised by the claimant and her representative is not persuasive. We are not persuaded that she could properly assess whether the allegations were racially motivated when that suggestion had never been put to those who had made the allegations in the first place.

144. The suggestion that the respondent did not want to carry out further investigation out of concerns for the claimant's health and a desire not to delay the investigation any further is not credible, given the time that it took to conclude the disciplinary process, and the impact that the process itself was having on the claimant who was,

by that time, off with work related stress.

145. We accept, on balance, that the failings in the initial investigation by Ms Swift, were due to lack of experience and expertise. The respondent has not, however, discharged the burden of establishing that the failings in the disciplinary process, the issuing of the final written warning and the failings in the appeal process were due to non-discriminatory reasons.

146. For these reasons we find that the complaint of direct race discrimination is well founded in relation to all of the allegations except those relating to the investigation. The complaints about the investigation fail firstly because the claimant has not shown that she was treated less favourably than Angela Briggs and secondly the respondent has provided a non-discriminatory explanation for the treatment.

Employment Judge Ayre

Date: 23 March 2025

JUDGMENT SENT TO THE PARTIES ON

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