



EMPLOYMENT TRIBUNALS

Claimant: Mr J Murebwa

Respondent: Walsingham Support

Heard at: Cardiff **On:** 18 and 19 December 2019

Before: Employment Judge M R Havard
Members: Mrs J Kiely
Ms C Izzard

Representation:
Claimant: In person
Respondent: Mr R Hignette, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant was not subject to direct race discrimination and his claim is dismissed. The Claimant's claim for breach of contract is also dismissed.

REASONS

Introduction

1. By a claim form dated 20 February 2019, the Claimant indicated that he wished to pursue a claim for unfair dismissal and that he had been discriminated against on the grounds of race.
2. However, it was accepted by the Claimant that, as he had been employed by the Respondent for less than two years, and as no special circumstances applied, he was not able to pursue a claim for unfair dismissal.
3. His claims were therefore restricted to a claim of race discrimination and a claim for breach of contract.

Issues

4. At a preliminary hearing conducted by telephone on 11 June 2019, the issues between the parties to be determined by the Tribunal had been formulated. At the beginning of this hearing, it was confirmed by both the Claimant and Mr Hignette on behalf of the Respondent that there was no need for those issues to be amended in any way.

5. Those issues are:

1. *Time limit / limitation issues*

- a. Were the claimant's detriment complaints presented within the time limits set out in Sections 123(1)(a) & (b) of the Equality Act 2010 ("EqA")?
- b. Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred; etc.

2. *EQA, section 13: direct discrimination because of race (colour)*

- c. It is not in dispute that the respondent treated the claimant as follows:
 - i. Suspended the claimant on 26 September 2017;
 - ii. Continued the suspension from April 2018 onto October 2018;
 - iii. Subjected the claimant to an initial review meeting on 19 October 2018;
 - iv. Dismissed the claimant on 26 October 2018.
- d. Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

The claimant relies on the following comparators: Leanna Morris (Manager) and/or hypothetical comparators.

- e. If so, was this because of the claimant's colour and/or because of the protected characteristic of colour more generally?

3. *Breach of contract*

- f. How much notice was the claimant entitled to?
- g. Did the respondent breach the contract of employment in not paying the contractual notice on termination?

4. *Remedy*

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:

- i. if it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result?
- ii. did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?
- iii. did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any compensatory award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?
- iv. Have regard to the Pensions Principles when deciding any orders relevant to the calculation of pension loss.

Evidence

6. The Claimant gave evidence on his own behalf.
7. The Respondent called:
 - i. Mrs Lucy Thomas, Head of Operations and Development for the Respondent, and
 - ii. Mr Scott Davies, Locality Manager for the Respondent.
8. An agreed bundle had been submitted and, by consent, some additional documents were incorporated into it in the course of the hearing. Unless otherwise stated, any page references in this judgment refer to pages in the bundle.

Findings of Fact

9. The Respondent is a charitable organisation and its activities involve the support of people with learning disabilities, autism, brain injuries and complex needs across England and Wales. It has operated since 1986.
10. In the Swansea area in which the Claimant worked, the Respondent has 15 homes which cater for the care of such vulnerable adults.
11. Taking account of the nature of its activities, the Respondent and its staff are required to operate in accordance with a number of policies to include: a Discipline Grievance and Appeals Policy; an Initial Review Policy; a Diversity and Equality Policy, and an Incident Policy (pages 65 to 86e).
12. Other standard documentation used by the Respondent and its staff and which are relevant to this claim are: a Behaviour Monitoring Form ("BMF") (page 102); a daily report form (pages 103 to 105) and an incident report form.
13. In the event that there is a safeguarding concern, a form VA1 – Adult Protection Referral Form (pages 237 to 238) is completed and submitted to the Safeguarding Officer at the local authority.
14. On 30 March 2017, the Claimant attended an interview with the Respondent for the post of support worker. The offer was to work as a support worker for 162 hours per calendar month in the Swansea and Neath Port Talbot area, specifically at a location called The Orchard (pages 87 to 91).
15. On 28 April 2017, the Respondent wrote to the Claimant confirming his appointment with a start date of 26 April 2017. He was also provided with a document entitled, "Statement of Particulars – Terms and Conditions of

Employment" (pages 93 to 95e). In that document, in a section entitled "Initial Review and Appraisal", it states:

"During the first six months of employment all employees are on probation and during this period normal disciplinary procedures do not apply. All employees must satisfactorily complete their initial review period before having their employment confirmed.

There may be some circumstances when an initial review period is extended and occasions when permanent employment is not confirmed and an employee's contract is terminated during or at the end of their initial review period.

All employees will receive an initial review within their first six months of employment to review performance to date, set new objectives and identify any training and development needs."

16. On 2 May 2017 the Claimant signed the statement of terms and conditions of employment.
17. When working as a support worker at The Orchard, the Claimant had the responsibility for the care of a service user, PP. The care plan and risk assessment for PP included a provision that he required support on the basis of 2:1. This meant that, as PP was assessed as being highly vulnerable, and volatile, two support workers should always be in attendance for his care. The Claimant knew that PP required 2:1 care.
18. On 24 May 2017, a BMF was completed (page 102) relating to disruptive behaviour on the part of PP.
19. On 25 May 2017, a daily report sheet had been completed (page 106) regarding the activities involving PP during that day. Neither document make any reference to an injury having been sustained by the Claimant.
20. However, in the Claimant's medical records, there is reference to the Claimant attending his GP on 25 May 2017 for treatment relating to an injury to his little finger on his right hand. This was caused when caring for PP who had assaulted the Claimant when he grabbed the Claimant's hand. The injury is described as a mallet deformity to the right little finger (page 187).
21. The Claimant acknowledged that he knew that the Incident Policy (page 86a) required support workers to record all incidents. Indeed, the policy states that the Incident Internal Reporting Procedure must be followed and that an online Incident Internal Report Form must be completed and then reviewed by the line manager of the member of staff.
22. The Claimant stated that the BMF and daily report sheet contained within the bundle were not completed by him. He stated that he had completed a BMF

and a daily report sheet in which he had referred to the incident when he sustained an injury and suggested that those documents had been destroyed. However, there was no suggestion that the BMF and daily report sheet contained within the bundle were not completed at the time by another employee of the Respondent, Jo Clarke.

23. More particularly, the Claimant accepted that he had not completed the incident internal report form online. He suggested that the reason he was unable to do so was because he had not been provided with the password to enable him to gain access to the form. However, this explanation was not provided to Mr Scott Davies when he interviewed the Claimant at an initial review meeting on 19 October 2018 (pages 166 – 168) to which we refer in more detail in due course. Furthermore, it was suggested by the Claimant for the first time when he made his closing submissions to the Tribunal that everyone else had the password to the system and he was the only one who did not.
24. Having considered the evidence, and the absence of any reference to a failure to possess the password until late in the proceedings, the Tribunal finds that the Claimant failed to report the injury he sustained in contravention of the incident policy with which he was familiar. It does not accept his very late submission, as opposed to when he gave evidence, that he was the only person who had not been provided with the password.
25. From July 2017 to September 2017, a number of allegations were being made in respect of the conduct of the Claimant's line manager, Leanna Morris. They related to concerns regarding her conduct towards PP some of which included safeguarding issues which were reported to the safeguarding co-ordinator at the City and County of Swansea, Ms Angela Singh. Ms Singh was acting as safeguarding coordinator at a time when the full-time coordinator, Mr Martin Powles, was on secondment.
26. Indeed, there was a police investigation which centred around safeguarding and whistleblowing in relation to The Orchard. Once it was concluded that, in relation to Ms Morris, there would be no further action taken by the police, Mrs Thomas conducted an internal investigation into the allegations against Ms Morris.
27. The decision was taken not to suspend Ms Morris pending the outcome of the investigation. The reason for this decision was that Ms Morris was a line manager and therefore her primary role was to manage support workers as opposed to having day-to-day direct "hands-on" involvement in the care of service users. However, Ms Morris would, from time to time, provide such direct support to support workers such as the Claimant when dealing with service users such as PP. Indeed, certain of the allegations, which were subsequently found to be unsubstantiated, revolved around alleged inappropriate management of PP. Nevertheless, it was concluded that it was

not necessary to suspend Ms Morris whilst the investigation was ongoing. The reason for this decision was on the basis that it was possible to move her to the regional office where she would have no contact at all with service users. She could use her experience and expertise to assist in various tasks and projects being conducted at the regional office. In this way, pending the outcome of the investigation, it was concluded that any risk to service users was eliminated.

28. As for the Claimant, on 21 September 2017, a VA1 form was completed and submitted to the Respondent and also to the safeguarding co-ordinator, Ms Singh, at the City and County of Swansea (pages 237 – 242). The VA1 form contained allegations of physical and emotional abuse of PP by the Claimant. It was based on allegations made by members of staff of Trinity Nursing Services working at The Orchard regarding events which were alleged to have taken place on 20 September 2017. The Claimant maintained that the allegations made against him by staff from Trinity Nursing Services was out of revenge because the Claimant had reported a member of staff for being asleep when on duty during a night shift.
29. The description of alleged abuse/injuries was as follows:
 - "- Physically pushing P.P into the corner of the room*
 - Saying "I'm not scared of you, I will fight you, come and get me"*
 - Physically ripping P.P t-shirt*
 - Constantly wanting to be with P.P on his own and telling other staff members to lock themselves in either the kitchen or office.*
 - talks about having sexual intercourse in front of P.P*
 - spits at P.P*
 - physically pushing P.P by his chest into the back door."*
30. On 22 September 2017 at 16.26 pm, the safeguarding co-ordinator at the City and County of Swansea, Ms Angela Singh, sent an email to Tina Hawkins of the Respondent (page 110), which was copied to the police, saying as follows:

"Subject: Re: PP

Hi Tina,

Following a VA referral received this afternoon in relation to [PP] and the working practices of Jeffery (sorry I don't know his surname) I have had a discussion with Diane Cole, police officer at the Public Protection Unit and we are requesting that Jeffrey is suspended with immediate effect until the allegations can be investigated further. Please confirm you have received this email and will action the request.

Thank you in anticipation of your support in this matter.

Regards

Angela"

31. The decision to suspend the Claimant was communicated to him personally although the Claimant was not informed in any detail of the reasons for his suspension.
32. On 26 September 2017, Ms Gallagher of the Respondent wrote to the Claimant confirming, "your suspension from duty under your Initial Review (probation) period with effect from 26 September 2017 following notification of a Safeguarding alert" (page 111).
33. The letter went onto say that if the Claimant had any queries with regard to his suspension, he should contact human resources who would be able to assist him with any factual information. The Claimant confirmed that he made no contact with human resources following his suspension.
34. On 9 October 2017, a strategy meeting took place at the City and County of Swansea to discuss the concerns raised in the VA1 (page 243). It was concluded that the Claimant should remain suspended and that an investigation would be undertaken by safeguarding and the police. The Claimant accepted, and the Tribunal found, that, whilst the investigation by safeguarding at the City and County of Swansea, and the police, was ongoing, any internal investigation by the Respondent would not be possible.
35. The Claimant argued that, in the absence of any allegations being proved against him, whilst he appreciated it would be inappropriate for him to carry on as a support worker in the care of PP, it would have been appropriate for him to be moved to another premises and to carry on work as a support worker to other service users. The Tribunal did not accept this assertion by the Claimant. The Tribunal accepted the evidence of Mrs Thomas and found that the Respondent was obliged to follow the recommendation of the safeguarding co-ordinator at the City and County of Swansea and that, until the conclusion of any investigation, it would be inappropriate for the Claimant

to perform his role as a support worker for any vulnerable adult. Indeed, as Mr Hignette suggested, the decision to suspend the Claimant is financially an expensive one as the Claimant remains on full pay during that period of suspension.

36. In April 2018, the Claimant and the Respondent were informed that the investigation by the police into the allegations made against the Claimant had been concluded and that no further action would be taken.
37. In April 2018, Mrs Thomas indicated that, when she took over, she was asked by the safeguarding co-ordinator at the City and County of Swansea to halt any internal investigation into the allegations against the Claimant or others as a result of a much wider investigation that was ongoing. Mrs Thomas confirmed and the Tribunal found, that she was required to follow the guidance from the safeguarding co-ordinator. It coincided with two senior managers at the Respondent also being suspended in May 2018 and therefore the operational side of the Respondent's activities in Swansea were described by Mrs Thomas as being in crisis.
38. Finally, on 30 September 2018, the safeguarding co-ordinator for the City and County of Swansea, Martin Powles, sent an email to Mrs Thomas confirming that she could proceed with a number of investigations to include that of the Claimant. This was in response to a request from Mrs Thomas (page 147a).
39. Having received authorisation to do so, the task of meeting with the Claimant was delegated to Mr Scott Davies, a locality manager.
40. On 15 October 2018, a letter was sent to the Claimant by Mr Davies informing him of the date, time and location of the meeting which was to discuss the Claimant's initial review/probation (page 148).
41. The letter states that the purpose of the meeting was to review the Claimant's performance and conduct within the initial review period and he is told that there are three possible outcomes from the meeting:
 1. that we confirm you are in the post on a permanent basis;
 2. that we extend your initial review period for up to three months;
 3. that your employment comes to an end due to you unsatisfactorily completing your initial review period.
42. It was suggested by the Claimant that, as he had been with the Respondent since April 2017, he could no longer be on probation, that he had effectively passed his initial review (probation) and was a permanent employee. He submitted that this was on the basis that he had satisfactorily passed his initial review period. The Tribunal rejected this suggestion and found that, as the Claimant had been suspended from September 2017 to October 2018 as a

result of alleged misconduct arising out of safeguarding concerns, it could not possibly be concluded that he had passed his initial review (probation) period on the basis of satisfactory performance.

43. Furthermore, whilst the Tribunal considered that there was a lack of communication from the Respondent to the Claimant during the period of his suspension to inform him of what was happening and why his suspension had to continue, there was nothing to suggest that the Respondent had ever written to the Claimant to confirm that he had passed his initial review (probation) and that he was now a permanent employee.
44. On 19 October 2018, the Claimant attended the initial review meeting with Mr Davies. Mr Davies had not met the Claimant before this meeting and was considered by the Respondent to be entirely independent and was looking at the allegations afresh.
45. The Claimant stated that he did not appreciate the purpose of the meeting which he considered to be disciplinary but the Tribunal found that the purpose of the meeting was made sufficiently clear in the letter of 15 October 2018 (pages 148 to 149) as outlined in paragraphs 40 and 41 above.
46. Mr Davies prepared notes of the meeting with the Claimant (pages 150 to 168). The Claimant agreed with the accuracy of a number of sections of the notes, particularly with regard to those allegations which Mr Davies found unsubstantiated.
47. However, with regard to the two allegations which he found to be substantiated, namely the Claimant's failure to report the injury he sustained to his hand in May 2017 and the fact that he had provided care and support to PP on a 1:1 basis rather than 2:1 as required in PP's care plan, he took issue with the accuracy of Mr Davies's note.
48. The Claimant also referred the Tribunal to a document entitled "Guidelines for initial review" (page 165) which states:

"The member of staff must sign the review and shall be encouraged to comment whether they agree with the contents of the review."
49. The Tribunal found, and indeed it was conceded by Mr Hignette, that this process, "could have been dealt with better". Indeed, the Tribunal found that it was of even greater importance in circumstances such as the review meeting with the Claimant that the notes should have been given to the Claimant to review and sign. However, the Tribunal took into consideration the fact that the Claimant found substantial parts of the notes of the meeting to be accurate. The Tribunal also noted that Mr Davies had not met the Claimant prior to this meeting and therefore was considered to be independent. Finally, the evidence provided by Mr Davies was consistent and the Tribunal found him to be a credible witness. On balance, the Tribunal

found the notes of the meeting to be an accurate account of the exchanges between the Claimant and Mr Davies.

50. Indeed, the Claimant himself accepted that the following exchange was accurate:

"SD – During times when you have supported PP 1:1 during his challenging behaviour, is this normal practice to work 1:1 at these times.

JM – I have supported PP, 1:1 on a few occasions even though he is written up for 2:1 support at all time."

51. Earlier in the discussion, notes recorded by Mr Davies stated the Claimant said:

"JM – The problem in The Orchard was being short staffed. Agency would sent different staff with inappropriate training to support PP, most of them were scared of PP, mostly females. When there was behaviours in kitchen PP sometimes broke plates and got pieces and threw them at staff and also cut himself with these. When challenging behaviour occurred in kitchen we had to do everything to stay in the kitchen to keep PP safe because there are so many items that can cause harm. Trinity staff couldn't manage PP and his behaviours so I would ask them to leave so I could manage it on my own. Manager (LM) thanked me for my good work when supporting PP during challenging times in a service team meeting. For me it isn't just a job. I worked overtime to get to know PP and how best to support him. There were times when I felt I was better off managing the behaviour alone and did tell staff to leave the area."

52. On the basis of his findings, Mr Davies concluded that it was appropriate for the Claimant's employment to be terminated. Before notifying the Claimant, Mr Davies consulted with Mrs Thomas and the human resources department who confirmed that they were in agreement with the outcome of the review and his decision.
53. On 26 October 2017 Mr Davies wrote to the Claimant informing him that his employment had been terminated (pages 169 – 170). The decision to terminate the Claimant's employment was restricted, first, to the Claimant's failure to report an injury and, secondly, supporting PP on a 1:1 basis as opposed to 2:1 staffing at all times.
54. The Claimant confirmed that it was only when he received the letter from Mr Davies that he considered the decision had been reached because he was black. In his letter to the Respondent on 9 November 2018 (pages 176 to 178), the Claimant said that he had, "concluded that I was treated with malice because of the colour of my skin (black)". The Claimant then sets out, in paragraphs a) to h), the reasons for him reaching such a conclusion.

55. On 8 January 2019, the Claimant entered into early conciliation with ACAS.
56. On 23 January 2019, ACAS issued an Early Conciliation Certificate.
57. On 20 February 2019, the Claimant issued an ET1.

The Law

58. The Tribunal had adopted the following legal framework when reaching its decision.
59. Race is a protected characteristic for the purposes of the Equality Act 2010 (“EqA”).
60. The Employment Appeal Tribunal in the **Law Society v Bahl** [2003] IRLR 640, made this simple point, at paragraph 91:

“It is trite but true that the starting point of all tribunals is that they must remember that they are concerned with the rooting out certain forms of discriminatory treatment. If they forget that fundamental fact, then they are likely to slip into error”.

61. The provisions are designed to combat discrimination. It is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: **Glasgow City Council v Zafar** [1998] ICR 120. Tribunals should not reach findings of discrimination as a form of punishment because they consider that the employer’s procedures or practices are unsatisfactory; or that their commitment to equality is poor; **Seldon v Clarkson, Wright & Jakes** [2009] IRLR 267.
62. Direct discrimination is defined by Section 13 EQA:

13 Direct discrimination

(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.

63. Section 23 EQA provides that a comparison for the purposes of Section 13 must be such that there are no material differences between the circumstances in each case. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this means, in most cases, the Tribunal should consider how the Claimant would have been treated if she had not had the protected characteristic. This is often referred to as relying upon a hypothetical comparator.
64. Since exact comparators within the meaning of section 23 EQA are rare, it may be appropriate for a Tribunal to draw inferences from the actual

treatment of a near-comparator to decide how an employer would have treated a hypothetical comparator: see **CP Regents Park Two Ltd v Ilyas** [2015] All ER (D) 196 (Jul).

65. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516.
66. Statutory provision is now made by Section 136 EQA:

136 Burden of proof

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

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

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

67. Guidance on the reversal of the burden of proof was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867. The guidance may be summarised in two stages: (a) the Claimant must establish on the totality of the evidence, on the balance of probabilities, facts from which the Tribunal ‘could conclude in the absence of an adequate explanation’ that the Respondent had discriminated against her. This means that there must be a ‘prima facie case’ of discrimination including less favourable treatment than a comparator (actual or hypothetical) with circumstances materially the same as the Claimant’s, and facts from which the Tribunal could infer that this less favourable treatment was because of the protected characteristic; (b) if this is established, the Respondent must prove that the less favourable treatment was in no sense whatsoever because of the protected characteristic.
68. It was also said by Mummery LJ in **Madarassy**:
- “The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case.”
69. To establish discrimination, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a significant influence: **Nagarajan v London Regional Transport** [1999] IRLR 572

70. The Tribunal’s focus “must at all times be the question whether or not they can properly and fairly infer... discrimination.”: **Laing v Manchester City Council**, EAT at paragraph 75.
71. In considering what inferences can be drawn, Tribunals must adopt a holistic approach, by stepping back and looking at all the facts in the round, and not focussing only on the detail of the various individual acts of discrimination. We must “see both the wood and the trees”: **Fraser v University of Leicester** UKEAT/0155/13 at paragraph 79.
72. The time limit in which complaints of discrimination should be brought is set out in Section 123 of the EqA:
- “(1) ... proceedings on a complaint ... may not be brought after the end of—
- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable.
- ...
- (3) For the purposes of this section—
 - (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.”
73. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. **Robertson v Bexley Community Centre (t/a Leisure Link)** [2003] IRLR 434 is commonly cited as authority for the proposition that exercise of the discretion to apply a longer time limit than three months is the exception rather than the rule. In **Chief Constable of Lincolnshire Police v Caston** [2010] IRLR 327 Lord Justice Auld noted that the comments in Robertson were not to be read as encouraging tribunals to exercise their discretion in a liberal or restrictive manner. The tribunal should take all relevant circumstances into account and consider the balance of prejudice of allowing or refusing the extension.

Analysis and conclusions

74. Addressing each issue in turn, the Tribunal had carried out an analysis of the facts and, applying the law, had reached the following conclusions.

1. Time Limit / Limitation Issues

75. The ET1 was lodged on 20 February 2019 and therefore, with the extension of one month, it was accepted by Mr Hignette that, in those circumstances, the events described at issue 2ciii and iv, namely the initial review meeting on 19 October 2018 and the dismissal on 26 October 2018 respectively, were in time.

76. With regard to the issues at paragraph 2ci and ii which related to the suspension of the Claimant on 26 September 2017 and the continuation of that suspension from April 2018 to October 2018, Mr Hignette indicated that there were two ways of looking at it. The first was to conclude that there was a continuing act starting with the Claimant's suspension on 26 September 2017 and ending with his dismissal on 26 October 2018. Consequently, if the claim in respect of the dismissal was in time, so would the claim in respect of the suspension.

77. The alternative approach was that the suspension was a one-off act and that, although it had a continuing consequence, it should have been complained of at the time and therefore the Claimant was out of time to complain about the suspension.

78. The Tribunal was satisfied that this represented a continuing act. Certain elements of the Claimant's conduct which led to his suspension on 26 September 2017 formed the reasons for the Claimant's dismissal on 26 October 2018. Further, the length of the suspension was as a consequence of circumstances outside the Claimant's control.

79. In the circumstances, even if the Tribunal had concluded that this did not represent a continuing act, it would have been just and equitable to extend time in respect of pursuing a complaint relating to the suspension of the Claimant on 26 September 2017 and the continuation of that suspension from April 2018 to October 2018.

2. Did the Respondent treat the Claimant less favourably than it treated or would have treated others in not materially different circumstances and, if so, was this because of the Claimant's colour and/or because of the protected characteristic of colour more generally when it:

i. Suspended the Claimant on 26 September 2017

80. The Tribunal conclude that, on the facts, there was no basis at all to infer that the Claimant had been treated less favourably than it would have treated

others in not materially different circumstances, let alone that there had been any less favourable treatment because of the Claimant's colour.

81. Allegations had been made by members of staff working at The Orchard. Whilst the Claimant suggested that it may have been out of revenge as he had reported one of their colleagues for sleeping during a night shift, it had not been suggested by him that the complaint had been made as a result of him being black.
82. The Tribunal took into consideration the fact that the Respondent is a charitable organisation with responsibility for the care of vulnerable adults whose behaviour could be extremely volatile and difficult to manage. The Tribunal accepted that any complaint with regard to the manner in which a support worker such as the Claimant had conducted himself when caring for such a vulnerable adult had to be taken particularly seriously.
83. Furthermore, a report of the concerns was relayed to the Safeguarding Co-ordinator at the City and County of Swansea and it was at the request of the Safeguarding Co-ordinator that the Claimant was suspended. The Tribunal concluded that it was entirely understandable that the Respondent would comply with the request of the Safeguarding Co-ordinator and this had absolutely nothing to do with the Claimant being black. Indeed, as Miss Singh says in her email dated 22 September 2017 (page 110), she did not know the Claimant's surname but still requested that the Claimant is suspended with immediate effect. What was of particular relevance was that, whilst it was for the Respondent as the Claimant's employer to suspend the Claimant, it was effectively at the direction of the Safeguarding Co-ordinator at the City and County of Swansea.
84. It was suggested by the Claimant that he was treated less favourably because he was black when compared with the way in which Ms Leanna Morris was treated when allegations relating to safeguarding were made against her. However, the Tribunal did not consider that Ms Morris represented a realistic comparator. For her to be so, the Claimant would have to establish that there were no material differences between the circumstances in each case.
85. Ms Morris was the Claimant's line manager. Whilst she would involve herself in providing assistance to support workers from time to time, her primary role was to manage a team of support workers and not to have day-to-day hands-on involvement in the care of service users. In addition, it was possible for the Respondent to find an alternative role for Ms Morris whilst the allegations against her were being investigated which did not involve her having any contact with service users, thereby negating any potential risk. This involved transferring Ms Morris to the regional office and to assist in certain projects in which her experience as a manager could be deployed.

86. This option was not available to the Respondent with regard to the Claimant. Had it been so, it would have made absolute financial sense to redeploy the Claimant elsewhere as opposed to suspending him.
87. The Claimant maintained that he had been suspended but Ms Morris had not, despite the police requesting the Respondent to deal with them both in the same way. In making this submission, the Claimant relied on an email from the police to the Claimant of 23 November 2019 (page 173). However, this email was sent to the Claimant following a meeting with the police officer at which the officer explained the safeguarding procedures to the Claimant when they received complaints similar to those made against the Claimant and indeed Ms Morris.
88. Indeed, he confirmed that the process for both cases were dealt with in the same manner and that, in the case of the Claimant, the recommendation for suspension was made jointly between the police and the safeguarding officer. However, the email does not indicate that they made a similar recommendation in respect of Ms Morris.
89. It was also confirmed by Mrs Thomas that there were a number of other employees who had been suspended pending investigations of complaints that had been made.
90. The Tribunal had considered how the Claimant would have been treated if he had not had the protected characteristic and, on the basis of its findings, the Tribunal was entirely satisfied that the Claimant would have been treated in exactly the same way. The discriminatory reason alleged by the Claimant was neither the sole, nor a contributory, cause for the decision taken by the Respondent to suspend him on 26 September 2017.

ii. Continued the suspension from April 2018 to October 2018

91. The Tribunal had already found that, whilst the police had indicated that there would be no further action against the Claimant, the Respondent had been requested by the City and County of Swansea to refrain from conducting its own internal investigation as a result of a much wider investigation which was being undertaken at that time. Indeed, the Claimant accepted this was so.
92. Further, whilst this meant that the Claimant continued to be suspended for approximately a further six months, this was by no means unique. Mrs Thomas stated that there were others who had been suspended for an even longer period than the Claimant.
93. Indeed, Mrs Thomas, acting at that time as Regional Director of the Respondent, sent an email to the safeguarding officer at the City and County of Swansea on 30 September 2018 following a meeting the previous Friday (page 147a). In that email, Mrs Thomas says, "Hi Martin, good to catch up on

Friday. I would just like to confirm that you are happy for us to move forward on the below cases as discussed:-

MH – Appeal to dismissal

JM – Suspension (The Orchard)

JG – Suspension (Loughor Road)"

94. There is then reference to other cases which would commence following the conclusion of the wider investigation.
95. On 30 September 2018, the Safeguarding Co-ordinator, Mr Powles, replies saying, "Yes, I'm fine with all these actions as outlined ..." (page 147a).
96. This illustrated very clearly that the continuation of the suspension and the decision to continue the investigation was very much dependent on the direction provided by the City and County of Swansea.
97. For these reasons, the Tribunal was entirely satisfied that there was no evidence at all to suggest that the treatment of the Claimant was less favourable to the way it treated or would have treated others let alone that such treatment was as a consequence of the Claimant's protected characteristic of colour.

iii. Subjected the Claimant to an initial review meeting on 19 October 2018.

98. The fact that an initial review meeting was arranged was consistent with the Initial Review Supervision and Annual Performance Review Policy (page 76).
99. As stated in the policy, the probation period would extend for the first six months but it was capable of being extended although this should be for no longer than three months, "unless there are exceptional circumstances ..." (page 77).
100. The Tribunal was satisfied that, in the light of its findings of fact, the circumstances giving rise to the Claimant's suspension would represent exceptional circumstances. It was suggested by the Claimant that, as he had commenced his employment on 26 April 2017, and as the initial review meeting was to take place on 19 October 2018, this must mean that the Respondent was satisfied with his performance and that his employment had been confirmed. The Tribunal rejected this suggestion by the Claimant. It would make no sense for the Respondent to confirm the Claimant's employment on the basis of it being satisfactory at a time when he was suspended as a result of alleged conduct relating to safeguarding.

101. In these circumstances, the initial review policy and the discipline grievance and appeals policy (pages 77 and 66) made it clear that the disciplinary policy does not apply to those in their initial review (probation) period.
102. The Tribunal considered that the letter written to the Claimant by Mr Davies dated 15 October 2018 (pages 148 to 149) made the purpose of the meeting very clear, setting out the three possible outcomes, namely that: the Claimant would be confirmed in his post on a permanent basis, or extending the initial review period for up to three months or that his employment comes to an end.
103. The policy confirmed that the Initial Review meeting would be a process that every employee would have to undertake.
104. The Tribunal referred to its findings of fact and, whilst critical of the fact that Mr Davies failed to ensure that the Claimant read and signed the notes of the meeting, has held that the notes reflected the discussion that took place. The Tribunal did not consider that there was any evidence at all to suggest that subjecting the Claimant to the initial review meeting on 19 October 2018 represented less favourable treatment and that the Respondent treated the Claimant less favourably than it would treat others let alone such treatment was as a consequence of the Claimant's colour.

iv. Dismiss the Claimant on 26 October 2018

105. Mr Davies had formed the view that the Claimant's failure to report his injury in May 2017 and then the Claimant failing to ensure that care was provided to PP on the basis of 2:1 represented sufficient concern, taking account of the Respondent's activities and status, to justify the Claimant's dismissal.
106. However, before confirming that decision, he consulted with both Mrs Thomas and his HR Department who agreed with his assessment. It was therefore a decision that he made but which was endorsed by someone in a senior position to him in the organisation and HR.
107. Mr Davies therefore wrote to the Claimant on 26 October 2018 setting out his findings and confirming the decision that the Claimant's employment had been terminated.
108. The Claimant had failed to provide any evidence from which an inference could be drawn that he had been subjected to less favourable treatment either in comparison with Ms Morris or any other employee in not materially different circumstances.
109. Further, the Respondent had explained the reasons for their decisions clearly.
110. On this basis, the Tribunal was entirely satisfied that the decision to dismiss the Claimant did not represent treatment which was less favourable to the

manner in which it would treat others in not materially different circumstances, let alone that the treatment was because of the Claimant's colour.

111. The Claimant confirmed in his evidence that it was only when he received the letter from Mr Davies of 26 October 2018 that he concluded that he had been treated in this way, namely that he had been dismissed because he was black. He stated that he concluded that Mr Davies treated him in this way because "he abhors black people". The Tribunal did not consider there was any evidence at all to support such a claim. The Tribunal had not made any findings of fact on the basis of which such an inference could be drawn.
112. The Tribunal had also considered the reasons set out in the Claimant's letter dated 9 November 2018 (page 176) at paragraphs (a) to (h) (pages 177 to 178). Not one of the complaints were supported by any evidence on the basis of which the Tribunal had reached its decision on the facts.
113. Paragraphs (a) to (e) refer to the comparison being drawn between the Claimant's case and that of Ms Morris. The Tribunal was satisfied that the circumstances relating to Ms Morris were materially different.
114. At paragraph (f), the Claimant states as follows:

"Scot Davies accused me of not reporting an injury, which injury I am and was unaware of. He was obviously devious in using this accusation to terminate my employment. A further clear evidence of racial discrimination."(sic)
115. However, in the course of his evidence, the Claimant admitted the injury which took place in May 2017 and had produced his GP records to confirm the treatment he had received for that injury.
116. At paragraph (g), the Claimant referred to Mr Davies' failure to read the notes back to the Claimant and for the Claimant to validate them. The Claimant alleged that "he did not, implying that what he had recorded as a white man cannot be challenged or corrected by a black man."
117. The Tribunal was satisfied that, on its findings of fact, there was no basis upon which the Claimant could make such an assertion.
118. At paragraph (h), the Claimant stated that the police had dropped all allegations against him and were therefore more competent than Mr Davies. The Claimant says, "this is because he was confident a black man lacks truthfulness, integrity and aptitude."
119. Again, the Tribunal was satisfied that there was no evidence based on which the Tribunal could have made findings of fact on the basis of which such an inference could be drawn.

120. For all these reasons, the Tribunal found that the Claimant was not subject to direct race discrimination.

3. Breach of contract

121. The Tribunal had found that the Claimant's employment had not been confirmed and that he remained on probation which had been extended.

122. In the Claimant's terms and conditions of employment (page 95e), it stated that all employees over six months service, but still within their initial review/probation period, were entitled to one week's notice.

123. Those confirmed and over six months service were entitled to one month (page 95e).

124. On the basis of its findings of fact, the Tribunal found that the Claimant's employment had not been confirmed and that he had remained on probation. He was therefore only entitled to one week's notice.

125. The breach of contract claim was therefore dismissed.

Employment Judge M R Havard
Dated: 15 January 2020

JUDGMENT SENT TO THE PARTIES ON 17 January 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS