



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Ms Petrina-Liliana Tivadaru**

**v**

**The Fremantle Trust**

**Heard at:** Watford

**On:** 14 and 15 February 2022 and  
16 February 2022 (in chambers)

**Before:** Employment Judge Bedeau

**Members:** Mr M Bhatti  
Mr A Scott

## **Appearances**

**For the Claimant:** In person

**For the Respondent:** Mr K McNerney, counsel

## **RESERVED JUDGMENT**

1. The claim of unfair dismissal is not well-founded and is dismissed.
2. The claim of direct race discrimination is not well-founded and is dismissed.
3. The claim of unauthorised deduction from wages in respect of sick pay is dismissed upon withdrawal.
4. The claim of unauthorised deduction from wages is dismissed upon withdrawal.
5. The claims of discrimination arising in consequence of disability and failure to make reasonable adjustments are struck out as the claimant failed to pay the deposit.
6. The claim of wrongful dismissal or breach of contract has not been proved and is dismissed.

## REASONS

1. In her claim form presented to the tribunal on 10 August 2020, the claimant made claims of unfair dismissal, discrimination because of race and disability, unauthorised deductions from wages, and other payments.
2. In the response presented to the tribunal, it is averred that the claimant was dismissed for gross misconduct in that she had moved a resident from the lounge to her bedroom in a hoist contrary to the manual handling instructions, and had failed to ensure that the bed was set at a low position for the resident who fell out of the bed and was injured. The discrimination claims are denied.
3. A preliminary hearing held on 22 April 2021 before Employment Judge Allott, when the parties agreed the claims and issues in the case. They are now unfair dismissal; direct race discrimination; breach of contract, namely wrongful dismissal.

### The evidence

4. The claimant gave evidence and did not call any witnesses.
5. The respondent called: Mrs Lucy Goodman, Service Manager for Chesham Supported Living; Mr Andy Bedwell, Operations Manager for Learning Disabilities Services; and Ms Sarah Toye, Head of Human Resources.
6. In addition to the oral evidence the parties adduced a joint bundle of documents comprising of 161 pages. During the course of the hearing the respondents produced further documents in the case.

### The issues

7. The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

#### Unfair dismissal

7.1 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was gross misconduct.

7.2 If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

#### EQA, section 13: direct discrimination because of race.

7.3 The claimant describes her race/nationality as Romanian.

- 7.4 It is not in dispute that the respondent dismissed the claimant for gross misconduct.
- 7.5 Was that treatment “less favourable treatment”, i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances?
- 7.6 The claimant relies on the following comparators, namely Sue Frost, Toni Healey and Caroline Martin, all work colleagues who the claimant describes as British.
- 7.7 If so, was this because of the claimant’s race/nationality?

Disability

- 7.8 Was the claimant a disabled person in accordance with the Equality Act 2010 (“EQA”) at all relevant times because of the following condition, multiple sclerosis?

EQA, section 15: discrimination arising from disability

- 7.9 Did the following thing(s) arise in consequence of the claimant’s disability?
- 4.9.1 Becoming anxious/lacking focus and needing time to explain herself.
- 7.10 Did the respondent treat the claimant unfavourably as follows?
- 7.10.1 Requiring the claimant to attend an investigatory interview with Lisa Butt.
- 7.10.2 Not making the claimant aware of the consequences of the disciplinary process.
- 7.10.3 Giving the claimant insufficient time to explain herself during the investigatory interview.
- 7.11 Did the respondent treat the claimant unfavourably because of those things?
- 7.12 If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?
- 7.13 Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

Reasonable adjustments: EQA, sections 20 & 21

- 7.14 Did the respondent not know, and could it not reasonably have been expected to know the claimant was a disabled person?
- 7.15 Did the respondent have as a provision, criterion, or practice, the requirement to attend an investigatory interview?
- 7.16 Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that: she did not give a full explanation?
- 7.17 If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?
- 7.18 If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant; however, it is helpful to know what steps it is alleged should have been taken and they are identified as follows:
- 7.18.1 Explaining the consequences of the disciplinary process to the claimant.
- 7.18.2 Giving the claimant time for an in-depth explanation.
- 7.19 If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Unauthorised deductions/breach of contract

- 7.20 Is the claimant owed any outstanding pay?

Remedy

- 7.21 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

**Findings of fact**

8. The respondent is a charity that provides supported living for adults with learning difficulties and dementia in the South East of England, predominantly in Buckinghamshire. It deals with vulnerable people and provides a 24-hour care service.

9. It has a Safer People Handling Procedure which deals with a number of matters, such as a Safer People Handling Support Plan; risk assessments; working arrangements to minimise risks; repositioning service users; unsafe people handling; supporting a person with limited communication; people moving aids and equipment; hoists and slings; wheelchairs; hydraulic and profiling beds; safely handling an extremely heavy person; reporting accidents and incidents; monitoring and audit; and training.

10. In relation to Unsafe People Handling, section 4.5 of the procedure states the following:

“The service manager will ensure that employees carry out Safer People Handling are sufficiently trained and competent in up-to-date techniques so that unsafe practices/controversial techniques are not used at any time. These can cause injuries to employees and serious injure those being handled.

Employees should be aware that poor and unsafe techniques may be judged to be physical abuse or neglect which could result in gross misconduct and/or prosecution.”

11. In version 9 of the respondent’s disciplinary procedure which came into effect in January 2018, it gives a list of cases which require an investigation by the employee’s line manager or supervisor. Where the issue involves abuse of a vulnerable adult, the matter is reported to the local authority Safeguarding of Vulnerable Adults. The outcome of the investigation may lead to disciplinary proceedings being invoked. The employee concerned is notified of the allegations and possible consequences. At the disciplinary hearing they have the right to be represented. They can also appeal the disciplinary penalty.

12. In the procedure there are examples of what would constitute gross misconduct, although the list is not exhaustive. One example is:

“Serious breach of the organisation’s rules, including but not restricted to, health and safety rules...”

13. The procedure clearly states that gross misconduct can lead to dismissal.

14. Resident AR was an 87-year-old female suffering from dementia and had learning difficulties. Prior to 14 April 2020, her mobility had worsened, and a new risk assessment had been completed on her on 10 Aril 2020. In it it stated the following:

“Ann has a diagnosis of dementia which has progressed affecting her awareness and co-operation. Ann has cataracts in both eyes. She has decided not to have them operated on as she is frightened. This limits her sight abilities. As of 4 February 2020, Ann’s mobility has declined. She is very unsteady on her feet and requires a hoist to lift her into her wheelchair. Wheelchair MUST be used for all transfers.” (96)

15. Further in the risk assessment it stated the following:

“Are there variations in transferring levels? Yes. Between approximately 6pm and 8am there is a risk of falling while getting out of bed to use the toilet. A commode has been provided but is reluctant to use it. Since 11 March 2020 has not got out of bed at night. She now wears a continence pad while in bed. However there is still a high risk of her getting out of bed and falling. A night care risk assessment is in place for all support needs during the night.” (108)

16. AR’s bed had a sensor to alert staff when she was not in bed in order to facilitate a quick response.
17. The claimant commenced employment with the respondent on 24 April 2017 as a Supported Living Carer. She is a Romanian national. She was part of a team that provided 24-hour care to the residents. She worked at Whitebeam House, which is adjacent to another of the respondent’s premises, Hawthorn House. During her employment Whitebeam had 14 staff and Hawthorn 10.
18. The nationalities of the staff covered a wide range, such as, white British; Eastern European, including Romanians; Africans; Caribbeans and South Africans. We find that the workplace was multi-racial during the claimant’s employment and remains so.
19. An individual risk assessment was carried out on her and was reviewed on 30 October 2019. In relation to rest breaks, it stated the following:

“To have regular rest breaks during working day which will be arranged with colleagues on shift to ensure service is safe. Liliana to be mindful how many hours she is picking up and ensure that she does not exceed 56 per week.”  
(112-115)
20. She was absent from work from 23 March 2020 to 5 April 2020, as she had Covid-19 flu-like symptoms. (110-111)
21. By 7 April 2020, she was back at work and had a return to work interview with her line manager, Ms Lisa Butt, Deputy Manager.

The incident on 14 April 2020

22. At 8am, 14 April 2020, she started her shift at Whitebeam following her sleep-in shift at Hawthorn. She was, on that day, AR’s main carer. In the afternoon she went on her break and was replaced by someone who covered for her. In the office she saw AR’s risk assessment and decided to read it. After reading, she signed it knowing that failure to comply with the risk assessment may lead to disciplinary action. (97)
23. She told the tribunal that she did not have time to read the risk assessment as she was called away to help her replacement as AR needed to use a commode. We do not accept her account. We find that it did not take long for her to read AR’s risk assessment before she signed it on 14 April 2020.
24. AR had her own room which had a separate lounge and bedroom.

25. At or around 5pm the same day, while attending to AR's needs, the claimant called for assistance with toileting as AR needed to use the commode. Ms Sue Frost, Support Worker, came to help her. AR was in the lounge. A hoist was used by both of them to place AR on the commode. When AR had finished using the commode her pad was changed and the claimant pressed the button on the hoist to lift her up. Ms Frost then went to get the wheelchair. At that point the claimant pushed the hoist from the lounge to the bedroom with AR still in the toileting sling. Ms Frost said to the claimant, "What are you doing? Where are you going?" The hoist with AR in the toileting sling was pushed from the lounge to AR's bedroom which required both Ms Frost and the claimant to make a left-hand turn from the lounge into the bedroom and while in the bedroom a right turn to AR's bed. They had to manoeuvre the hoist through two doorways, the lounge and the bedroom.
26. The hoist has two stabilising arms which are attached to the bottom of the frame at the front with a wheel at each end. These can be pushed out into such a position as to stabilise the hoist with the person in the sling. It also provides room for a wheelchair to be pushed from behind to underneath the sling. The sling is held by metal arm that arches over the head of the person using it. It is hinged at the top to adjust the height and is attached at the base at the front. At the front are two wheels to guide it. It is operated by a handheld device.
27. We find that the hoist was not intended to be used to move a patient from one room or from one place to another. It is meant to be static. The aim of which is to lower the patient on to a commode, wheelchair, or chair.
28. The claimant and Ms Frost supported AR into bed and removed the sling. At or around 5.50pm to 5.40pm Ms Frost left the claimant and returned to her normal duties. The claimant remained with AR for another 20 minutes, tidying up, putting away AR's clothes, cleaning, and charging the hoist.
29. AR's bed was not lowered to the lowest level which is close to floor. This was contrary to the respondent's procedure and to AR's risk assessment which stated: "Profile bed MUST be down to the floor and crash mat removed." (109)
30. While the claimant was in the office, AR's bed sensor was activated. The claimant's colleagues went upstairs to find AR on the floor by the bathroom door. It appeared that she had fallen out of her bed on to the floor and was injured.
31. The following day, 15 April 2020, Ms Lisa Butt, Deputy Manager, conducted interviews with Ms Frost at 11.30am, and with the claimant at 4pm. In relation to Ms Frost's interview, she was asked by Ms Butt what happened the previous night when she and the claimant were putting AR to bed. Ms Frost replied that AR needed to use the toilet and the claimant buzzed for assistance. She, Ms Frost, left Flat 3 and went to support AR as her pad was wet. They put the toilet sling on AR and hoisted her on to the commode. Ms Frost needed to loosen the toilet sling belt, but the claimant told her to leave it as it had been fine all day. Ms Frost in fact did, however, loosen it. AR passed urine and her pad was changed. The claimant

pressed the button on the handheld device to raise AR. At that point Ms Frost went to get her wheelchair. The claimant pushed the hoist from the lounge to the bedroom with AR still in the toileting sling. Ms Frost asked her what she was doing, and where she was going. The claimant, according to Ms Frost, simply shrugged her shoulders. Ms Frost did not know whether she should go out of the room or remain. She stayed because she knew that to operate the hoist required two staff. They supported AR into bed, removed the sling, and at that point Ms Frost left. She said that she left the claimant and AR between 5.30 and 5.40 that evening and went back to Flat 3 to support with dinner. The claimant told her that she would tidy up the flat and was there for about half an hour. Ms Frost was asked by Ms Butt what height was the bed at when she left the claimant and AR. Ms Frost's response was to say that it was not to the floor, but it was not high. It was midway. (119)

32. In the claimant's interview she was asked whether she knew how to carry out any moving and handling tasks to support AR. Her response was to say, yes, as she had signed the paper. She confirmed that she had received a copy of the disciplinary procedure and a letter from Human Resources. The letter was in fact delivered to the claimant by hand on 15 April 2020. It referred to an investigation being conducted following allegations of gross misconduct, namely breach of the Safer People Handling Policy.
33. The claimant, during the interview, confirmed that she supported AR on 14 April 2020 and that she was the last person to leave AR's flat. She further stated that she read AR's risk assessment but not all of it as she was going to read the rest of it later. She did, however, sign it to say that she had read it. She was asked why she did not lower the bed and her response was to say that she did not read all of the policy. It was put to her by Ms Butt the following:

“Its come to my attention that you moved AR from her lounge to her bedroom whilst she was still in the hoist. Why did you do that?”

LT - I didn't follow the risk assessment.

LB - Is there anything you want to ask?

LT - I didn't think about the bed level as I didn't put her to bed on my own. I rely on my colleagues to tell me if they think I'm making a mistake, as I've been away from work with sickness. (120)

34. Ms Butt prepared her investigation report and concluded that the claimant had admitted to moving AR from one room to another via the hoist in breach of the Safer People Handling Policy. This was supported by Ms Frost's witness testimony. The claimant admitted to not reading the risk assessment for AR leading to her failure to lower the bed which was a risk to AR. Ms Butt recommended that the matter should proceed to a hearing to consider disciplinary action against the claimant on grounds of gross misconduct. The allegation being breach of Safer People Handling Policy,



“Through not following the risk assessment, leading to the potential injury to our residents: and moving a tenant in the hoist from one room to another.” (126-129)

35. The respondent has a communications book containing relevant information about the residents which should be read by staff. On 9 April 2020, the following was written in the book:

“Please read AR’s new Safer People handling Risk Assessment before supporting her. Failure to comply can lead to disciplinary action.” (130)

36. The message was written by Lauren Sheehy, Senior Support Worker.

The disciplinary hearing 28 April 2020

37. The claimant attended a disciplinary hearing at 2pm, 28 April 2020 together with her trade union representative, Mr Robert Fitzgerald. Also in attendance was Mrs Lucy Goodman who was chairing the meeting; Ms Butt, Investigations Manager; and Ms Erica Goff, Human Resources Advisor/note taker. The claimant confirmed that she had received the hearing pack and was told that Ms Butt would present the case for investigation and outcome, and that questions could be put to her. The claimant was told that she would be given the opportunity to put forward her account of events and be questioned. An outcome decision may be given either that day or sometime later.
38. Ms Butt gave an account of her investigation and outcome consistent with the above findings of fact. She stated that she had received a phone call that AR had fallen out of bed and was found in the hallway. The bed should not have been in an elevated position and that if it had been lowered the fall could have been prevented.
39. The claimant then gave an account of her work on the day in question and the care of AR. She was asked by Mrs Goodman if she had read the communications book, to which the claimant replied “No”, as she had moved from Hawthorn House and had started her shift at 8am as there was a shift change. She did not read the communications book. She acknowledged that she did not have a hard copy of the disciplinary hearing pack as it was sent to her online. Mrs Goodman shared with the claimant the documents she had in her possession.
40. The claimant admitted signing the risk assessment believing that she would have time to read the rest of it later. She understood that it was not safe the manner in which she and Ms Frost got AR to bed. She understood that what she did in moving AR was dangerous. She was the last person to leave the room that evening and was sorry that she did not follow the risk assessment. She acknowledged attending relevant training. It was put to her that after having read the risk assessment during the disciplinary hearing would she have conducted matters differently to which she replied “Yes, definitely”. The hearing concluded at 3.12pm. (131-135)

41. The hearing notes were sent to the claimant who made some corrections. (140-144)
42. Mrs Goodman's outcome decision was communicated to the claimant in a letter dated 1 May 2020. She wrote:

“Dear Liliana,

Further to the disciplinary hearing held on Tuesday 28 April 2020, in the presence of your union representative Robert Fitzgerald and Erica Goff, HR Advisor, I am writing to confirm my decision.

As the Chair of the disciplinary hearing considering all allegations against you, I am satisfied that a fair and thorough investigation has taken place.

The matters of concern were:

- Breach of Safer People Handling Policy.

This allegation came to light following an incident where a resident fell from a bed that was not lowered to the correct height as stated in the risk assessment. This led to further concerns surrounding your alleged use of the hoist to transport the same resident from the lounge to the bedroom as opposed to using the hoist to chair technique. Both situations are covered by the Safer People Handling Policy.

You offered the following in terms of explanation and mitigation for the above events that occurred on 14 April 2020;

- You were unaware of the resident's risk assessment as you had not read it,
- You were not acting alone as there was another carer present,
- You had not read the communication book,
- You were acting in the best interest of the resident in terms of the use of the hoist.

I appreciate your honesty for stating you had failed to read the risk assessment and communication book. The nature of the service requires us to be able to communicate with our carers in this way and for us to ensure risk assessments are read, understood and acted upon. By signing to state that you have read the risk assessment you are responsible for carrying out its instructions and therefore an unnecessary accident occurred. I acknowledge on this occasion there were two carers present and you shared responsibility in ensuring the bed was lowered and therefore the safety of the resident before exiting the flat. The fact is the bed was not lowered. This incident appears to involve another carer and will be raised as a supplementary issue to the original investigation and dealt with accordingly.

In terms of the using the hoist to move a resident between rooms this is in direct breach of the Safer People Handling Policy and contravenes all training you have received since your induction to the role. You have

again stated that another carer was present and allowed this however, I feel you were challenged at the time by this individual and the incident was reported which is what we ask all our employees. You state you were acting in the best interest of the resident during the hearing however this was not mentioned by yourself, at interview with the investigating manager, as the reason. When asked you simply stated because I didn't follow the risk assessment. You have confirmed that you have received sufficient Moving and Handling training and your failure to follow these guidelines represent a risk to the service and the safety of the residents. Therefore this constitutes gross misconduct and I have no option but to summarily dismiss you without notice of payment in lieu of notice in accordance with Fremantle's disciplinary procedure. Your last day of employment will be 1 May 2020 and all terms and benefits associated with your employment cease as of that date.

Given the possible impact of the failure to follow Safer People Handling Policy and our duty of care I am referring the matter to the DBS for consideration.

You have the right to appeal against my decision and should you wish to do so you should write to the HR Department within five working days giving the full reasons why you believe the disciplinary action taken against you is too severe or inappropriate. ..." (145-146

43. The respondent's disciplinary procedure provides for a referral to the Disclosure and Barring Service (DBS). It states:

"Following an investigation or disciplinary action, a decision will be made and the colleague notified particularly when there is a requirement to refer the person to the DBS and/or NNC (Nursing and Midwifery Council). If anyone is subsequently placed on the DBS Barring List, it will be illegal for them to be employed in a care role (ie a 'regulated activity')." (10)

#### The claimant's appeal hearing

44. The claimant appealed against her dismissal. Her grounds of appeal were: that the bed not being lowered/moving and handling/moving from lounge to bed; interview with investigating manager, Ms Butt and additional statements; acting differently in the past in similar cases; and excessive punishment.
45. In relation to the first ground that reliance was placed on challenging her rather than looking at what actually happened. She referred to the fact that she had previously been on sick leave for two weeks during which AR's behaviour had changed significantly. When she returned to work there were no updates and that her return to work interview was a face-to-face meeting during which the discussion was about the Covid-19 pandemic and her responsibility in case she contracted the virus at work. She was not the only one engaged in moving and handling AR. She had not finished reading AR's risk assessment. Ms Frost informed her that they should not hoist AR between rooms but having regard to AR's anxiety and distress, repeated screaming, grabbing with her hands, when putting on or taking off the sling,

or hoisting and/or moving from one place to another several times, she believed, that is, the claimant, that it would be less distress and in AR's best interests that she was moved from the lounge to the bedroom. It worked, as AR did not complain and did not show any discomfort. She did not force Ms Frost to take part or to remain. She could have left but did not do so because she, the claimant, was of the view that Ms Frost believed that it was in AR's best interests.

46. The claimant further stated that there was no proper handover from her colleagues although they knew that she had been away for a period of two weeks on sick leave and had not taken any moving and handling tasks since November 2018.
47. In relation to the second ground of appeal, the claimant stated that she acted in AR's best interests although she did not say that during the investigation meeting with Ms Butt. She further stated that her health condition exposed her to anxiety and acute stress during difficult times, all of which had a direct impact on her ability to express herself, understand others around her and in retaining information. She asserted that this was not considered by Mrs Goodman. Further, English was not her first language, and struggled sometimes expressing herself, in understanding what she had been told, or what she had read.
48. In relation to the third ground appeal, she referred to cases in which employees, in similar circumstances, were not dismissed nor reported to DBS. She wrote that two years previously, she had reported one of her colleagues alleging gross misconduct towards one of the tenants and inappropriate behaviour during work, but that person was neither dismissed nor reported to DBS.
49. In relation to her fourth ground of appeal, the claimant wrote that she had been working in care for three and a half years and slightly over two years with the respondent. The incident on 14 April 2020, was her first serious mistake even though her intentions were good, and no injuries sustained by AR. She had a clean record, and it would be devastating for her to have this on her DBS record, potentially not being able to work again in care, especially when she was not the only person following the procedure which ultimately led to AR's fall. (147-149)
50. The appeal hearing was held on 15 May 2020 and conducted by Mr Andrew Bedwell, Operations Manager for Learning Disabilities Services. Also in attendance were the claimant, Mr Fitzgerald, her union representative, as well as Ms Avril Rawlins who took notes and provided human resources support.
51. It was not a ground of appeal, nor was it put forward during the appeal hearing, that the claimant was suffering from the effects of being overworked.
52. During the hearing she elaborated on her grounds of appeal stating that she expected to have had a handover following her return to work. She again

admitted to not having read the full the risk assessment on AR, only part of it. At the time she had a short 10-minute break instead of 20 to 30 minutes. The assessment was three pages long, but she did not have time to read it. It was her biggest mistake. She acknowledged that she had moved AR in the hoist from the lounge to the bedroom and that the bed was not lowered. She stated that such a task was not her responsibility because she had not read completely the risk assessment. Ms Frost did let her know about AR's distress when putting her on and off a sling. Moving her caused less distress. The claimant acknowledged that the procedure was not to move the resident via a hoist. She maintained that she was acting in AR's best interests. Ms Frost was tending to AR in the bed, therefore, was engaged in lowering the bed, not her.

53. In relation to those members of staff who were treated more favourably in similar circumstances, the claimant referred to Ms Caroline Martin who had left a tenant in a hoist and forgot about them. Ms Rawlins stated that she was aware of Ms Martin's case. Mr Bedwell responded by saying that he would follow up Ms Martin's case.
54. The claimant then referred to the case of Toni who, two years previously in relation to a trip to the zoo, breached the risk assessment by making her own decision and did not take notice of the service user requirements. The claimant had written to Mr Mark Tillman and to Mrs Goodman about Toni who said that they would investigate. Toni was not referred to DBS and continued to work for one or two months before leaving.
55. The claimant then articulated her case as to why the dismissal and reference to DBS were excessive. She repeated that she was not engaged in lowering AR's bed and that Ms Frost could have stopped her at any point but thought that she was doing the right thing for AR. Mr Fitzgerald is recorded to have said on the claimant's behalf, the following:

“I have explained risk assessments to Liliana. She knows the importance and regrets her actions. She has a good work record and we will push for retraining or a probationary period. She is a caring person who has made a mistake and she should be supported not punished.”
56. Mr Bedwell asked him whether he was satisfied with the conduct of the hearing, to which responded by saying:

“Yes it's been fair.”
57. Mr Bedwell then informed the claimant and Mr Fitzgerald that he would be emailing them his outcome. (150-153)
58. On 20 May 2020, Mr Bedwell emailed his outcome letter to the claimant in which he considered all her grounds of appeal. He concluded that the disciplinary panel found that she had committed two offences of gross misconduct, which were exposing the service user to considerable risk; and failing to lower the bed to the floor before leaving the service user's room and moving a service user between rooms while still on the hoist. They were both serious breaches of the respondent's Safer People Moving Policy

and Procedures and her training, either one of which was considered as gross misconduct and could potentially lead to dismissal.

59. Having considered all of the grounds of appeal, he decided not to uphold the claimant's grounds and dismissed her appeal. He confirmed that her dismissal was effective on 1 May 2020.
60. In relation to the alleged comparator, Ms Martin, he was unable to confirm or deny the information given to him by the claimant due to confidentiality. (156-157)

#### Ms Sue Frost

61. Ms Frost, who is British, was the subject of a disciplinary hearing on 19 May 2020, conducted by Mrs Goodman who considered the allegation of breach of Safer People Handling Policy. Mrs Goodman believed, on the balance of probabilities, that AR's bed was not lowered by Ms Frost to the correct height and issued her with a first written warning for gross misconduct breaching the Safer People Handling Policy by failing to ensure that the bed was lowered in line with service user's risk assessments. The warning was to remain on her file for 12 months. (154-155)
62. On 26 May 2020, the claimant was referred to DBS by the respondent's human resources department. The respondent enclosed details of the investigation, interviews, invitation to the disciplinary hearing, dismissal letter, witness statement and referral to the local authorities Safeguarding Adults Team. (159a to 159j)

#### Alleged comparators

63. In support of her unfair dismissal claim, the claimant relies on the circumstances surrounding three members of staff to show inconsistent or disparate treatment, as well as less favourable treatment in support of her direct race discrimination claim. They are all British.
64. Mrs Caroline Martin was employed as a Supported Living Worker who arrived at a tenant's flat to carry out a moving and handling task, that of putting a resident to bed. The resident was attached to a standing hoist, when Mrs Martin was called away by another worker to help him log onto the office computer in order to do his training. During that time the resident was left stranded by the hoist for about 10 minutes in the standing position. While the service user was in the standing hoist, there was another worker with him at the time during Mrs Martin's absence.
65. The matter was reported by the resident and was investigated. Mrs Martin was the subject of disciplinary proceedings resulting in her being given her first written warning.
66. We find that this incident is not comparable to that of the claimant as there was no allegation of gross misconduct. No transportation of the resident was involved. Leaving the resident in a standing hoist is less serious than

being transported in a hoist. A standing hoist is designed to support an adult in the standing position.

67. In the claimant's case the hoist was used to move AR from the lounge to her bedroom which was not its purpose and is specifically not allowed.
68. The next comparator is Ms Toni Healey. This case involved a trip to the zoo. It is alleged that when supporting the resident in the bathroom, Mrs Healey came in and started shouting at the resident, demanding why she had prepared a packed lunch. The resident became anxious and replied that her finances were very low, therefore, could not afford to eat out. Ms Healey forced her to leave the packed lunch at her residence. She also left another female resident outside in direct sunlight with no water and without letting her other colleagues know where that person was so that she could be supported.
69. The claimant's case is that she found the female resident almost unresponsive and dehydrated. Although a risk assessment had been done by Ms Healey, the claimant stated that she did not respect the assessment and changed most of the allocations.
70. The matter was investigated. Allegations were also made against the claimant by Ms Healey in relation to her behaviour on that occasion. It was apparent that the relationship between them was poor. It was considered that disciplinary proceedings were not appropriate as it was the investigating manager's belief that there was no inappropriate conduct to warrant an investigation. Ms Healy did receive refresher safeguarding training. There was a team meeting for all of those involved to discuss the issues which arose from the incident and the risk assessment for future trips was amended.
71. The Healey case did not involve the use of a hoist or leaving service user in bed where the height of the bed was not at floor level. In any event, the issue raised by the claimant was borne out of a deteriorating relationship between her and Ms Healey. The circumstances of this case are not similar to those of the claimant's.
72. In relation to Ms Frost, she was not AR's main carer and had raised concerns with the claimant about moving AR via the hoist from the lounge to the bedroom, and the claimant remained with AR for between 20 and 30 minutes after Ms Frost had left.
73. We find that the particular circumstances surrounding Ms Frost were neither the same nor similar when compared with those of the claimant.

### **Submissions**

74. We have taken into account the submissions by Mr K McNerney, counsel on behalf of the respondent, and the brief written submissions by the claimant. We do not propose to repeat their submission herein having regard to rule 62(5) Employment Tribunal's (Constitution and Rules of Procedure)

Regulations 2013, as amended. We have also considered the cases we have been referred to.

### The law

75. Section 98(1) Employment Rights Act 1996 ("ERA"), provides that it is for the employer to show what was the reason for dismissing the employee. Dismissal on grounds of conduct is a potentially fair reason, s.98(2)(b). Whether the dismissal is fair or unfair having regard to the reason shown by the employer, the tribunal must have regard to the provisions of s.98(4) which provides:

"Where the employer has fulfilled the requirements of subsection (1), and 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 employees 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."

76. In the case of British Homes Stores v Burchell [1980] ICR 303, the EAT's judgment was approved in the Court of Appeal case of Weddel & Co Ltd v Tepper [1980] ICR 286. The following has to be established:

76.1 First, whether the respondent had a genuine belief that the misconduct that each employee was alleged to have committed had occurred and had been perpetrated by that employee,

76.2 Second whether that genuine belief was based on reasonable grounds,

76.3 Third, whether a reasonable investigation had been carried out,

77. Finally, in the event that the above are established, was the decision to dismiss reasonable in all the circumstances of the case. Was the decision to dismiss within the band of reasonable responses?

78. The charge against the employee must be precisely framed Strouthos v London Underground [2004] IRLR 636.

79. Even if gross misconduct is found, summary dismissal does not automatically follow. The employer must consider the question of what is a reasonable sanction in the circumstances Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854.

80. The Tribunal must consider whether the employer had acted in a manner a reasonable employer might have acted, Iceland Frozen Foods Ltd v Jones



[1982] IRLR 439 EAT. The assessment of reasonableness under section 98(4) is thus a matter in respect of which there is no formal burden of proof. It is a matter of assessment for the Tribunal.

81. It is not the role of the Tribunal to put itself in the position of the reasonable employer, Sheffield Health and Social Care NHS Trust v Crabtree UKEAT/0331/09/ZT, and London Ambulance Service NHS Trust v Small 2009 EWCA Civ 220. In the Crabtree case, His Honour Judge Peter Clark, held that the question "Did the employer have a genuine belief in the misconduct alleged?" goes to the reason for the dismissal and that the burden of showing a potentially fair reason rests with the employer. Reasonable grounds for the belief based on a reasonable investigation, go to the question of reasonableness under s.98(4) ERA 1996. See also Secretary of State v Lown [2016] IRLR 22, a judgment of the EAT.
82. The range of reasonable responses test applies to the investigation as it does to the decision to dismiss for misconduct, Sainsbury's supermarket Ltd v Hitt [2003] ICR 111 CA.
83. In the case of Taylor v OCS Group Ltd [2006] ICR 1602 CA, it was held that what matters is not whether the appeal was by way of a rehearing or review but whether the disciplinary process was overall fair.
84. The seriousness of the conduct is a matter for the employer, Tayeh v Barchester Healthcare Ltd [2013] IRLR 387 CA.
85. The Court of Appeal acknowledged that employment tribunals are entitled to find whether dismissal was outside the range of reasonable responses without being accused of placing itself in the position of being the reasonable employer. In Bowater-v-Northwest London Hospitals NHS Trust [2011] IRLR 331, a case where the claimant, a senior staff nurse who assisted in restraining a patient who was in an epileptic seizure by sitting astride him to enable the doctor to administer an injection, had said, "It's been a few months since I have been in this position with a man underneath me" was the subject of disciplinary proceedings six weeks later. She was dismissed for, firstly, using an inappropriate and unacceptable method or restraint and, secondly, the comment made. The employment tribunal found by a majority that her dismissal was unfair. The EAT disagreed. The Court of Appeal, overturned the EAT judgment, see the judgment of Stanley Burnton LJ, paragraph 13. See also Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677 in which the Court of Appeal held that the tribunal is required to consider section 98(4) ERA 1996, when considering the fairness of the dismissal.
86. The level of inquiry the employer is required to conduct into the employee's alleged misconduct will depend on the particular circumstances including the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee. "At the one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required,

including the questioning of the employee, is likely to increase.”, Wood J, President of the EAT, ILEA v Gravett [1988] IRLR 497.

87. In the case of Thompson v Alloa Motor Co Ltd [1983] IRLR 403, the EAT, Lord McDonald, held that conduct within the meaning of section 98(2)b means “actings of such a nature, whether done in the course of employment or outwith it, that reflect in some way upon the employer-employee relationship”, paragraph 5.
88. Evidence as to decisions made by an employer in “truly parallel circumstances” may be sufficient to support an argument, in a particular case, that it is not reasonable on the part of the employer to visit the particular employee’s conduct with the penalty of dismissal and that some other lesser penalty would have been appropriate. “Employment tribunals should scrutinise arguments based upon disparity with particular care and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar to afford an adequate basis for argument.”, Hadjiioannou v Coral Casinos Ltd [1981] IRLR 352 EAT.
89. Under section 13, Equality Act 2010, “EqA”, direct discrimination is defined:

“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”
90. The protected characteristics are set out in section 4 EqA and includes race and sex.
91. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

“There must be no material difference between the circumstances relating to each case.”
92. Section 136 EqA is the burden of proof provision. 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 provisions 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.”
93. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions has an important role to play where there is room for doubt as to the facts, they do not apply where the

tribunal is in a position to make positive findings on the evidence one way or the other.

94. In Madarassy v Nomura International plc [2007] IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.
95. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicated a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.
96. The Court then went on to give a helpful guide, “Could conclude” [now “could decide”] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.
97. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if

accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

98. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy or gender reassignment.
99. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.
100. The tribunal could pass the first stage of the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex. This was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.
101. The claimant has to prove that the act occurred and, if so, did it amount to less favourable treatment because of the protected characteristic?, Ayodele v Citilink Ltd [2017] EWCA Civ 1913.
102. Unreasonable conduct does not amount to discrimination, Bahl v Law Society [2004] IRLR 799

## Conclusions

### Unfair dismissal

103. Applying Burchell, the claimant was invited to an investigation meeting to discuss AR's fall on 14 April 2020. Also being interviewed the same day was Ms Frost. Ms Butt concluded that the claimant failed to follow the respondent's Safer Handling Procedure, in that, being AR's main carer, she moved AR in the hoist from the lounge to the bedroom. While in the bedroom for 20 to 30 minutes after Ms Frost had left, she failed to lower AR's bed to floor level. This led to AR falling out of her bed on to the floor.

The responsibility for not lowering the bed was that of the claimant who was in AR's bedroom for 20 to 30 minutes after Ms Frost had left.

104. We are satisfied that the claimant gave her account of the events that evening which was taken into consideration by Ms Butt. A fair and reasonable fact-finding investigation was conducted into the events that evening.
105. The claimant attended a disciplinary hearing and was represented by Mr Fitzgerald. Again she was able to put forward her account of the events. No issue was raised by Mr Fitzgerald about the way in which the hearing was conducted.
106. The respondent genuinely believed, on reasonable grounds, the claimant was guilty of the allegations against her, and that Ms Frost's role was not comparable to the claimant's. This was clearly set out in the disciplinary hearing outcome letter sent by Mrs Goodman.
107. The claimant appealed but was unsuccessful. During the appeal hearing Mr Fitzgerald acknowledged that she was at fault, the only issue was the punishment being severe. He had no concerns in relation to the conduct of the appeal hearing.
108. The claimant's grounds of appeal were dismissed, and the dismissal upheld.
109. We are satisfied that here was a reasonable investigation into the allegations and the claimant given the opportunity to put forward her case. There were reasonable grounds for believing in her guilt based on the evidence provided by Ms Frost and the claimant's admissions made during the investigation, disciplinary and appeal hearings. The respondent, as an employer, determines the seriousness of the allegations, Tayeh. In this case it involved safeguarding procedures as it concerns vulnerable adults suffering dementia and other mental and physical disabilities.
110. In accordance with the respondent's disciplinary procedure, failure to comply with its rules including its health and safety, constitutes a serious breach and an act of gross misconduct entitling it to dismiss summarily.
111. It is not the role of this Tribunal to put itself in the position of being the reasonable employer. Section 98(4) Employment Rights Act 1996 requires a Tribunal to consider the fairness of the dismissal. While it may be the case that another employer possessed of the same information may issue a final written warning, another may have dismissed, Newbound. All we can say is that dismissal fell within the range of reasonable responses. Accordingly, the claimant's unfair dismissal claim is not well-founded and is dismissed.

Direct race discrimination

112. The claimant is a Romanian national and compares her treatment with the comparators who are all British. For the same reasons given in relation to the unfair dismissal claim, there is no evidence that the alleged comparators were treated differently from the claimant based on their nationality or race. This was an assertion by the claimant with little evidence in support. Of importance is that their circumstances were neither the same nor similar to those of the claimant. What was the reason for the claimant's treatment? We are satisfied that it was that she had committed a serious breach of the respondent's Safety Handling Procedure resulting in AR having a fall.

113. Even if the named individuals were correct or appropriate comparators, if they had behaved in the same way as the claimant, we are satisfied that they would have been summarily dismissed.

114. Accordingly, the claimant's direct race discrimination claim is not well founded and is dismissed.

#### Breach of contract/wrongful dismissal

115. In relation to the breach of contract or wrongful dismissal claim, we are satisfied, having regard to our findings, that the claimant had engaged in a serious breach of the respondent's procedures entitling it to terminate her employment summarily and not her pay in lieu of notice. This claim has not been proved and is dismissed.

#### Disability discrimination

116. As the claimant was ordered to pay £500 deposit as a condition for continuing with her disability discrimination claims, and had failed to do so, the tribunal struck out those claims.

#### Unauthorised deduction from wages in respect of sick pay

117. In addition, during the hearing the claimant acknowledged that she had been paid sick pay by the respondent and withdrew that claim. It was, therefore, dismissed by the tribunal upon her withdrawal.

#### Unauthorised deduction from wages

118. She further claimed that the respondent had taken either a week or month's salary when she commenced her employment which was to be paid to her upon termination. She was given time to go through her wage slips which were provided to her by the respondent. Following her perusal, she agreed that she had been paid on time from the commencement of her employment and there had been no withholding of her pay. Accordingly, she decided that she no longer was willing to pursue such a claim against the respondent. It was dismissed upon her withdrawal.

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Employment Judge Bedeau

11 May 2022  
Date: .....

Sent to the parties on: 13 May 2022

For the Tribunal Office