



# EMPLOYMENT TRIBUNALS

**Claimant**

Ms H. Koroma

**Respondent**

Norwood Ravenswood Ltd

v

**Heard at:** Watford

**On:** 26 - 28 September and  
2 November 2017.

**Before:** Employment Judge Heal  
Ms N. Duncan  
Ms M. Harris

## Appearances

**For the Claimant:** Mr. H. Ogbonmwam, representative  
**For the Respondent:** Ms C. Jennings, counsel.

## JUDGMENT

The complaints of unfair dismissal, dismissal because of public interest disclosure, breach of contract and race discrimination are not well founded and are dismissed.

## REASONS

1. By a claim form presented on 25 October 2016, the claimant made complaints of unfair dismissal, dismissal because of public interest disclosure, race discrimination and breach of contract. She also made complaints of unauthorised deductions from wages and unpaid annual leave but those complaints have since been withdrawn.

2. We have had the benefit of a bundle running to 267 pages. At the outset of this hearing, the claimant's representative told us that this had not been agreed.

3. We have heard oral evidence from the following witnesses in this order:

Ms Chantel Baigent, registered home manager for Eretz Residential Home;  
Ms Carol Goodall, registered home manager;  
Ms Julie Hall, Head of Services for Berkshire and

Ms Hawa Koroma, the claimant.

4. Each of those witnesses gave evidence in chief by means of a typed witness statement which we read all the witness was called. Each witness was then cross-examined and re-examined in the usual way.

### ***Issues***

5. The issues were identified by Employment Judge Smail at a preliminary hearing on 23 February 2017. At the outset of the hearing and with the assistance of the parties we further identified the issues as follows.

#### ***Unfair dismissal***

6. The claimant qualifies to claim unfair dismissal, her claim is in time and she was dismissed.

7. What was the reason for dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for the purposes of section 98(2) of the Employment Rights Act 1996. The respondent says that the conduct was sleeping at work on 6 and 29 June 2016. The respondent must prove that it had a genuine belief in the misconduct and that this was the reason for the dismissal.

8. Did the respondent hold that belief in the claimant's misconduct on reasonable grounds having carried out as much investigation as was reasonable in all the circumstances? The burden of proof is neutral here but it helps to know the claimant's challenges to the fairness of the dismissal and her representative identified them as follows:

8.1 The dismissal was motivated by Ms Baigent's malice which clouded the employer's view;

8.2 This malice was linked to the claimant's race;

8.3 The respondent had not reasonably or fairly formed a belief that the claimant had fallen asleep naturally as opposed to because of the effects of medication because she was ill;

8.4 In particular, there was evidence from a witness that the claimant was ill;

8.5 In the course of the investigation Ms Baigent manipulated evidence by not disclosing that she knew about the claimant's marital problems and promised that she would not take the 6 June incident further in the light of those problems;

8.6 The claimant was not informed between 6 and 29 June that she was under investigation;

8.7 The minutes of the disciplinary hearing were not provided to the claimant to review, amend or agree;

8.8 The minutes of the disciplinary hearing were inaccurate in that the minutes taker modelled the responses the claimant provided;

8.9 At the disciplinary hearing, there was no investigation into whether the claimant had made a public interest disclosure: had this matter being investigated it would have been apparent that a manager had failed to carry out work and that may have been the subject of a cover-up;

8.10 The dismissal manager did not properly consider the evidence;

8.11 The dismissal was tainted by race discrimination;

8.12 The respondent failed properly to consider in the grievance and the appeal that the issue was one of a dispute between the claimant and her home manager;

9. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses were a reasonable employer?

10. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove on the balance of probabilities, that the claimant actually committed the misconduct alleged.

11. Does the respondent prove that the claimant would have been fairly dismissed in any event? If so, what is the percentage chance of unfair dismissal and when?

*Public interest disclosure*

12. Did the claimant make the following disclosures:

12.1 On 3 June 2016 by writing in the communication book that the front door was broken;

12.2 telling Chantel Baigent that she had blocked the doors on the night of 5-6 June 2016 because the lock was broken?

13. In either or both of those, was information disclosed which in the claimant's reasonable belief intended to show one of the following?

13.1 A criminal offence had been committed;

13.2 A person had failed to comply with a legal obligation to which the subject

13.3 A miscarriage of justice had occurred

13.4 The health and safety of any individual had been put at risk

13.5 The environment had been put at risk

13.6 Or any of those things were happening all were likely to happen, or that information relating to them had been was likely to be concealed?

14. If so, did claimant reasonably believe that the disclosure was made in the public interest?

15. Was the making of any proven protected disclosure the principal reason for the dismissal?

15.1 Has the claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure(s)?

15.2 Has the respondent proved its reason for the dismissal namely that the claimant was asleep on 2 occasions?

15.3 If not, has the tribunal accepted the reason put forward by the claimant or does it decide that there was a different reason for the dismissal?

*Race discrimination*

16. Has the respondent subjected the claimant to the following treatment falling within section 39 of the equality act 2010 namely dismissing her.

17. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated an actual and/or hypothetical comparator?

18. If so, are there primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the claimant's race?

19. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for the dismissal?

*Breach of contract*

20. Was the claimant in repudiatory breach of contract by sleeping on duty on the 2 relevant occasions so that the respondent was entitled to terminate her contract of employment without notice?

21. We agreed with the parties that we would deal with issues of contributory fault and/or Polkey at the same time as liability.

22. The respondent objected to the issue that Ms Baigent had promised not to take the 6 June matter further because of the claimant's marital problems (8.5). Ms Jennings said that this had not been raised previously. On reflection, and having taken instructions, she suggested that the appropriate course was for the claimant to apply for permission to amend and, pragmatically, she said that she would not object to that application save to ask that the matter be dealt with in examination in chief.

23. Mr Ogbonmwam therefore made the application for permission to amend which we granted with the proviso sought by Ms Jennings.

24. No other application for permission to amend the issues was made at this stage.

***Procedural matters***

*Application for postponement and bundle*

25. At the beginning of the first day of this hearing, Mr Ogbonmwam applied for a postponement on the grounds that his mother-in-law had passed away in Sierra Leone. Accordingly, he had had a lot to do at home and had not been able to deal with new documents sent to him by the respondent.

26. The respondent provided the claimant's representative with a new bundle containing those documents. We adjourned at 10.48 for an hour to allow Mr Ogbonmwam to read that bundle and to see if he could deal with the case today having read it.

27. At 11.49, the claimant and her representative were not in the tribunal building and we waited until 12.13 for them to return. Mr Ogbonmwam apologised for the delay. He said that he had identified new documents at pages 192 to 217. He said that this new bundle was in a completely different form from his earlier bundle and he had difficulty locating documents. The numbering was also different.

28. With the respondent's consent, we therefore gave him until 2 pm to adapt to the new bundle. Mr Ogbonmwam said that he would try to ensure that we could commence the proceedings then. At 2 pm the parties were ready to proceed. We therefore embarked on the exercise of identifying the issues as set out above.

*Timetable*

29. With the assistance of the parties, we set a timetable for the hearing of the evidence which would enable this matter to be concluded within the 3 days listed. Unfortunately, unforeseen circumstances (set out below) took up so much time that we were only able to complete the evidence within the 3 days available to us and a 4<sup>th</sup> day was therefore listed on 2 November 2017 for the hearing of submissions and for deliberation.

*Complaint of harassment*

30. On the second day of the hearing, Ms Goodall was called to give evidence beginning about 11:40 am. At 12:10 pm the claimant's representative began to ask questions about whether it was appropriate to discuss the claimant's children's private life. The tribunal asked Mr Ogbonmwam why these questions were relevant to the issues. He replied that they were relevant to harassment. This matter had not been raised in the issues identified by Employment Judge Smail and had not been raised either on the first day of the hearing when we worked through those issues with the parties.

31. Mr Ogbonmwam said that harassment was raised in the claim form. He said that he did not need permission to raise matters that were in claim form.

32. Ms Jennings strongly objected to the issue of harassment being raised at this stage. She said that the parties had spent 'hours' before Employment Judge Smail identifying the issues. She said that the use of the words harassment and victimisation in the claim form seemed to be no more than a layperson's use of the words. So, she said that she was surprised that a claim of harassment in the legal sense was being raised now.

33. Mr Ogbonmwam confirmed that he had been present at the preliminary hearing although he said that he was not on the record and therefore the resulting document was sent to the claimant and not to him. He said that he had not raised the matter of harassment at the outset of this hearing because there were interruptions, we proceeded to the issues and he 'got past that matter'.

34. He said that it was not his duty to raise something which the tribunal had not struck out.

35. We heard considerable argument from both parties on this matter. Ms Jennings objected to our permitting the claimant to run a case of harassment. She said that her clients would be subjected to substantial prejudice. One of her witnesses had already finished giving evidence and it was unacceptable of the claimant to attempt to slip the issue into the case during cross examination.

*Decision about the harassment claim*

36. In the absence of the parties, the tribunal decided unanimously not to permit the claimant to pursue a complaint of harassment (and insofar as she sought to raise it, of victimisation). We gave the parties these reasons:

36.1 'We note that the claim form does use the word harassment although it gives no particulars of that claim. At the preliminary hearing in February, Employment Judge Smail recorded the issues setting out the race discrimination claim as one of direct discrimination and making no mention of harassment or victimisation. The claimant's current representative was present on that occasion although he was not on record. The resulting document was sent to the claimant who was not then represented.

36.2 The claimant's representative said that the claimant's grievance and appeal documents were copied for the tribunal at the preliminary hearing so that it was clear that harassment and victimisation were part of the claim. We do not think that that changes anything. The list of issues set out the claim clearly: the other documents were relevant to help Employment Judge Smail understand the unfair dismissal claim only.

36.3 We have read Employment Judge Smail's reasons for not striking out the claims: we see that the claim there was described as one of direct discrimination in that the claimant was dismissed because of race discrimination. There is no mention of harassment.

36.4 The claimant did not write to the tribunal after the preliminary hearing to say that the issues were wrong. We note of course at this stage that she was not represented. However, she could have written in if the issues were wrong and did not set out her claim as she understood it.

36.5 At this hearing on the first day we spent some considerable time working through the issues to ensure that all understood what the claim was about. Mr Ogbonmwam has told us that he wanted to raise the issue of harassment at 2 pm when he came back into the tribunal. He said that he raised the issue of new documents then and was told that we would look at the issue of new documents later. This is correct, to the extent that we took the view that we could best rule on the relevance of documents once we knew exactly what were the issues. Mr Ogbonmwam did not raise the issue of harassment then or at any time as we subsequently worked through the list of issues. The claim for race discrimination was left and agreed to be one of direct discrimination, the treatment being the dismissal.

36.6 Having done that and timetabled the case, we embarked on hearing evidence. Without making it clear in advance that he wished to run a harassment claim, Mr Ogbonmwam began to cross examine the second witness about harassment.

36.7 We do not consider it in the interests of justice or consistent with the overriding objective to allow him to do so.

36.8 The respondent has not prepared its case on that basis. Ms Jennings does not have instructions to deal with such a claim. If we were to entertain a harassment claim at this stage, we would in fairness have to take time to identify exactly how the claimant puts it and so reduce it to a set of issues so that we knew upon what we had to adjudicate and the respondent knew how to prepare its case. We might need to have the first witness recalled, and would certainly need to allow Ms Jennings to re-do Ms Goodall's evidence in chief, and then to allow cross-examination again. It may be that the third witness too would have to have a witness statement re-done. We cannot envisage that all that could be done while still having any chance of completing the evidence in the three days allowed.

36.9 We think it would be necessary to go part heard and to relist for a further 2 days. That would involve the delay of some months. Mr Ogbonmwam had made it clear that he would strongly oppose any application for costs: he says that none of this is his or his client's fault. He blames the tribunal and Ms Jennings, who he says should have raised these matters, instead of him. Pausing there, we note that the Court of Appeal has held that it is not the duty of the tribunal to raise issues not raised by the parties: *Mensah v East Hertfordshire NHS Trust* [1998] IRLR 531.

36.10 At any rate, we consider that the respondent is unlikely to be adequately compensated in costs for any delay. The claimant was a support worker, and we would be likely to take her ability to pay into account. Further redress might be available against Mr Ogbonmwam in wasted costs. That would expose the

respondent to expensive satellite costs litigation. It is plain from his approach that there would be no agreement on costs.

36.11 Weighing it all up, we do not think that we should permit cross-examination to proceed on the subject of harassment or victimisation.'

*Concerns about recording proceedings*

37. When we had given that judgment, the respondent immediately raised a concern that the claimant might be recording the hearing. We therefore asked Mr Ogbonmwam whether the claimant was recording the proceedings and he replied twice that he did 'not believe so'. We wished to have a clear answer to this question and we explained that because the recording of proceedings could amount to a contempt of court, it was necessary to be absolutely clear, and so we adjourned for 10 minutes to enable Mr Ogbonmwam to take instructions.

38. When the parties returned, Mr Ogbonmwam said that the claimant wished to check her battery (we infer on her mobile telephone) because her battery was getting low.

39. The respondent then clarified its concern that it was Mr Ogbonmwam himself who was recording proceedings. He said that his phone was on silent, he had notes on his phone and he was never recording. He gave the tribunal a clear undertaking that neither he nor the claimant was or had been recording proceedings. We were satisfied with that and therefore we continued with cross-examination at 3:24 pm.

40. At the outset of the hearing on the third day, to be sure that there would be no misunderstanding between the parties, we suggested that they put their phones away and on silent. We noticed as we did so, that Mr Ogbonmwam had what appeared to be a black electronic device visible between the pages of his bundle, the end of which was projecting towards the tribunal and the witness. We drew his attention to this object which he then put in his pocket and confirmed that there was no recording of the proceedings.

***Concise statement of the law.***

41. Our starting point is always the wording of section 98 of the Employment Rights Act 1996 which says, so far as is relevant:

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

*(2) A reason falls within this subsection if it-*

*(a)...*



- (b) relates to the conduct of the employee,*
- (ba)...*
- (c) ...*
- (d) ...*

*(4) In any other case 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."*

42. Where an employer has a suspicion or belief of an employee's misconduct and dismisses for that reason we have to apply the three stage test set out in British Home Stores v Burchell [1980] ICR 303. We find it helpful to remind ourselves of the relevant passage in the judgment of Arnold J:

*"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. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure," as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt." The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."*

43. It is with that test in mind that we have formulated the issues in this case. The burden lies upon the employer to prove the reason for the dismissal: that it had a genuine belief in the misconduct. Thereafter the burden is neutral. On that neutral burden, we ask whether the employer had in its mind reasonable grounds upon which to sustain that belief, and also, on a neutral burden of proof, we ask whether the employer had carried out as much investigation as was reasonable in all the circumstances.

44. We remind ourselves that it is not for us to substitute our own view for that of the employer. The question at this stage is not whether the claimant was actually guilty of misconduct, or whether we would have dismissed in the circumstances or even whether we would have investigated as this employer did. The question is whether this employer took an approach which was open to a reasonable employer: was it within the reasonable range of responses? We find those principles set out in the judgment of Browne - Wilkinson P in Iceland Frozen Foods v Jones [1983] ICR 17 paragraph 24.

45. We have to apply that test as much to the question of whether the employer carried out a fair procedure as to the question of whether dismissal was a fair sanction. We have to focus therefore on the evidence that was actually before the employer, not on evidence that we have heard but that the employer did not hear.

46. In asking whether or not an employer has carried out a fair procedure, we bear in mind the ACAS Code of Practice and Guide to Disciplinary and Grievance Procedures (2015).

#### *Public Interest Disclosure*

47. If there was a protected disclosure, then for the claimant to succeed in a claim under section 103A, the disclosure must have been more than a material factor in the decision, it must have been *the*, or *the principal* reason for the dismissal. Simply for it to have been on the employer's mind is not enough.

#### *Breach of Contract*

48. If an employee is, on the balance of probability, guilty of gross misconduct, then an employer is entitled to dismiss summarily, that is, without notice.

#### *Discrimination*

49. We have reminded ourselves in particular of the principles set out in the annex to the Court of Appeal's judgment in *Igen Ltd v Wong* [2005] EWCA Civ 142, [2005] IRLR 258.

50. Until *Efobi v Royal Mail Group Limited* UKEAT/0203/16/DA, it was understood to be the claimant who must establish her case to an initial level. Once she did so, the burden transferred to the respondent to prove, on the balance of probabilities, no discrimination whatsoever.

51. The accepted state of the law has been thrown into some disarray however by the judgment of the EAT in *Efobi* in which Laing J has held that properly understood, section 136 does not place the burden of proof on the claimant to adduce facts from which a tribunal could conclude, in the absence of an explanation, that the respondent has committed an act of discrimination. At paragraph 77, Laing J points out that section 136 states, 'If there are facts from which the court could decide...' and does not expressly place the burden of proving those facts on one party or the other. This is not the way the burden of

proof has been understood in the case law, including *Igen v Wong*. Section 136 itself was not at issue in *Igen v Wong*, but its predecessor, section 63A of the Sex Discrimination Act 1975. The wording of section 63A did place the burden of proof on the claimant.

52. Some argue that *Efobi* is wrong in law and was decided per incuriam, although these points have not been raised before us. In any event, we do not consider this to be a case that requires us to enter into that fray. Whether we ask: 'has the claimant proved the necessary primary facts from which a tribunal could properly conclude....', or simply, 'is there evidence from which a tribunal could properly conclude...?', we think we would reach the same conclusion in this case, for the reasons that appear below.

53. However the burden of proof is formulated, once there is enough evidence on which a tribunal could conclude properly and fairly that there had been discrimination, then the burden transfers to the respondent to prove, on the balance of probabilities, *no discrimination whatsoever*. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing a claimant which it would be very difficult to overcome if she had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race or age. What then, is that initial level that the evidence must reach?

54. In answering that we remind ourselves that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves.

55. We have to make findings of primary fact on the balance of probability on the basis of the evidence we have heard. From those findings, the focus of our analysis must at all times be the question whether we can *properly and fairly* infer race discrimination.

56. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the '*same, or not materially different*' as those of the claimant.

57. Facts adduced by way of explanations do not come into whether the first stage is met. If we are to find discrimination using the burden of proof we must find, on the balance of probability, that the facts from which we draw the inference of discrimination, actually happened. This means, for example, that if the complainant's case is based on particular words or conduct by the respondent employer, we must find (on the balance of probabilities) that such words were uttered or that the conduct did actually take place, not just that this might have been so. Simply deciding that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof.

58. If unreasonable conduct therefore occurs alongside other indications (such as under-representation of a group in the workplace, or failure

on the part of the respondent to comply with internal rules or procedures designed to ensure non-discriminatory conduct) that there is or might be discrimination on a prohibited ground, then a tribunal should find that enough has been done to shift the burden onto the respondent to show that its treatment of the claimant had nothing to do with the prohibited ground. However, if there is no rational reason proffered for the unreasonable treatment of the claimant, that may be sufficient to give rise to an inference of discrimination.

59. It was pointed out by Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] IRLR 285, [2003] ICR 337 (at paragraphs 7–12) that sometimes it will not be possible to decide whether there is less favourable treatment without deciding '*the reason why*'. This is particularly likely to be so where, as here, a hypothetical comparator is being used. It will only be possible to decide that a hypothetical comparator would have been treated differently once it is known what the reason for the treatment of the complainant was. If the complainant was treated as she was because of the relevant protected characteristic, then it is likely that a hypothetical comparator without that protected characteristic would have been treated differently. That conclusion can only be reached however once the basis for the treatment of the claimant has been established.

60. Some cases arise (See *Martin v Devonshire's Solicitors* [2011] ICR 352 EAT paragraphs 38 - 39) in which there is no room for doubt as to the employer's motivation: if we are in a position to make positive findings on the evidence one way or the other, the burden of proof does not come into play.

### **Facts**

61. We have made the following findings of fact on the balance of probability. What that means is this. We do not possess a fool proof method of discovering absolute truth. Therefore, we listen to and read the evidence placed before us by the parties and on that evidence only we decide what is more likely to have happened than not.

62. The respondent is one of the largest Jewish charities in the United Kingdom supporting children and families and people with learning disabilities.

63. The claimant was employed by the respondent from 8 February 2005 as a Support Worker and from 6 May 2013, as a Waking Nights Support Worker. Her role involved staying awake for the purpose of supporting the respondents' vulnerable residents while working on a shift at night.

64. Under CQC guidelines the respondent is required to carry out 6 night visits/inspections per year. Two staff were required to carry out these visits together. The visits also had the benefit of providing support to night staff.

65. On 3 June 2016, there was a problem with the main door to the Eretz residential home where the claimant worked. It may have appeared to the claimant and her colleagues that the door would not lock but we accept Ms Baigent's evidence that it would and did lock: the problem was that the self-closing mechanism did not work properly so that the door would not fully close on its own.

66. Accordingly, Ms Sibó Tendele completed a 24 hour report in writing in which, having supplied routine required information, she added in manuscript, 'main door does not lock.' The claimant's name also appears on this report

because she was one of the staff on duty and to that extent it appears that she supported and joined in a report made by Ms Tendele. (The respondent accepts that this amounted to a protected disclosure.)

*6 June 2016*

67. On the balance of probability, we prefer Ms Baigent's account of the events of 6 June 2016. We do so because Ms Baigent was undoubtedly awake throughout those events, because she made a detailed record immediately afterwards and because, although the claimant now denies that she was asleep on that occasion, her own written account accepts that she was asleep.

68. Therefore, we find that Ms Baigent made a night visit together with Janice Baylis to the Eretz residential home at 3.00 am on 6 June 2016. On arrival, the hallway of the home was in complete darkness. Ms Baigent unlocked the door and then found that it would not open. She could not see the obstruction and therefore pushed the door hard, and as she did so realised that something was blocking the door from inside. Having squeezed in she saw that a large, specialised, comfy chair was blocking the door and on it was a large and heavy, ornamental elephant-shaped stool.

69. Ms Baigent and Ms Bayliss inevitably made considerable noise as they entered the home but no member of staff came to investigate.

70. Ms Baigent saw the claimant seated on a sofa with her legs up on the sofa and covered by a shawl or cardigan. She saw - and we find as a fact - that the claimant was asleep. Ms Bayliss also saw Ms Brantina Tundawani, another member of waking night staff, who had one leg up on a pouffe and her head resting on her hand. Ms Tundawani then spoke so that although Ms Baigent suspected that she had been asleep, she could not be certain.

71. Ms Baigent called the claimant's name twice to wake her up. She asked both staff members why they had been asleep. Ms Tundawani denied sleeping. The staff said that they had blocked the front door because it would not lock properly.

72. The claimant was unable to tell Ms Baigent how long she had been asleep. She said that she had come to work with a headache and had taken some paracetamol. This was subsequently corroborated by another member of staff. Ms Baigent asked if the claimant still felt unwell and she said that she was fine. Ms Baigent told her that she should have notified the manager on call if she was unwell.

73. Ms Baigent thought at the time that this was a one-off episode and she felt sorry for the claimant. She did not suspend the claimant, however we find that she did not make a promise that the claimant would not be disciplined for this incident. On the contrary, she did immediately produce a written report which she sent at 4:41am to Darren Young and Elena Theodeous. To make such a promise would have been inconsistent with this action.

74. Ms Baigent told the claimant verbally that she would be under investigation for this incident. She did not confirm this in writing because the process was that the claimant would receive written advice from human resources.

*29 June 2016*

75. Before any disciplinary process began arising out of that first incident, Ms Baigent attended the Eretz residential home together with Leahanne Wilkinson during the night of 29 June 2016. On this occasion Ms Baigent walked into the lounge area of the home to see the claimant sitting on the sofa with her legs curled up, wrapped in what appeared to be the same shawl as was used on 6 June and with her head slumped. Ms Wilkinson confirmed her opinion that the claimant was asleep. While they were watching the claimant, the claimant's AT telephone began to ring but she did not respond to it. (This telephone will ring to raise an alarm for the claimant should one of the residents be experiencing, for example a seizure or be out of bed.)

76. Ms Baigent called the claimant's name 3 times but the claimant did not respond. Ms Baigent had to touch the claimant and shake her gently in order to wake up. Ms Baigent asked the claimant how long she had been asleep and she said, 'not long'.

77. We accept Ms Baigent's evidence that the claimant was asleep, not least because during the disciplinary hearing, when the claimant was asked whether she accepted that she was asleep, she replied, 'the last one, I didn't know if I was alive, I took Benadryl for my hay fever.'

78. In line with the respondent's procedure, the claimant was offered a taxi to go home. She elected to wait however and later took herself home by car without telling Ms Baigent that she was going. Therefore, Ms Baigent did not have an opportunity to take a statement from the claimant.

#### *The disciplinary procedure*

79. By letter dated 11 July 2016 the respondent invited the claimant to a disciplinary hearing on 13 July. The letter noted that the respondent had now received the claimant's completed statement about the events of 29 June.

80. This statement, in the claimant's handwriting, says that the claimant had hay fever and a headache on 29 June. She says that she sat on the sofa and took her medication, 'Benelyn Syrup'. She was watching television and within 15 minutes was told that she was sleeping.

81. The disciplinary hearing arising out of both incidents took place on 13 July 2016. The hearing was chaired by Carol Goodall and Ms Baigent was present at the early part of the meeting to give her account of events.

82. The claimant was reminded that she had the right to attend the meeting with a colleague union representative but she confirmed that she had chosen to come unattended.

83. There is a dispute about whether the notes of this meeting are accurate. We accept that they are a reasonably accurate - if not 100% verbatim - record of the disciplinary hearing. We do so because we have found the respondent's witnesses more reliable than the claimant and also because the notes contain detail and phraseology which we think the respondent would be unlikely to make up, for example the claimant's precise description of her legs not being straight on the sofa but being tilted to one side and the vivid use of the words, 'I didn't know if I was alive.'

84. At the disciplinary hearing Ms Baigent gave an account of the 2 incidents and the claimant declined to ask her questions about those incidents. Ms Goodall explored the claimant's domestic arrangements with her with a view to discovering whether the claimant was getting enough rest. At the end of that

discussion the claimant said that she did have a routine which worked for her and that she was getting enough rest to come in and work a waking night. The claimant accepted that she had been asleep on both occasions. In particular, about the first occasion she said, 'they woke me up.' About the second occasion, she used the expression, 'I didn't know if I was alive.' Ms Goodall made it clear that she considered that the claimant had accepted that she was asleep and also that the claimant had said she did not come to work with the intention of falling asleep. To this, the claimant said: 'yes'.

85. The claimant said that she felt she had let down Eretz. She said that she was sure that it was the medication that made her sleep.

#### *Ms Goodall's decision*

86. Ms Goodall adjourned to make a decision. She re-read all the documentation. She was aware that Eretz was a home for 9 to 10 residents between the ages of 40 to 60 all of whom had moderate to severe learning difficulties; some with epilepsy and some with challenging behaviour. All the residents were highly vulnerable and the purpose of a waking night shift was to make sure that if a resident needed help someone would be on hand to take care of the resident immediately.

87. Ms Goodall concluded that the claimant had been asleep on 2 occasions within one month and this had placed vulnerable residents in her care at serious risk. This was underlined by the fact that on the second occasion her 'phone had gone off, showing that there was an emergency, but the claimant did not respond.

88. Ms Goodall was aware that the claimant had 11 years' service and a clean disciplinary record. She took that into account and also took into account the fact that the claimant had taken medication which might have affected her.

89. However, Ms Goodall thought that to be caught asleep on 2 occasions while on duty was completely unacceptable: the mitigation available was not sufficient to enable Ms Goodall to take a lenient view. She thought that if the medication affected the claimant then the claimant had a duty to discuss that with her manager. She had not done so.

90. Furthermore, Ms Goodall was aware of the respondent's policy about being asleep on duty and that this was specifically listed as an example of gross misconduct. Ms Goodall took into account the need for consistency with other genuinely similar cases.

91. Taking all that into account Ms Goodall decided that dismissal was the appropriate sanction, particularly taking into account the potentially serious consequences for the residents.

92. It transpired that Ms Goodall lacked authority to make a final decision to dismiss because a decision to dismiss can only be made by a business manager, head of service or director. Accordingly, having taken the decision herself, Ms Goodall took the decision to Julie Hall who reviewed it to check that due process had been considered and that alternative options had been looked at. This was a review process for safeguarding purposes, not an independent decision being taken by Ms Hall.

93. The meeting was reconvened for Ms Goodall to give the claimant the result of a decision orally. The claimant was told of her right to appeal within 5 working days. The claimant responded that she was not going to appeal internally but she was going to take action outside.

94. By letter dated 19 July 2016 Ms Goodall confirmed the outcome to the claimant and reiterated the right of appeal.

*Was there an appeal?*

95. There are 2 letters in our bundle dated 1 August 2016 from the claimant to the respondent. These are a letter of grievance and an appeal letter. The respondent says that it did not receive these 2 documents. Certainly, there was no grievance hearing and no appeal hearing. On the balance of probabilities, we consider that the respondent genuinely did not receive these 2 documents. We have formed an impression on the evidence that the respondent is an organisation which follows its own procedures meticulously. There is in our bundle evidence of one other appeal appropriately dealt with. We do not think that this respondent would have neglected to deal with the grievance and appeal if it had received them.

### **Analysis**

96. We have used the issues identified above to structure our analysis.

97. *The claimant qualifies to claim unfair dismissal, her claim is in time and she was dismissed.*

98. *What was the reason for dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for the purposes of section 98(2) of the Employment Rights Act 1996. The respondent says that the conduct was sleeping at work on 6 and 29 June 2016. The respondent must prove that it had a genuine belief in the misconduct and that this was the reason for the dismissal.*

98.1 We have found as a fact that the respondent genuinely dismissed the claimant because it believed that she had fallen asleep at work on 6 and 29 June 2016.

99. *Did the respondent hold that belief in the claimant's misconduct on reasonable grounds having carried out as much investigation as was reasonable in all the circumstances?*

99.1 Ms Baigent saw the claimant asleep on the 2 occasions as did her colleagues. Furthermore, claimant admitted that she had been asleep on both occasions, as the respondent notes of the disciplinary hearing and one of the claimant's own statements show. The claimant's second statement does not deny that she was asleep, although a reasonable employer would have expected it to do so if she believed that she was not asleep.

100. *The burden of proof is neutral here but it helps to know the claimant's challenges to the fairness of the dismissal and her representative identified them as follows:*



*100.1 The dismissal was motivated by Ms Baigent's malice which clouded the employer's view;*

100.1.1 We do not think that the evidence shows that Ms Baigent was malicious towards the claimant. On the contrary Ms Baigent was sympathetic towards the claimant, especially on the first occasion. Ms Baigent appears to us to have followed the night visit procedure carefully and to have been ready to give Brantina the benefit of the doubt when she could not be sure that she was asleep.

*100.2 This malice was linked to the claimant's race;*

100.2.1 We have found that there was no malice.

*100.3 The respondent had not reasonably or fairly formed a belief that the claimant had fallen asleep naturally as opposed to because of the effects of medication because she was ill;*

100.3.1 The respondent had clear evidence that the claimant had been asleep on both occasions. It took into account the possible influence of medication but did not think that that amounted to sufficient mitigation given that the claimant had not advised her line manager of any concerns about being unfit for work.

*100.4 In particular, there was evidence from a witness that the claimant was ill;*

100.4.1 The respondent did not query the claimant's assertion that she was ill, however it did not think that this was sufficient mitigation because she should have reported to her manager any condition that might have affected her ability to do her work. This was especially so on the second occasion because the claimant had been reminded of this on the first occasion.

*100.5 In the course of the investigation Ms Baigent manipulated evidence by not disclosing that she knew about the claimant's marital problems and promised that she would not take the 6 June incident further in the light of those problems;*

100.5.1 We have found as a fact that these events did not happen. Ms Baigent did not manipulate the evidence and no promise was made.

*100.6 The claimant was not informed between 6 and 29 June that she was under investigation;*

100.6.1 Ms Baigent told the claimant verbally after the incident on 6<sup>th</sup> June that she was under investigation.

*100.7 The minutes of the disciplinary hearing were not provided to the claimant to review, amend or agree;*

100.7.1 The minutes of the disciplinary hearing were not provided to the claimant to review, amend or agree before Ms Goodall made her decision. Ms

Goodall did not make her decision on the basis of what the minutes said, but on the basis of her own memory and experience of the disciplinary hearing. The purpose of minutes is not to ensure a fair decision but to provide evidence of what took place at a disciplinary hearing for an appeal or any subsequent investigation. We do not find that it is outside the reasonable range of responses in these circumstances not to send the claimant the notes of the disciplinary hearing before the decision-maker makes her decision.

100.8 *The minutes of the disciplinary hearing were inaccurate in that the minutes taker modelled the responses the claimant provided;*

100.8.1 We have found that the minutes of the disciplinary hearing were in any event reasonably accurate, if not 100% accurate.

100.9 *At the disciplinary hearing, there was no investigation into whether the claimant had made a public interest disclosure: had this matter being investigated it would have been apparent that a manager had failed to carry out work and that may have been the subject of a cover-up;*

100.9.1 The claimant did not assert at the disciplinary hearing that she had made a public interest disclosure that a manager had failed to carry out work that there may have been a cover-up. That being the case there was no reason why any reasonable employer would start to investigate whether she had made a public interest disclosure.

100.10 *The dismissal manager did not properly consider the evidence;*

Ms Goodall properly considered and explored Ms Baigent's evidence that the claimant was asleep, the claimant's own domestic circumstances and whether she was getting enough rest, the issue of the claimant's medication and that the claimant had accepted that she was asleep. We consider that Ms Goodall did properly consider the evidence and did so within the reasonable range of responses.

100.11 *The dismissal was tainted by race discrimination;*

The dismissal was not tainted by race discrimination: please see our analysis below

100.12 *The respondent failed properly to consider in the grievance and the appeal that the issue was one of the dispute between the claimant and her home manager;*

100.12.1 The respondent did not receive the grievance and the appeal but in any event the issue was not one of a dispute between the claimant and her home manager. There was no such dispute and indeed Ms Baigent was sympathetic towards the claimant. The issue was one of the claimant having been asleep at work.

101. *Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?*

101.1 We consider that it was within the range of reasonable responses for a reasonable employer to decide to dismiss in the circumstances. The residents of the Eretz home were vulnerable and it was important for the claimant to stay awake in order to protect them from harm. She was found asleep not just once but twice and the respondent took the view within the reasonable range of responses that it could not properly rely upon her in the future.

*Ms Goodall's authority*

102. We do not consider that it was outside the reasonable range of responses for Ms Goodall to have her decision reviewed by Ms Hall. Once it was realised that Ms Goodall did not have the authority to make the final decision it was within the reasonable responses not to re-hear the entire disciplinary process but to put in place a safeguarding process to ensure that the decision made was safe. Given that Ms Goodall had clear evidence that the claimant had been asleep on 2 occasions we do not consider that the lack of authority and consequent need to have the decision checked by someone more senior renders the decision outside the reasonable range of responses.

103. These next issues do not now arise:

104. *If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove on the balance of probabilities, that the claimant actually committed the misconduct alleged.*

105. *Does the respondent prove that the claimant would have been fairly dismissed in any event? If so, what is the percentage chance of unfair dismissal and when?*

*Public interest disclosure*

106. *Did the claimant make the following disclosures:*

106.1 *On 3 June 2016 by writing in the communication book that locked the front door was broken;*

106.2 *telling Chantel Baigent that she had blocked the doors on the night of 5-6 June 2016 because the lock was broken?*

107. *In either or both of those, was information disclosed which in the claimant's reasonable belief intended to show one of the following?*

13.1 *A criminal offence had been committed;*

13.2 *A person had failed to comply with a legal obligation to which the subject*

13.3 *A miscarriage of justice had occurred*

13.4 *The health and safety of any individual had been put at risk*

13.5 *The environment had been put at risk*

13.6 *Or any of those things were happening all were likely to happen, or that information relating to them had been was likely to be concealed?*

108. *If so, did claimant reasonably believe that the disclosure was made in the public interest?*

108.1 The respondent accepts that the disclosures were protected disclosures, although it does point out that the first disclosure was not directly made by the claimant. In the circumstances, this point is now academic for the reasons we set out below.

109. *Was the making of any proven protected disclosure of the principal reason for the dismissal?*

109.1 *I.e. as the claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure(s)?*

109.2 *Has the respondent proved its reason for the dismissal namely that the claimant was asleep on 2 occasions?*

109.3 *If not, has the tribunal accepted the reason put forward by the claimant or does it decide that there was a different reason for the dismissal?*

109.4 The claimant has not produced sufficient or any evidence to raise the question whether the reason for the dismissal was the protected disclosures. Her case is one of bare assertion. In any event, the respondent has proved its reason for the dismissal, that is that the claimant had been found asleep twice.

#### *Race discrimination*

110. Has the respondent subjected the claimant to the following treatment falling within section 39 of the equality act 2010 namely dismissing her?

110.1 Yes

111. *Has the respondent treated the claimant as alleged less favourably than it treated would have treated an actual and/or hypothetical comparator?*

112. *If so, are there primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the claimant's race?*

113. *If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for the dismissal?*

113.1 This is one of those cases where we feel it appropriate to go directly to the 'reason why'. The reason why the respondent dismissed the claimant was because it had found her asleep on 2 separate occasions within one month. There is no evidence (beyond bare assertion) that race played any part in the decision.

#### *Breach of contract*

114. *Was the claimant in repudiatory breach of contract by sleeping on duty on the 2 relevant occasions so that the respondent was entitled to terminate her contract of employment without notice?*

114.1 We have found as a fact that the claimant was asleep on those 2 relevant occasions. We consider that this does amount to gross misconduct because the claimant was employed to stay awake at night in order to care for vulnerable people. On more than one occasion she did not stay awake and therefore put those vulnerable people at considerable risk. For those reasons, the respondent was entitled to terminate her contract of employment without notice. Therefore, the respondent was not in breach of contract.

115. For all those reasons, we dismiss the claims.

\_\_\_\_\_  
Employment Judge Heal

Date: .....02/11/2017.....

Sent to the parties on: .....

.....  
For the Tribunal Office