



EMPLOYMENT TRIBUNALS

Claimant

Respondents

Mr T Olaniyan

v

Blossom Children's Homes Ltd

Heard at: Watford, in person

On: 20-22 July 2026

Before: Employment Judge Hyams

Members:

Mr A Scott
Ms A Telfer

Representation:

For the claimant: In person

For the respondent: Mr Nigel Henry, representative

UNANIMOUS JUDGMENT ON LIABILITY

1. The claimant was not dismissed unfairly within the meaning of 98(4) of the Employment Rights Act 1996.
2. The claimant's claim of direct race discrimination within the meaning of section 13 of the EqA 2010, contrary to section 39(2) of that Act, does not succeed and is dismissed.
3. The claimant's claim of direct disability discrimination within the meaning of section 13 of the EqA 2010, contrary to section 39(2) of that Act, does not succeed and is dismissed.
4. The claimant's claim of discrimination within the meaning of section 15 of that Act does not succeed and is dismissed.
5. The claimant's claim of a failure to make reasonable adjustments within the meaning of section 20(3) of the EqA 2010, contrary to sections 21 and 39(5) of that Act, does not succeed and is dismissed.
6. The claimant's claim that he was prevented from taking breaks contrary to regulation 12 of the Working Time Regulations 1998 does not succeed and is dismissed.

REASONS

These reasons

- 1 We, through Employment Judge (“EJ”) Hyams, gave judgment orally on 22 July 2026, with full reasons on the basis that if written reasons were asked for then those written reasons would supersede what was said by way of oral reasons. At the end of the hearing, the claimant said that he wanted the reasons to be given in writing. These are those written reasons.

The claims made by the claimant

- 2 The claimant’s claim form was presented on 7 April 2023. There was a copy of it at pages 5-16 of the 238-page bundle put before us as the hearing bundle. Any reference to a page below is, unless otherwise stated, to a page of that bundle. There was an early conciliation certificate at page 4. It was dated 26 March 2023 and the date of receipt by ACAS of notification of early conciliation was 12 February 2023. In the circumstances, the claim was in time in respect of conduct occurring on or after 13 November 2022.
- 3 The claimant was employed as a Waking Night Residential Support Worker at Rose House, which is a small, specialist, care home for young people with learning disabilities and challenging behaviour, from 18 January 2021 to 3 February 2023, when he was dismissed with immediate effect for gross misconduct. During cross-examination, the claimant agreed that his employer was in fact as stated in the heading to this document and not as stated in the claim form, and that it should be changed to the name stated above. The respondent’s main stated reason for dismissing the claimant was that he had been found asleep during the night of 27-28 November 2022 when he should have been awake.
- 4 The details of the claim form bore careful scrutiny if only because the claim subsequently developed in ways which were not the subject of any application to amend, and ultimately the claimant did not pursue many of the aspects of the claim which were included in a list of issues which was agreed by the parties after a preliminary hearing which was conducted on 10 October 2023 by Judge A Shields, sitting as an Employment Judge (“EJ”). Judge Shields conducted that hearing by telephone, and she could not hear what the parties were saying properly, so she listed the issues as she understood them in her record of that hearing, which was at pages 35-48. The problem was that she had no idea what the substance of the issues was, and so she inserted into the list, which was drawn from the national template, a number of comments in this form: “[Details to be agreed and inserted by the Parties following the Request for Further Information from the Respondent and the Response from the Appellant.]” (Sic)

- 5 There was a list of issues at pages 61-66. Mr Henry (who is employed by Croner, and to whom we were grateful for the manner in which he conducted the hearing on behalf of the respondent, including by his well-judged cross-examination and submissions) said that it was compiled by a former colleague, Mr Brotherton, who no longer works for Croner, with input from the claimant.
- 6 Much of the content of that list of issues was not supported by any part of the witness statement of the claimant. At the end of the oral evidence and after the claimant had sent us some written closing submissions, which was at about 3.30pm on the second day of the hearing, Tuesday 21 July 2026, we, through EJ Hyams, asked whether the claimant was pressing any of the claims indicated by the issues which were not dealt with in his witness statement or his written closing submissions, and he said that he was not. We record here that while the claimant said in paragraph 4 of his witness statement that his claims included one of “victimisation”, there was no hint of such a claim in the claim form.
- 7 That meant that the claims were, as agreed with the claimant and Mr Henry at the end of the oral evidence and submissions (and we heard oral submissions from the claimant and Mr Henry at the start of 22 July 2026) and bearing in mind the list of issues at pages 61-66, of (1) unfair dismissal within the meaning of section 98(4) of the Employment Rights Act 1996 (“ERA 1996”), (2) direct race discrimination within the meaning of section 13 of the EqA 2010, contrary to section 39(2) of that Act, (3) direct disability discrimination (within the meaning of the same provisions), (4) discrimination within the meaning of section 15 of the EqA 2010, (5) a failure to make one or more reasonable adjustments within the meaning of section 20 of that Act, and (6) that the claimant was denied the right to take breaks as provided for by the Working Time Regulations 1998. In those regards, we now record the following things.
 - 7.1 The respondent accepted that the claimant was disabled within the meaning of the EqA 2010 by reason of anxiety and depression.
 - 7.2 The claim of direct discrimination was made in relation to the claimant’s dismissal: it was his case that his dismissal was tainted by such discrimination. The claim of direct discrimination was not pressed on any other basis.
 - 7.3 It was the claimant’s claim (made under section 15 of the EqA 2010) that he was treated unfavourably because of something arising in consequence of his disability of anxiety and depression (1) by being suspended and then dismissed and (2) as a result of his grievances being dismissed.
- 8 We return to those claims after stating the relevant law and our findings of fact.

Relevant law

Direct discrimination within the meaning of section 13 of the EqA 2010

9 Section 13 of the EqA 2010 provides:

“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.”

10 Proving a person's motivation is usually difficult, for obvious reasons. That is why section 136 of the EqA 2010 was enacted. It provides:

“(1) This section applies to any proceedings relating to a contravention of this Act.

(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.”

11 When applying section 136, it is possible, when considering whether or not there are facts from which it would be possible to draw the inference that the respondent did what is alleged to have been less favourable treatment because of a protected characteristic, to take into account the respondent's evidence about, but not its explanation for, the treatment. That is clear from paragraphs 19-47 of the judgment of Lord Leggatt JSC (with which Lord Hodge, Lord Briggs, Lady Arden and Lord Hamblin agreed) in the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] ICR 1263.

12 However, as the House of Lords said in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, in some cases the best way to approach the question whether or not there has been for example direct discrimination within the meaning of section 13 of the EqA 2010 is by asking what was the reason why the conduct or omission in question occurred.

13 If there is no evidence from which the inference could be drawn that a claimant's treatment was to any extent because of a protected characteristic, then the claim of direct discrimination is likely, if not very likely, to fail. The mere fact that a claimant had a particular protected characteristic and was treated detrimentally will not, without something additional from which such an inference could be drawn, enable a court or tribunal to find that the claimant was discriminated against directly because of that protected characteristic. That is stated specifically in paragraph 46 of the judgment of the Supreme Court's judgment in *Efobi*, approving directly what was said in that regard by Mummery LJ in *Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] IRLR 246, [2007] ICR 867.

Section 15 of the EqA 2010

14 Section 15 provides:

“(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B’s disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”

15 Paragraph L[377.02] of *Harvey on industrial relations and employment law* concerns the question whether any unfavourable treatment “is a proportionate means of achieving a legitimate aim” and is as follows.

“The EAT in *Hensman v Ministry of Defence* UKEAT/0067/14/DM, [2014] EqLR 670 applied the justification test as described in *Hardy and Hansons Plc v Lax* [2005] EWCA Civ 846, [2005] IRLR 726, [2005] ICR 1565 to a claim of discrimination under EqA 2010 s 15. Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. (Applied *Monmouthshire County Council v Harris* UKEAT/0010/15 (23 October 2015, unreported)). As stated expressly in the EAT judgment in *City of York Council v Grosset* UKEAT/0015/16 (1 November 2016, unreported), the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent’s ‘workplace practices and business considerations’ firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET. The Court of Appeal in *Grosset* ([2018] EWCA Civ 1105, [2018] IRLR 746) upheld this reasoning, underlining that ‘the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment’.”

Claims of a failure to make one or more reasonable adjustments

16 If a claimant satisfies an employment tribunal that he or she had an impairment within the meaning of section 6 of, and Schedule 1 to, the EqA 2010 at a material time, then an obligation to make a reasonable adjustment within the meaning of section 20(3) of that Act will have arisen where a provision, criterion or practice (“PCP”) was applied by the employer which put the claimant “at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.” A PCP cannot at least normally be a single act towards the claimant: it has to have some sort of generality to it. That was emphasised in

Ishola v Transport for London [2020] ICR 1204 where, the Court of Appeal decided, as it is said in the headnote, that

“however widely and purposively the concept [of a PCP] was to be interpreted, it did not apply to every act of unfair treatment of a particular employee, as that was not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments was intended to address; that, in context, all three words [i.e. ‘provision’, ‘criterion’ and ‘practice’] carried the connotation of a state of affairs indicating how similar cases were generally treated or how a similar case would be treated if it occurred again; that, therefore, a one-off decision or act could be a practice, but it was not necessarily”.

- 17 As long as the employer knew or ought reasonably to have known of the disability and the manner in which the disability was likely to put the claimant at a substantial disadvantage (see paragraph 20 of Schedule 8 to the EqA 2010), there will have been a duty, imposed by a combination of sections 20, 21 and 39(5) of the EqA 2010, “to take such steps as it is reasonable to have to take to avoid the disadvantage”. Whether or not it would have been reasonable to make the adjustment sought is a matter for the tribunal to determine, taking an objective approach, and is not to be determined by reference to the “range of reasonable responses of a reasonable employer” approach applicable in the law of unfair dismissal: *Smith v Churchill Stairlifts plc* [2006] ICR 524.

The law of unfair dismissal

- 18 In a claim of unfair dismissal within the meaning of section 98 of the ERA 1996, where there is no dispute that the claimant was dismissed, in practice the first question is what was the reason for the dismissal. In that regard, in *Abernethy v Mott Hay and Anderson* [1974] IRLR 213, [1974] ICR 323, at 330B-C, Cairns LJ said this:

“A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.”

- 19 Conduct is a potentially fair reason for an employee’s dismissal. That is because of sections 98(1) and (2) of the ERA 1996.
- 20 Where the employer has satisfied the tribunal that the reason is a potentially fair one, the question of the fairness of the dismissal falls to be determined under section 98(4) of the ERA 1996, which provides this:

“Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) 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."

21 In a claim of unfair dismissal where the tribunal concludes that the reason for the dismissal was the claimant's conduct, the following issues arise.

21.1 Did the employer, before concluding that the employee had done that for which he or she was dismissed, carry out an investigation which it was within the range of reasonable responses of a reasonable employer to carry out? The best authority in that regard is the decision of the Court of Appeal in *J Sainsbury plc v Hitt* [2003] ICR 111.

21.2 Were there reasonable grounds for concluding that the claimant had committed the conduct for which he or she was dismissed? The following statement of the applicable principles in *British Home Stores v Burchell* [1978] IRLR 379 shows why that question needs to be answered, and how it has to be answered (although the third question stated in the following extract is the predecessor to the question which we have stated in the preceding sub-paragraph above; the correct test is as stated in that sub-paragraph).

"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

22 The final question which will then need to be answered is whether the dismissal of the claimant for the conduct for which he or she was in fact dismissed was outside the range of reasonable responses of a reasonable employer.

The Working Time Regulations 1998, SI 1998/1833 ("WTR 1998")

- 23 Regulation 12(1) of the WTR 1998 entitles a worker to a rest break where the worker's "working time is more than six hours". That must be for "an uninterrupted period of not less than 20 minutes", but the entitlement is subject to the exception provided for in regulation 21 "where the worker's activities involve the need for continuity of service or production, as may be the case in relation to– (i) services relating to the reception, treatment or care provided by hospitals or similar establishments (including the activities of doctors in training), residential institutions and prisons".
- 24 By reason of regulation 24 of the WTR 1998, where
- "the application of any provision of these Regulations is excluded by regulation 21 [and] a worker is accordingly required by his employer to work during a period which would otherwise be a rest period or rest break–
- (a) his employer shall wherever possible allow him to take an equivalent period of compensatory rest, and
- (b) in exceptional cases in which it is not possible, for objective reasons, to grant such a period of rest, his employer shall afford him such protection as may be appropriate in order to safeguard the worker's health and safety."

The evidence which we heard

- 25 We heard oral evidence from the claimant on his own behalf and, on behalf of the respondent, from
- 25.1 Mr James Baker, a registered manager employed by what we understood to be an associated company of the respondent, namely Champion Children NW London Limited;
- 25.2 Mr Matthew Wakeling, who was a director of both the respondent and Champion Children NW London Ltd; and
- 25.3 Mr Jack Woods, who was the registered manager of Rose House.

Our findings of fact

- 26 There was a copy of the claimant's "statement of main terms and conditions of employment" at pages 67-74, which the claimant signed (as shown by page 75) on 28 May 2021. The claimant's full job title as shown by page 67 was "Waking Night Residential Support Worker".
- 27 The claimant was the subject of an investigation meeting on 14 May 2021 of which there was a record at pages 76-80. It was conducted by Mr Woods. The first paragraph of the content was on page 77 and was this:

“Thank you for joining us for this investigation meeting, first I would like to outline why I’ve asked you to come in. This is regarding the situation where you were in Jack’s (the young person’s) room. Ken spoke to you about this then you were found in Jack’s room again with your personal laptop. I would like to hear your versions of things. So please start off by giving me your version of events.”

- 28 On page 78, there was this exchange (JW being Mr Woods and MO being the claimant):

“JW: Would having a personal laptop be a potential safeguarding issue?

MO: I don’t use it for personal use, I take my job very seriously. *Says all the colleagues witnessed him logging into the work website* and that he has eye problems so cannot use the phone but he has downloaded the work website on his personal computer. You’ve seen me with the laptop before? *MO questioned Jack*

JW: yes, and we verbally had a conversation about this. You were showing Amin YouTube videos and we discussed personal and professional [sic] boundaries. You should not be using your personal laptop”.

- 29 There was a record of a discussion stated to have been created on 28 November 2021 at pages 81-82. The claimant was now referred to as “MTO”. The record had two paragraphs on page 82, the first of which was this:

“JW arrived on shift at 08:30 on 27.11.21 and observed MTO to be using his personal laptop in the office. JW queried why MTO was using his personal laptop. MTO did not respond and appeared confused why the question was being asked. JW clarified [t]he way the reason for challenging MTO was in relation to a previous investigation that took place that involved MTO using his personal laptop in JT’s bedroom and that one of the actions following this was that MTO would not bring his own laptop to the home. MTO acknowledged what was being said and informed JW he would not bring it again.”

- 30 There was a document entitled “Safer Caring” at pages 107-129 which was dated 2 June 2022 and which the claimant was shown by page 130 to have seen on 23 June 2022. In section 29 on pages 128-129, under the heading “Photography and Video”, there was a lengthy section of text, which included the following statements:

- 30.1 “Within the children’s homes provision is made for all Adults in the homes to have access to a work mobile phone (with a camera facility), a digital camera and/or a video camcorder, whereby Adults are able to take photographs for the home and for the children and young people (i.e. life story work). However, Adults should not use their own camera or personal mobile to take pictures of children and young people, as these cannot be

monitored in the same way and it is not appropriate for Adults to take photographs of children or young people for their own personal use.”

30.2 “Key Principles for Good Practice:

Adults should:

Only use equipment used by the organisation”.

- 31 On 11 November 2022, Mr Woods sent a “Notification to all staff regarding personal IT equipment” which was on page 132 and which was shown by what was on that page to have been seen by the claimant. It was in these terms:

“Effective immediately no one is to bring their own IT equipment to use at the home, we now have an additional laptop available for those who do not wish to use their work mobile phones or the chromebox’s that are already available. There are no exceptions to the above. Thanks”

- 32 On 18 November 2022, there was a meeting between the claimant and Mr Woods which was noted in the document at pages 135-136 (which the claimant did not challenge). Only the first part of the document was material, and that part was in the following terms.

“JW thanked MTO for attending and outlined the purpose for the meeting. Following a discussion that took place on 13/11/2022 where MTO explained he had not attended shifts he was scheduled for on the 7th and 12th. JW asked the reason why MTO had not attended, MTO initially said it was because it was not his shift pattern before adding he was experiencing difficulties within his personal life which included ongoing depression and a court case involving his children and ex wife.

JW asked MTO if he could share further details relating to his treatment for depression. MTO explained this was a long standing condition with work and ongoing court proceedings impacting this. JW asked what specifically about work was contributing to this as support can be put in place. MTO did not answer, JW asked whether there was anything with the specific duties, MTO informed JW there was not, JW asked if it was working at night, MTO informed JW it was not. JW asked what support MTO required from himself and the organisation. MTO said he did not require any additional support.

MTO then showed JW 2 X packets of medication.

high blood pressure amlodine 10mg - once times daily - MTO does not take this medication regularly, sometimes will get a headache so will take a tablet..

Depression - sertraline 50mg 1 a day, Jw asked if MTO follows the advice given, MT shared he does not take the medication regularly, he finds that work helps and he likes to keep busy. Finds work helps, keeping busy."

- 33 On the night of 27-28 November 2022, Mr Woods conducted a spot check of the situation at Rose House. He was accompanied by the deputy manager, Mr Simba Mughodi. There were two notes of what happened during that spot check which, according to the index to the hearing bundle, were made by them (one by Mr Woods and the other by Mr Mughodi). The notes were at pages 137-138 and 139. Both sets of notes contained redactions, but no complaint was made by the claimant about those redactions, so we concluded that the redacted parts were not relevant. The notes were not dated, and they were not proved by the evidence of any witness for the respondent, including that of Mr Woods, who would have been most likely to be able to give evidence about them. The note at pages 137-138 was attributed to Mr Woods in the index to the hearing bundle. It was, we concluded for the reasons which we give in paragraph 46 below, written at least reasonably contemporaneously.
- 34 Mr Woods gave oral evidence about what he had seen when he went to the house, and we accepted that evidence in its entirety (including paragraphs 27-30 of his witness statement, which we have set out in paragraph 36 below). He and Mr Mughodi on entering the house via its front door split up. Mr Woods checked the upstairs part of the building (of which there were two floors) and Mr Mughodi checked the ground floor.
- 35 The note at pages 137-138 was so far as relevant in the following terms.

"As we approached the building we observed that the blinds were shut in the office and the lights were off, the lights in the top lounge were also off as observed from outside the building. We entered the property at 04:00; upon entering the automatic light sensor activated and turned the lights on in the hallway. The office, kitchen and ground floor lounge doors were shut.

I then made my way up the stairs and SM remained stationed in the hallway, as I began to climb the second set of stairs I began to hear a phone alarm. I reached the doorway of the top lounge within seconds of this sounding. KW's bedroom and ensuite doors were shut, the top lounge door was open with the lights off. Inside the lounge Michael (Taofiki Dada Olanyian) was laying on his back on the floor with his head resting on a bed pillow and his body covered in a blanket. To the right of TDO was his personal laptop with the device opened in an operating position with the screen facing the door, along with his laptop bag. As I entered the room I verbally prompted TDO to wake; TDO immediately sat up and appeared surprised by my presence. TDO then switched off his phone alarm and stood up. I asked TDO to gather his belongings and make his way downstairs and informed him he was required to leave and would be suspended pending investigation as he was found to be sleeping whilst on shift, TDO did not respond. TDO seemed

dazed and left the room without his belongings, I again asked TDO to bring his belongings and join me downstairs.

I then made my way back downstairs to the ground floor”.

36 In paragraphs 27-30 of Mr Woods’ witness statement, he said this:

“27. It is essential that waking night staff are conscious and prepared to undertake their duties when at work. The Respondent homes vulnerable children and young people who sometimes wander into other rooms during the night; the following evening one young person suffered a seizure during the night shift. If staff are asleep they are not available for emergencies.

28. I said the Claimant’s name and he awoke. He was visibly shocked to see me and then sat up and switched off his mobile alarm. I asked him to get his belongings and that he was immediately suspended pending investigation.

29. Michael and his colleague were both found to be asleep. I asked both to leave the premises and told them we would be in touch regarding the investigation, as I would any sleeping night staff member. I did not want to engage in further conversation while emotions may have been high, to avoid any prejudice of the ensuing investigation.

30. Once Michael and the other colleague had left the home, I found they had not completed their cleaning duties or updated the logs as they should have done [133-134].”

37 The claimant accepted that he and that “other colleague”, whom he called “Ambassador” and who was referred to in the documents before us in several places also as “AN”, had not made any entries on the log at page 134 after 01:32, and that the next entry was made by Mr Woods at 04:05.

38 The claimant left the building at 04:12. Mr Woods’ oral evidence, which the claimant did not challenge, was that there was a bus stop just outside Rose House.

39 At 05:07 on the same day, so less than an hour later, the claimant sent (from the bus on which he was then travelling: see paragraph 44 below) the letter at page 140 to Mr Woods, in the following terms.

“Dear Jack

Please accept this letter as notice that I will be resigning from my position here at blossom children. My final day of work will be 28/11/22.

I would like to take this opportunity to thank you for the knowledge and experience I have gained by Working here. I am very grateful for the time I

have spent on our team and the children and the professional relationship I've built.

It's been a pleasure working for you, and I wish the company continued success, and I hope to stay in touch in the future."

- 40 Mr Woods said in paragraph 31 of his witness statement that he was "of the view that Michael had done this because he feared an investigation and potential dismissal so wanted to leave first." We accepted that evidence. Mr Woods could simply have left the situation where it was, with the claimant having resigned, but he did not. Rather, Mr Woods responded in the letter at page 141 dated 29 November 2022, which contained the following paragraphs after acknowledging receipt of the resignation letter which we have set out in the preceding paragraph above.

"During my visit to the home on **28th November 2022**, you were verbally advised that you had been suspended pending an investigation into allegations of **sleeping whilst on duty**. I confirm that no decision has been reached with regard to what, if any, action would be taken following the investigation.

I am prepared to accept your resignation. However, should you feel that you have made a hasty decision in resigning, I would be prepared to consider allowing you to withdraw your resignation. Should this be the case, you should be aware the ongoing investigation process would have to be concluded.

If you have not contacted me by **1st December 2022** I will arrange for your resignation letter to be processed."

- 41 The claimant did then withdraw his resignation. On 1 December 2022 Mr Mark Higgins interviewed Mr Woods as part of a disciplinary investigation into the conduct of the claimant. The record of the interview was at pages 144-146. It was in substance to the same effect as the note which we have set out in paragraph 35 above. However, the following record of what Mr Woods said in the interview seemed to us to be the best contemporaneous evidence of what Mr Woods saw when he went to Rose House. That was in part because of what we say in paragraph 46 below, but it was mainly because of the content of the record and because what was recorded in it was on any view said no later than three days after the events to which it related. The record (in which the claimant was referred to as "TDO") was at page 145, where the reference to "MW" was plainly an error: it should have been to "MH", i.e. Mr Higgins.

"JW: As I went upstairs, I heard a phone alarm going off. The upstairs lounge door was open, and I witnessed TDO laying on the floor on his back asleep. He had a pillow and covered himself with a blanket. His personal laptop was open. I then called his name, and he awoke, he was visibly shocked at my presence. TDO then sat up and switched off his phone

alarm. I asked TDO to get his belongings and informed him that he would be suspended effective immediately pending an investigation, since he was sleeping on shift. TDO did not respond, in my opinion he still seemed half asleep. TDO left the lounge and went downstairs without his belongings. I had to once again remind him to take his items with him.

MW: On reflection would it have been prudent to enquire what had happened.

JW: No, because it was evident that he was asleep and it my decisions to suspend him pending an investigation [sic]. I asked TDO for the home keys, which he took some time to locate. TDO then offered to hand in his mobile phone. I informed him that it was not necessary, however he handed the phone to me. I informed him that Management will be in touch regarding the investigation.

Within approximately 40 minutes of asking him to leave the premises, I received an email from TDO tendering his resignation.”

- 42 The claimant was interviewed twice as part of the same investigation, and the note of the first interview was at pages 147-150. That interview took place on 5 December 2022. In the record of the interview, this exchange was recorded (at page 147):

‘I gave instructions to AN to stay in the office because he had a stomach ache. I was in the upstairs lounge. I did use a blanket and pillow (because the room was very cold) and lay on the floor, where I could see the hallway. I was not asleep. I was monitoring the upstairs hallway.

During the night I was caring for residents and AN who was ill.

When Jack came upstairs I was laying on the floor. I was not asleep. Jack then said to me “You are sleeping” I responded immediately that I am not sleeping. He then said “can you pack your bag. I said it was 4 am and you are asking me to leave. We had to walk at 4am to find a night bus route. We are also meant to have a break during the shift. Jack did not ask any information, he just said leave, I found this racist and felt like I was being bullied. There was no duty of care for the staff when he asked us to leave the premises.

MH: Why do deem this to be racist being asked to leave.

TDO: It is that black people can look after themselves at this time of the morning’.

- 43 On page 148, there was this exchange recorded:

TDO: ... I had also taken medication for my high blood pressure, which can make me drowsy, however when Jack [Woods] came I was fully alert.

MH: Read JW statement to TDO that explained that he was found sleeping in the loft and made reference to to [sic] having a pillow and blanket

TDO: This is not true, I was using a pillow and blanket, I was not sleeping, why would I leave the door open, if I was sleeping. I left the door open, so I can see if the children come out. I am entitled to a break and my eyes were dry and sore, i use eye drops, my medication can make me sleepy. TDO took some flattened packets of medication from his bag to show MH.

MH: Jack made reference to use of your laptop at work in his witness statement, I understand that we cannot use these items at work?

TDO: My computer was on because I was also completing NVQ modules previously. Staff are not supported at the home, we need to be shown more support at work.

It is against the rules to tell staff not to use my phone at work, what if i need to call someone that is sick. JW did not inform me I was suspended at the home and he just asked me to leave."

44 At page 149, there was this exchange:

"MH: Can you tell us why you submitted a letter of resignation.

TDO: I was so aggrieved and felt disrespected about the whole situation. I wrote the resignation when I was on the night bus. Jack then sent me an email asking me to withdraw the resignation letter."

45 The claimant was subsequently interviewed again, and the record of the interview was at pages 151-152. That record was dated 14 December 2022, and the claimant did not say that that date was inaccurate. As a result, we concluded that the interview took place on that day. On page 152, there was this exchange:

"MH: I understand that you are not supposed to use personal devices as part of your policy at Rose house.

TDO: I have never been informed about any policy where I could not use personal devices. I use the work phone to do childrens logs and I used my personal phone to AN and because I used my personal phone inside the house and that is not out."

46 Mr Higgins prepared a report of his investigation. It was at pages 153-156. We concluded from what was said in the report that Mr Higgins had asked for the written statements which were at pages 137-139 and to which we refer in paragraphs 33 and 35 above. However, as we say in paragraph 33 above, the statements were not dated, and it was not clear from the report when the

statements were sought (although the index to the hearing bundle gave them the date of 28 November 2022). The report of Mr Higgins at pages 153-156 was, however, plainly written after the second investigation meeting with the claimant, which as we say in the preceding paragraph above occurred on 14 December 2022. The report was simply dated (on page 156) "December 2022". In the index to the bundle, however, it was given the date of 22 December 2022.

- 47 On 25 January 2023, the claimant was sent by Mr Adrian Lobo the letter at pages 165-166. It started:

"Re: Follow up from informal Grievance and invite to Disciplinary Hearing

Following from concerns you raised informally on 5th December 2022, we have tried multiple times to book in and hear these concerns through the formal grievance procedure with yourself. We have also requested that you raise your concerns by recording a formal grievance and you have failed to do so. Due to REASON, and lack of participation from your side we are unable to hearing this formally and therefore consider this matter closed. [Sic]

Further to our recent letter reconfirming suspension from work on full pay, and the investigation into the allegations set out below, you are required to attend a formal Disciplinary Hearing to be held on 26.01.23 at 17.00pm at Head Office, Suite 7 & 8 Moran House, NW10 2JJ.

James Baker, Registered Manager of Bay Tree House will be conducting the Hearing and Bose Omotoye, Deputy Manager of Fig Tree House will also be present to take notes.

The Disciplinary Hearing is to consider the following allegation(s):-

As a member of Waking Night Staff you were sleeping while responsible for supervising and monitoring the children and young people."

- 48 The letter then listed its enclosures, the first six of which were as follows:

- "1. TDO Investigation Report- Mark Higgins**
- 2. Letter re Resignation While Suspended sent to TDO**
- 3. TDO Appendix 1. 28_11_2022 - Spot check- Jack Woods**
- 4. TDO Appendix 2. - WN statement SM- Simba Mugodhi**
- 5. TDO Appendix 3. Jack Woods Investigation Meeting minutes**
- 6. TDO Appendix 4. Simba Mugodhi Investigation Meeting 1 Dec 2022".**

- 49 On the next day, 26 January 2023, the claimant sent the email at page 167, asking among other things for "the minutes of the meeting in word" for which, he wrote, he had previously asked but which he had not been given. He also asked for more "time to go through all of the documents and appendices sent to [him]".

- 50 The claimant appeared from the hearing bundle to have sent the letter at pages 157-158 to "Beth", but the email enclosing it was not in the hearing bundle and the letter was undated. We saw that it was, however, given the date of 28 December 2022 in the index to the bundle. We had the texts of a long series of emails sent in one email to us on 21 July 2026, but the texts were rather out of chronological order and the dates of the emails themselves were only shown on some of them. We wondered whether the claimant's letter at pages 157-158 was sent on 27 January 2023. However, "Beth" was plainly Beth Massey, for whom there was a witness statement before us but who did not give oral evidence, and in paragraph 2 of that statement she said that the claimant's grievance letter was dated 27 January 2023 and was at pages 176-177. The letter at pages 176-177 was not a repeat of what was at pages 157-158. The letter at pages 176-177 was about the conduct of Mr Woods, and included an allegation that it was "tantamount to racism". That was said in the following passage.

"I have found his attitude towards me and a lot of other black colleagues depicting unfavourable treatment towards us on grounds of our race and his mentality around the expectations of work is tantamount to racism, he has constituted investigations for not cleaning, and this attitude has lead to high turnover of staff within the team. He has been condescending as aforementioned and rude a times. and my rationale for resign was due to the persistent power imbalance displayed, he did not listen to me as per his usual stance and I felt harassed again.

I have raised concerns about working time directive, I am entitled to an hour break so not sure why mark Higgins has concluded albeit not factually that James assertion that I was sleeping is accurate, Investigations in line with ACAS guidance must be based on facts, not opinions of the investigator.

Provision for break was not provided and as aforementioned, I was within my right to rest for 1 hour in line with the working time directive 2003.

I have evidence in the form of my work colleagues, and if colleagues are not worried about victimisation, I am sure they will be able to provide evidence.

I believe Jack's actions could be construed as victimisation, I argued that I am not a cleaner and that my job primarily was to look after the kids and do the basic cleaning, which I had done on the day in question as I did whenever I was on shift and as aforementioned, again on the day in question, between 9 -10 pm, however, he consistently mistreated and shouted me down when I tried to raise valid concerns about work apprehensions and or any issues.

I would be grateful if you could let me know when I can meet you to talk about my grievance. I would like to be accompanied at the meeting

particularly as a reasonable adjustment because of my mental state of mind, low mood and depression.

I will appreciate if concession is given to me re my choice of companion throughout this process, as a reasonable adjustment to give me the opportunity to share my experience and concern as stated above.”

- 51 The letter at pages 176-177 also referred to the claimant’s “depression and mental health issues”. That was done in the following passage, which was the first part of the letter.

“I am writing to raise a formal grievance. I have spoken to ACAS and they think it is imperative that I raise this grievance.

I have had problems and consistently raised concerns about Jack Wood my manager.

I raised this at the meeting with Mark Higgins, who downplayed my concerns by asserting that I have no evidence to back my claim, I find that unacceptable especially given the organisation is aware and it has even been documented that I struggle with depression and mental health issues.”

- 52 The outcome of Ms Massey’s investigation of the grievance was in the letter dated 31 January 2023 at pages 185-188. We noted in particular (but not only) two parts of that letter. The first was on page 186 and was this.

“I note that since the allegation and subsequent suspension and Investigation process has been instigated you have stated that you have requested for an occupational health assessment to be conducted. This appears to contradict the statement that you made in our meeting where you stated that you were fit to work.”

- 53 The second part was the whole of the section on pages 186-187 under the heading “4. Lack of breaks during your shift”, which was as follows.

“As you will know due to the nature of the role it can be difficult to have dedicated break times due to the needs of the young people. I note that this concern has not been raised in any supervisions held on file, where a possible solution may have been found. However, you did mention during the meeting that your medication does make you drowsy and on occasions the children can rise and not settle. You confirmed that on those occasions you do not always record in the daily running log these occurrences, although you are aware it is an expectation of the role.

This raises a number of concerns regarding your conduct, in particular safeguarding. I note that this has been raised with you as a concern on numerous occasions in your time with the organisation.

As you share your waking night shift with a colleague, I would also have expected some kind of communication between you and your colleague that may have supported each of you to have a break, however as the children are in the main settled and the only other expectation is cleaning and paperwork, I would have expected this to allow plenty of time for a break."

- 54 On 1 February 2023, Mr Baker conducted the disciplinary hearing of which there was a record at pages 189-201. Mr Baker permitted the claimant to be accompanied and represented by a friend who was neither a work colleague nor a representative of a recognised trade union. That person was Temi Alao, who was recorded on page 189 to have attended as a "Support person". We saw from the document at pages 189-201 that the claimant was recorded to have said the following things in the following exchanges.

54.1 On page 190:

"JB - So you were on a break?

MTO - Yes

JB - Was your colleague aware that you were on a break?

MTO - No he was not as we have to split the children that night Ambassador was sick and I was the only one who was looking after the 4 children.

JB - And the use of personal devices?

MTO - There is no proof that I used my personal device, I was using my laptop for my NVQ 3".

54.2 On page 192:

"JB - And just clarify as well you had not informed your colleague that you were on a break

MTO - He was aware, he was aware because I know that my colleague was unwell on that particular night and he was downstairs in the office because he had a bellyache on that particular night, so I was looking after Ambassador, I was also looking after 4 kids, one person. And that night the kids wake up around 3 am, and I'm the only one running up and down between, 1 and 3 they wake up. The children running up and down in each other's room and am the only one, [K] was awake, [M] was awake and [J] was awake. And in the Logs someone needs to stay with [K] as [K] is the only female child and [K] also comes downstairs naked, that's why we make that suggestion that somebody needs to stay upstairs and [K] likes to flood the whole house with water. And that particular loft is very very cold, you can ask anybody there. We've been asking them for the key for the radiator, something that we cannot find the key for the radiator, I've been complaining, I've been sick and I told them that I can't continue to stay in the loft, its very cold and the weather, so I used the blanket, the blanket they have been using it before and everybody uses it. Even during the day

they use it when they stay upstairs, they use it to cover their feet, that's what I did on that day, so he thought maybe I was sleeping, so Jack made the assumption that and I respond to him that no, I don't sleep that I was on my break and that's what I said to Jack

JB - Can I clarify for the record as I know you said earlier that you did not inform your colleague that you were on a break.

MTO - Said?

JB - Did you inform your colleague that you were on a break?

MTO - We made an arrangement that I was going to go on my break but because it was, we always have the time, that so time we will go on break, definitely he was aware that I was going on my break because I told him when I went downstairs that I was tired, I said because we log between 0430 the kids will start to wake up and we start to prepare them for school."

54.3 On page 193:

"JB - And it was just you looking after the children, are you saying your colleague wasn't looking after them?

MTO - yes my colleague was unwell and he was downstairs in the office, am the only one looking after the four kids as [M] will be going to [J]'s room, [J] will be going to [M] room, you know these kids, when they are unsettled they will be going up and down and [K] also wanted to come downstairs, I Am the only one saying ok go to your room, so i was just going between them and standing between three of them, shouting and running up and down."

54.4 On page 197:

"JB - Ok, so MTO, in regards to what Jack witnessed, you had a blanket covering your leg and you were laying on your back

MTO - I was just sitting down, Jack should bring the proof, he should have taken a picture because I was told that he took a picture after when I left. You have to take a picture of me sleeping. I was just sitting and am not the only one

JB - Sorry you were sitting, you said you weren't laying down

MTO - I was just sitting and I just spread my leg like this, where I was sitting and he came in and said you are sleeping and I responded to him that i'm not sleeping, I respond to him that if I'm sleeping there's no way I would just respond to him. Regarding to my alarm, I set them to make sure that I carry out my welfare check on the children, every hour, ask any day staff, they will tell you. Even when I come from 9, 10, 11 my alarm will remind me to do checks. I check all the kids so I was laying down and put the blanket to cover my feet, so if I was sleeping, I would not have responded straight away as I would have been fast asleep. I was not fast asleep and people can tell you, I've even worked there, lone working where there will be no

staff. Only one working night and Jack will say the day staff is going to sleep with four kids and they will tell you I don't sleep. Every hour I do my log, even with one person working and one sleeping, for four young people and I still complete my logs. But because I was on my break, that particular day and the kids were unsettled, that is why we could not right the log every hour. And Jack also made it clear to us that the children are my priority. And he said just make sure that you note the time or what is going on and Jack never gave us the opportunity to complete our logs. I was laying and sitting, that's what I was doing. I just laying and put the blanket on my feet."

- 55 Mr Baker decided that the claimant should be dismissed. He communicated that decision in the letter dated 3 February 2023 at pages 203-204. The reasons given in that letter for the dismissal were as follows.

"You have failed to provide an acceptable explanation for the allegation that you were caught sleeping whilst on duty. There were inconsistencies in your account. Initially during our discussion you stated that you did not inform your colleague you were taking a break. You then changed this account. In your original statement you did not mention informing your colleague you were going on a break. Your colleague has made no reference to this event either. Also you stated your colleague was 'feeling better' and was sitting upright at the desktop when you informed him you were taking a break. This is not consistent with his presentation witnessed by two others just moments later.

You have admitted to using your personal laptop at work despite having previously been warned this was not allowed and contravened company policy.

I believe that the act of sleeping was pre-meditated and placed those in your care at serious risk. I consider your actions to amount to Gross Misconduct. I have been mindful of your long service with the Company and in mitigation, I have taken into consideration all that was raised. However, because of the pre-meditated nature of the offence, no expression of remorse and the disregard for the companies policies and procedures. I have no alternative but to dismiss.

Therefore, I have decided to take the severest sanction an employer can take against an employee and to summarily dismiss you with effect from today (03.02.23). You are not entitled to notice pay. I will arrange for your P45 to be forwarded to you in due course, together with payment for any outstanding holiday that you have accrued."

- 56 In his witness statement, Mr Baker said this:

"11. In consideration I took into account that the Claimant had purposely arranged a blanket and pillow, either on a chair (Claimant) or on the floor (Jack). This was not a case of the Claimant being drowsy and

unwittingly falling asleep, the Claimant was either planning to sleep, or careless that he would might likely fall asleep at work. The Claimant had also disregarded written company policy by using his personal laptop at work [132].

12. The Claimant had not provided a reasonable explanation for the his [sic] actions. I considered whether the Claimant had put the young people in the care of Blossom Children's home at risk.
13. On balance I concluded that the Claimant had planned to sleep at work and had deliberately slept at work. He had brought his personal laptop to work. Young people in the care of the Claimant had been put at unacceptable risk. The Claimants actions amounted to Gross Misconduct.
14. While I did consider a lesser disciplinary sanction, the misconduct was so serious that dismissal was the only appropriate sanction."

57 We accepted that evidence of Mr Baker as to his reasons for dismissing the claimant.

58 The claimant appealed against that decision. The grounds of the appeal were not in the hearing bundle but they were in the email chain sent to us on 21 July 2026, and were as follows.

"1. The band of reasonableness in coming to the decision was misconceived. The decision was not within the band of outcomes, a reasonable employer would have made.

2. The hearing manager and the disciplinary manager were of equal footing within the organisation

3. The evidence put forward was not taken into consideration.

4. The rationale for dismissal is untenable, ie my colleague was not found at his desk, how is that a reason for dismissal

5. The organisation is in breach of the WTD and have dismissed me for raising same."

59 Mr Wakeling heard that appeal in that he convened a video hearing to hear what the claimant had to say at it, but, as the notes of the hearing (which occurred on 15 February 2023) showed (the notes were at pages 207-214),

59.1 the claimant was again accompanied by Temi Alao, and

59.2 the claimant left the meeting without advancing his appeal to any extent after Mr Wakeling had spent some time making it clear to the claimant and

Temi Alao that the latter was at most there to support the claimant and clarify any question.

- 60 The claimant was given an opportunity by Mr Wakeling (in the letter dated 15 February 2023 at page 215) to attend a rearranged appeal hearing, but the claimant did not take up that opportunity.
- 61 In addition, the claimant was permitted to appeal the dismissal by Ms Massey of his grievance but he did not pursue that appeal. We made that finding in part on the basis of the witness statement of Mr Chetan Kotecha which was put before us, although Mr Kotecha was not called to give oral evidence. We also based that finding on the fact that the claimant did not contend that he had pressed his appeal against the decision of Ms Massey to which we refer in paragraphs 52 and 53 above.
- 62 Finally in regard to the facts, EJ Hyams asked Mr Woods when he was giving oral evidence whether members of staff in the position of the claimant were required to remain awake even during his breaks, and Mr Woods said that they were, so that they could deal with an emergency.

Our conclusions on the claims here

The claim of unfair dismissal

The reason for the dismissal

- 63 We concluded that the real reason for the claimant's dismissal was as stated in paragraphs 55 and 56 above. That reason was the claimant's conduct within the meaning of section 98(2)(b) of the ERA 1996. It consisted principally in the fact that the claimant was asleep when at work at about 4am on 28 November 2022, but it was also the fact that the claimant had brought his own laptop to work and was using it there.

The procedure followed in deciding to dismiss the claimant

- 64 The claimant did not as far as we could see assert that there was any failure in the investigative process followed by the respondent before that decision of Mr Baker was made, that is to say in relation to the manner in which persons were interviewed by Mr Higgins. The claimant did submit that the investigation was fundamentally flawed, that it was not approached with an open mind and that "the Respondent consistently sought evidence that supported its initial conclusion whilst failing to investigate evidence that may have supported the Claimant." The substance of that submission was then stated in the following manner:

"[The respondent] failed to investigate the purpose of the alarm on the Claimant's telephone, failed to analyse the laptop, failed to examine whether motion-sensitive lighting explained the conditions in the room,

failed to investigate the behaviour of the young people throughout the night and failed to reconcile the Claimant's account with contemporaneous care records."

- 65 However, in our view those things which the claimant asserted should have been investigated were at best of only peripheral relevance. We could not see how anything which was found as a result of investigating those things could have undermined (at least materially) the evidence of Mr Woods of what he saw when he first saw the claimant at about 4am on 28 November 2022.
- 66 In any event in our view the process followed by the respondent in deciding that the claimant should be dismissed was well within the range of reasonable responses of a reasonable employer.

Were there reasonable grounds for concluding that the claimant did that for which he was dismissed?

- 67 We concluded also that there were reasonable grounds for concluding that the claimant was asleep when Mr Woods and Mr Mughodi carried out their spot check at around 4am on 28 November 2022. The claimant's main reason for saying that his dismissal was unfair was that he was not asleep at that time, but as we explained through EJ Hyams several times during the hearing of 20-22 July 2026, whether or not the claimant was so asleep would not need to be determined by us in the course of deciding his claim of unfair dismissal unless that claim succeeded.
- 68 In coming to the conclusion that there were reasonable grounds for concluding that the claimant had in fact been asleep when Mr Woods and Mr Mughodi carried out their spot check of the early morning of 28 November 2022, we took into account the following factors.
- 68.1 It is not possible to know whether another person is asleep.
- 68.2 Even someone who is asleep may wake up and not realise, at least immediately, that he or she has been asleep.
- 68.3 Deciding whether a person is asleep can be done only by coming to a conclusion on the objective phenomena.
- 68.4 If a person's eyes are closed and he or she is not moving, then he or she may be asleep.
- 68.5 Movement is possible when asleep, but it is often perceivable as movement in sleep.
- 68.6 Sleeping is usually done sitting or lying down. It is not common for a human being to be asleep when standing up.

- 68.7 If a person lies down on a flat surface and puts his or her head on a pillow and covers him or herself with a blanket then that is consistent with a desire to sleep.
- 68.8 If a person is lying under a blanket with his or her head on a pillow, not moving, and not switching off an audible alarm, then that person may well be asleep.
- 68.9 If that person takes time to “come to” when another person comes into the vicinity, then that is evidence consistent with the first person having been asleep when the second person arrives.
- 68.10 If the first person appears dazed initially, then that is also consistent with that person having been asleep when the second person arrived.
- 68.11 The claimant here on 5 December 2022 said (as we record in paragraph 42 above):
- “I did use a blanket and pillow (because the room was very cold) and lay on the floor”.
- 68.12 However, on 1 February 2023, as we record in paragraph 54.4 above, the claimant said that he was “just sitting down”. During the hearing before us, he said that he was sitting on the landing with his head on a pillow on the floor by the highest step on the staircase.
- 69 In any event, we saw nothing before us to undermine the veracity of Mr Woods’ evidence of what he saw, which we have recorded above as being best shown by the passage which we have set out in paragraph 41 above.
- 70 As for the possession by the claimant of his personal laptop at work on 27-28 November 2022, these were the claimant’s written closing submissions:
- “The Respondent also placed considerable reliance upon the presence of the Claimant’s personal laptop and telephone. However, it has not produced any clear contractual provision, disciplinary rule or written policy demonstrating that possession or appropriate use of those items was prohibited during waking night shifts or that such use constituted gross misconduct. The Respondent therefore sought to rely upon conduct which had never been clearly prohibited and which, in any event, was entirely consistent with the Claimant’s explanation that he was undertaking professional coursework during quieter periods.”
- 71 Nevertheless, the claimant plainly accepted (see paragraphs 43 and 54.1 above) that he did have with him at work at around 4am on 28 November 2022 his personal laptop, as he did in the final sentence of those submissions. The claimant’s possession at work and use of his personal laptop on 28 November 2022 was expressly prohibited by the respondent and the claimant knew or at

least ought to have known that. That can be seen from the evidence which we have set out in paragraphs 27-31 above. We observe that that suggested a willingness to ignore clear instructions from the respondent, so while the claimant's conduct in this regard was itself part of the reason for his dismissal, it supported the conclusion of Mr Baker that the claimant had knowingly gone to sleep at work on 28 November 2022. In any event, there plainly were reasonable grounds for concluding that the claimant had, contrary to an express prohibition of which he was or at least ought to have been aware, brought his own laptop to work and used it while at work.

Was the claimant's dismissal within the range of reasonable responses of a reasonable employer?

72 In relation to the main reason for dismissing the claimant, namely that he was asleep at work at about 4am on 28 November 2022, given

72.1 that the claimant's role was "Waking Night Residential Support Worker",

72.2 the evidence of Mr Baker which we have set out in paragraph 56 above which, as we say in paragraph 57 above we accepted,

72.3 the evidence of Mr Woods in paragraph 27 of his witness statement which we have set out in paragraph 36 above and which as we say in paragraph 34 above we accepted, and

72.4 in relation to the fact that the claimant had brought his laptop to work, our findings of fact set out in paragraphs 27-31 above,

we concluded that the claimant's dismissal was within the range of reasonable responses of a reasonable employer.

The fairness of the claimant's dismissal

73 For all of those reasons, we concluded that the claimant's dismissal was not unfair, so that his claim of unfair dismissal failed and had to be dismissed.

The claimant's claims of direct discrimination because of race and/or disability

74 There was on the facts before us nothing from which we could conclude in the absence of any explanation from the respondent that the claimant's dismissal was to any material extent because of (1) his race or (2) his disability of anxiety and depression. In any event, we concluded on the evidence before us without any doubt at all that

74.1 the decision that the claimant should be dismissed principally for sleeping at work was arrived at by Mr Baker purely because he, Mr Baker, accepted as accurate the evidence of Mr Woods to the effect that the claimant was asleep at around 4am on 28 November 2022, and

74.2 Mr Woods came to the conclusion that the claimant was so asleep on the basis only of what he saw at that time, so that his conclusion was in no way influenced by the claimant's race or his disability.

75 We also asked ourselves whether a white British person would have been dismissed in the same circumstances, namely principally for being asleep while on duty at work but also for bringing to, and using at, work a personal laptop in breach of an express prohibition of which the person was, or at least ought to have been, aware. We concluded that such a white British person would have been dismissed in those circumstances.

76 Accordingly, the claim of direct discrimination because of race and/or disability had to, and did, fail.

The claim of discrimination arising from disability within the meaning of section 15 of the EqA 2010

77 The claimant's own repeated evidence before he was dismissed (some of which we have set out in paragraph 43 above) was that he was not asleep because he had taken medication or because of his anxiety and depression. As for his evidence to the tribunal, it included paragraph 94 of his witness statement, in which he said (and said only): "I consistently denied sleeping." On that basis the claimant could not credibly assert that he was dismissed because of something which arose in consequence of his disability of anxiety and depression. In any event, the importance of the claimant being awake at all times when working (on which we state our findings in paragraphs 72.1-72.3 above) meant in our view that if the claimant was in fact asleep at around 4am on 28 November 2022, then dismissing him was a proportionate means of achieving the legitimate aim of having any waking night support worker awake at all times during the night. For all of those reasons, the claim of discrimination within the meaning of section 15 of the EqA 2010 had to, and did, fail.

The claim of a failure to make a reasonable adjustment

78 We have not said it so far, but the claim of a failure to make a reasonable adjustment within the meaning of section 20 of the EqA 2010 was made on the basis, recorded in paragraph 7.2 on pages 63-64, that the following PCPs were applied:

78.1 "Requiring Supervising staff to stay awake while caring for highly vulnerable patients."

78.2 "Requiring all supervision staff to declare any medication they are taking an adverse effect such as tiredness in relation to their work. (*Sic*)"

79 We record here that it was said in paragraph 7.2.2 of the list of issues, on page 64, that a PCP was applied in this form: "Was it a reasonable response to send

the claimant to be sent home at 3 am and was the investigation devoid of prejudice?”. However, that was not a PCP, bearing in mind what we say in paragraph 16 above (applying *Ishola*).

- 80 The PCP set out in paragraph 78.1 above did not put the claimant at a disadvantage because of what we say in paragraph 77 above, i.e. it was the claimant’s case throughout that he was not asleep at work and did not sleep at work. The PCP set out in paragraph 78.2 above did not put the claimant at a disadvantage, given the unchallenged documentary evidence which we have set out in paragraph 32 above.
- 81 We record here that the claimant’s closing submissions included this passage towards their end:

“The Claimant further relies upon the Respondent’s failure to take proper account of his health. Before the disciplinary process commenced, the Respondent was aware that the Claimant suffered from anxiety and depression and was prescribed medication. The Claimant maintains that he requested an Occupational Health referral. Despite this knowledge, the Respondent undertook no medical assessment and sought no Occupational Health advice before concluding that his presentation proved he had been asleep. If, as alleged, the Claimant appeared tired or disorientated, the Respondent was under a duty to consider whether his medical condition or prescribed medication may have contributed to his presentation. It failed entirely to do so.”

- 82 Either the claimant was asleep or he was not. In relying here on his “presentation”, the claimant went close to accepting that he appeared to have been asleep at around 4am on 28 November 2022. As EJ Hyams said during the hearing, the claimant’s case in this regard was being presented in the alternative which amounted to blowing hot and cold: in the old fashioned-language, approbating and reprobating. In any event, the only adjustment that the claimant could in our view have asserted might have been made if he was asleep was not to dismiss him. Not only did he not contend that it would have been a reasonable adjustment not to dismiss him if he was in fact asleep, but, we repeat, he persisted at all times in maintaining that he was awake. In addition, the claimant put before the respondent the evidence which we have set out in paragraph 43 above, and Mr Baker plainly took that evidence into account, as can be seen from paragraph 11 of his witness statement, which we have set out in paragraph 56 above. Accordingly, there was no failure “to consider whether [the claimant’s] medical condition or prescribed medication may have contributed to his presentation”.
- 83 In any event, we concluded that there was here no failure to make a reasonable adjustment within the meaning of section 20(3) of the EqA 2010.

The claim of a breach of the WTR 1998

84 The claimant's evidence about whether or not he was able to take a break at any time was inconsistent. For example, as we record in paragraph 54.1 above, on page 190, the claimant was recorded to have said that he was in fact on a break at around 4am on 28 November 2022. In any event, we concluded that the employment of the claimant was in circumstances to which the exception that we have set out in paragraph 23 above applied. We did so because

84.1 we accepted that the passage from the letter of Ms Massey which we have set out in paragraph 53 above was accurate, and

84.2 because of the oral evidence of Mr Woods which we have recorded in paragraph 62 above.

The claimant's argument in his submissions about victimisation

85 In the final paragraph on page 2 of his written closing submissions, the claimant said this:

"The Claimant also relies upon the wider context in which the dismissal occurred. Prior to the disciplinary proceedings he had raised concerns regarding his treatment at work, including concerns relating to race, disability, excessive cleaning expectations and the failure to provide proper rest breaks during waking night shifts. Those grievances were rejected shortly before the disciplinary hearing took place. The proximity between the grievance outcome and the disciplinary process raises legitimate concerns that the Respondent did not objectively consider the Claimant's explanations or the wider employment context before deciding to dismiss him."

86 We could not see in that submission an allegation of victimisation within the meaning of section 27 of the EqA 2010. In any event, if and to the extent that it could have been read as such an allegation, it was no more than reliance on the simple fact that the claimant had relied on that Act in asserting before he was dismissed that Mr Woods had (see for example paragraph 42 above) discriminated against him because of his race. The claimant did not point to anything by way of factual evidence before us from which we could have concluded in the absence of any explanation from the respondent that he, the claimant, was dismissed to any material extent because he had alleged one or more breaches of the EqA 2010. Nor did we see any such evidence.

87 Similarly, if and to the extent that it was being said in the submission set out in paragraph 85 above that the claimant had been treated detrimentally within the meaning of section 45A of the ERA 1996 for asserting the right to take a break as provided for by the WTR 1998 (and as it should be clear from what we say above in these reasons, such a claim was not previously indicated in these proceedings, although we saw from the email which we have set out in paragraph 58 above, it was indicated in the claimant's appeal against his dismissal, which we saw for the first time on 21 July 2026), the claimant did not point to anything

by way of factual evidence before us from which we could have concluded in the absence of any explanation from the respondent that he, the claimant, was dismissed to any material extent because he had alleged one or more breaches of the WTR 1998. Nor did we see any such evidence.

In conclusion

- 88 For all of those reasons, none of the claimant's claims succeeded and they were therefore all dismissed by us.

Approved by Employment Judge Hyams

Date: 29 July 2026

SENT TO THE PARTIES ON

24 August 2026

FOR THE TRIBUNAL OFFICE