Case No: 2301874/2015

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS: **Mrs AJ Sadler**
Ms C Edwards

BETWEEN:

MR PETER HALE

Claimant

AND

BRIGHTON AND SUSSEX UNIVERSITY HOSPITALS NHS TRUST

Respondent

ON: **9 – 20 May 2016**

Appearances:

For the Claimant: Mr Daniel Matovu, Counsel
For the Respondent: Mr Thomas Kibling, Counsel

RESERVED JUDGMENT (AMENDED)

1. The claim of direct discrimination in respect of the opening of an MHPS disciplinary investigation on or around 14 July 2014 is struck out for want of jurisdiction as it is out of time. All other race discrimination claims fail.

2. The unfair dismissal claim fails

3. The wrongful dismissal claim fails.

REASONS

1. By a claim form presented on 22 May 2015, the claimant complains of direct race discrimination; unfair dismissal and wrongful dismissal. All claims are denied by the respondent.

2. We heard evidence from the claimant. On behalf of the respondent, we heard from Abayomi Alemoru, Director, Vista Employer Services Limited; Keith Altman, Deputy Medical Director; Dominic Ford, Director of Corporate Affairs and Company Secretary; Julian Lee, Chair B&S University NHS Trust Board; and Austin Vickers, People and Change Business Partner. We also had a statement from Jane McNevin on behalf of the claimant which was taken as read as its contents were, in the end, not challenged.

The issues

3. The issues in this case are summarised in the case management order of Employment Judge Martin of 7 August 2015 and are as follows:

    a. Was the decision to subject the claimant to the disciplinary process an act of direct race discrimination and if so;

    b. Was the decision to dismiss the claimant an act of direct race discrimination

    c. Are any of the discrimination claims out of time.

    d. Was the dismissal of the claimant for gross misconduct unfair

    e. Was the claimant ‘s summary dismissal wrongful

The Law

4. Section 13 of the Equality Act 2010 (EqA) provides that 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.

5. Section 23 EqA provides that on a comparison of cases for the purposes section 13, there must be no material difference between the circumstances relating to each case.

6. “The relevant circumstances” for the purposes of the statutory comparisons are those

which the respondent took into account when deciding to treat the claimant as it did. If the relevant circumstances are to be "the same or not materially different" all the characteristics of the claimant which are relevant to the way his case was dealt with must be found also in the comparator. They do not have to be precisely the same but they must not be materially different. MacDonald v Advocate General for Scotland and TSB Governing Body of Mayfield Secondary School [2003] IRLR 512 House of Lords.

7. Section 136 EqA provides that if there are facts from which the court could decide, in the absence of any other explanations that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

8. The leading authority on the burden of proof in discrimination cases is Igen v Wong 2005 IRLR 258 That case makes clear that at the first stage the tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved the burden passes to the Respondent to prove that it did not discriminate.

9. In Laing v Manchester City Council [2006] IRLR 748 the Employment Appeal Tribunal (EAT) made clear that it would not be an error of law for a tribunal not to follow the two-stage approach and that there might be cases where it would be sensible for a tribunal to go straight to the second stage and consider the subjective reasons which caused the employer to act as it did. Assuming that the burden may have shifted causes no prejudice to the employee. The EAT here followed the dictum of Lord Nicholls in Shamoon v Chief Constable of the RUC [2003] IRLR 285, where he held that sometimes the less favourable treatment issue cannot be resolved without at the same time deciding the reason-why issue. He suggested that tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

10. In the case of Madarassy v Nomura International PLC [2007] IRLR 246 it was held that the burden does not shift to the respondent simply on the claimant establishing a difference in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination."

11. Section 123 of the Equality Act 2010 provides that a discrimination complaint must be presented after the end of 3 months starting with the act complained of or such other period as the tribunal considers just and equitable.

12. The case of Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA makes clear that the discretion of the tribunal to extend time on just and equitable grounds should be exercised exceptionally. In O'Brien v Department for Constitutional Affairs [2009] IRLR 294, the Court of Appeal held that the burden of proof is on the claimant to convince the tribunal that it is just and equitable to extend time and that in most cases there are strong reasons for a strict approach to time limit

13. The tribunal's jurisdiction to extend time on the basis that it would be just and equitable to do so has been held in ***British Coal Corporation v Keeble [1997] IRLR 336*** to be as wide as that given to the civil courts by section 33 of the Limitation Act 1980. The court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension and to have regard to all the other circumstances, in particular the length of and reasons for the delay, the extent to which the cogency of evidence is likely to be affected by delay, the extent to which the party sued has cooperated with any requests for information, the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. However, there is no legal requirement to go through such a list in every case provided of course that no significant factor has been left out of account by the tribunal in exercising its discretion.

14. Section 94 of the Employment Rights Act 1996 ("ERA") provides the right not to be unfairly dismissed and section 98(2) sets out the potentially fair reasons for dismissal. One of those reasons is conduct.

15. Section 98(4) ERA provides that in determining whether a dismissal is fair or unfair, the tribunal must have regard to whether in all the circumstances the employer acted reasonably or unreasonably in treating the reason shown by the employer as sufficient reason for dismissal.

16. In considering whether a dismissal is fair, the tribunal must not substitute its view for that of the employer but should consider whether dismissal fell within the range of reasonable responses open to the employer. The *range of reasonable responses* test applies to both the decision to dismiss and the procedure applied. Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA.

Findings

17. Unusually for a discrimination complaint, the material facts in this case are substantially agreed. We have therefore crafted our findings in large part from the chronology and summaries provided by the parties.

Findings of Fact

1. The claimant commenced employment with the Trust on 1 June 1995 as a Consultant, General Surgery. Latterly he was employed as Clinical Director, Digestive Diseases Unit; a position he held until his summary dismissal on 8 January 2015.

2. The claimant had line management responsibility for a number of junior doctors and other clinical staff. These included 4 Asian doctors (3 from India, 1 from Pakistan) – Mr Christi Swaminathan; Mr Vivek Kaul; Mr Ved Prakash and Mr Khawaja Zia. (the "Complainants")

3. On 13 November 2013, the Complainants lodged a collective grievance of bullying and harassment against the claimant. The grievance alleged unfair treatment by the claimant in respect of their contract status (they had been on successive fixed term contracts for many years) de-skilling and other matters. [95, 89-93].

4. Dr Vivienne Lyfar-Cisse, BME (Black Minority Ethnic) Network, agreed to lead on this grievance and be the point of contact for the Complainants. [105-106] On matters of race, Ms Lyfar-Cisse reported directly to Matthew Kershaw, Chief Executive of the Trust. Historically, race relations between the Trust and its BME staff has been poor and has resulted in a number of employment tribunal claims. As a result, the Trust launched a programme entitled Commitment to Change for Race Equality, a key part of which was a

Memorandum of Understanding signed between the Trust, BME Network and the Race Equality Commission in September 2011. [80-81].

5. The stated purpose of the Memorandum was to promote race equality and to challenge discrimination. The Memorandum provides that there should be an effective definition of zero tolerance on racial harassment and a robust application by managers where inappropriate behaviour arises. [81] Mr Altman, Deputy Medical Director, was asked about the Memorandum in evidence and his response was that zero tolerance was a nice soundbite but putting it into practice was another matter as the Trust cannot investigate every incident of poor behaviour and conduct. From that we formed the impression that not every allegation would result in an investigation under the programme. The decision on whether or not to conduct such an investigation is a feature of this case.

6. The zero tolerance sentiment is reinforced in the Trust's Dignity at Work policy dated 17 August 2012. Paragraph 1.2 states that the policy aims to promote a zero tolerance approach to any forms of bullying, harassment, discrimination, and victimisation, where all allegations of such action will be regarded seriously. [867]. Complimenting this policy is the Equality, Diversity, and Human Rights Policy. That provides that all allegations of discrimination will be investigated in accordance with the disciplinary policy and procedures and the Investigation Policy and Procedures. It goes on to say that behaviour that goes against the essence or letter of the Equality Diversity and Human Rights Policy will normally constitute serious misconduct liable to disciplinary action, which includes dismissal. [901]

7. On 13 December 2013, the claimant chaired a management meeting to discuss the introduction of a new rota in the Digestive Diseases department. The attendees at the meeting included the Complainants. It is common ground that the meeting was heated. The Complainants used the meeting as an opportunity to air their various grievances against the Trust, which they attributed to the claimant. The meeting was surreptitiously recorded by the Complainants. [112-223] Their behaviour at the meeting was described by Jane McNevin, Clinical Services Manager, as inappropriate and aggressive and she was so appalled by their conduct that she put in a grievance. [225] She says in her witness statement that HR discouraged her from putting in a formal complaint. Mr Austin

Vickers, People and Change Business Partner in HR, gave evidence on this matter. Although he told us in his oral evidence that he did not discourage her from making a formal complaint, he concedes in his written statement that he may have said to her that it might be better not to put in a formal grievance as it could be seen by the Complainants as victimisation and give rise to a claim. That advice was given on the direction of **Mr White, HR Director**. In the end, she agreed to the matter being dealt with informally with the Complainants being spoken to about their behaviour and them providing assurances about their future conduct. [232 & 236]

8. After the meeting, the Complainants left the room and an impromptu discussion about what had occurred took place between some of those remaining. The claimant was part of that discussion which, as before, was covertly recorded by the Complainants. [193]

9. Mr Abayomi Alemoru, an external consultant and director of Vista Employer Services Limited, was engaged by the Trust to carry out a Dignity at Work investigation into the collective grievances of the Complainants. On 18 February 2014, during the course of that investigation, the Complainants handed over to him the transcript of the covert recording of the impromptu meeting, referred to above. The transcript (the contents of which are not disputed) reveal the claimant making a number of remarks which the Complainants viewed as racially offensive, prompting a further complaint against the claimant. As a result, Mr Alemoru's terms of reference were extended to include 4 allegations of race discrimination/harassment against the claimant arising from comments he made on the covert recording. [257-259]

10. From 10 February 2014, the claimant was signed off sick with work-related stress. He was later diagnosed as suffering from significant depression. [315-317]. He remained signed off until 13 June 2014 but did not return to the workplace thereafter as he was excluded while the investigations against him were underway. Although the possibility of temporary redeployment was initially discussed, this was subsequently withdrawn.

11. On 19 March 2014, the claimant's line manager, Mr Peter Larsen-Disney, Chief of Surgery, wrote informing him of the additional allegations and that they were to form part of the dignity at work investigation being carried out by Mr Alemoru. [260-261]

12. On 13 June 2014, the claimant lodged a formal grievance. There were 5 separate allegations but for our purposes, it is allegation 5 that is relevant as it is an allegation of

racial harassment against 3 of the doctors – Kaur, Prakash and Zia – (the "3 complainants") based on statements they made during the management meeting on 13 December 2014. The offending comments to the claimant by the 3 doctors were: *"Racism and Slavery are gone*" and *"we are just used like slaves"*. *"I can prove how you have destroyed our careers*". [327/330] The claimant told us that the remarks had racial overtones in the context in which they were said. He said that the combination of the words racism and slavery connoted the slave trade and he was being likened to a slave master in his treatment of them because he was white. He said that the comments were made knowing that they would offend as he had complained about similar comments made by one of them previously.

13. Keith Altman, Deputy Medical Director, was tasked with case managing the Complainant's grievance. He also took over the case management of the claimant's grievance from Steve Holmberg, Medical Director, who the claimant had complained about in the grievance.

14. **On 14 July 2014, Mr Altman wrote to the claimant informing him that the matter was to be investigated under the trust's disciplinary policy for medical staff under the auspices of the MHPS (Maintaining High Professional Standards) framework. The claimant was also advised that because his grievance was inextricably linked to those of the Complainants, it would be investigated by Mr Alemoru and that separate terms of reference for his grievance would follow. [352-354]**. Mr Alemoru told us that although he was asked to investigate the claimant's complaint, no revised terms of reference were issued.

15. On 28 July 2014, Mr Altman wrote to the claimant setting out the 3 allegations to be investigated under the MHPS as follows: i) racially offensive remarks about the doctors and derogatory remarks about them because of race or nationality and/or ii) Racially offensive and derogatory remarks that amount to harassment related to race/nationality/ethnicity and or iii) Unfounded and derogatory remarks about professional colleagues. Enclosed with the letter were the MHPS terms of reference. [368-371]

16. On 9 December 2014, Mr Alemoru produced 3 separate reports. The Dignity at Work report into the Complainants' grievance; the MHPS report into the claimant's conduct and the report into the claimant's grievance. The Complainants' Dignity at Work complaint was wholly rejected, save for one minor allegation of age discrimination. Our focus however is on the other 2 reports as it is the respondent's approach to these that is relied upon by the claimant as the less favourable treatment.

17. The MHPS report concluded that the claimant had a case to answer of race discrimination as his comments were overtly about race because they referred to the ethnicity of the Complainants when describing what he regarded as their unreasonable behaviour.

18. In relation to the claimant's grievance against the 3 Complainants, Mr Alemoru found that there was no case to answer. In reaching that decision, he concluded that the reference to slavery, whilst inappropriate, was not inherently a reference to race. [513]

19. Based on the MHPS findings, Mr Altman concluded that a case of misconduct against the claimant should be put before a disciplinary panel. To that end, on 6 November 2014, the claimant was invited to attend a disciplinary hearing to answer allegations of: 1) direct race discrimination; 2) racial harassment; and 3) unfounded and derogatory remarks about colleagues. [621-623]

20. The disciplinary hearing took place on the 16 December 2014, chaired by Dominic Ford, Director of Corporate Affairs. Mr Altman presented the management case [626-634] and Mr Alemoru attended as a witness. The claimant was supported by Mark Briggs of the BMA. [662-691]. The outcome of the hearing was the claimant's summary dismissal. Mr Ford concluded that a number of the comments made by the claimant in the transcript amounted to discrimination on grounds of race, nationality or ethnicity and that others were derogatory. These remarks are set out below and follow the numbering in the dismissal letter [692-696]

> *1.…You're a straight forward Australian, good person who talks the truth in a ruthless and efficient way*

2….However, there are a significant number of people in this room this afternoon who do that very rarely. Okay? So a swap will occur. An on-call goes down and everyone's got to be at the airport etc etc Okay?

3. For Lola, you know what this will mean? Lola will fly to Nigeria and I will put 50 quid….

4. For you a cup of tea – tht the plane – there will be a problem with the plane coming back.

5. Yes it's part of the punishment rota

6. Somone like Clifford who is nothing but a good human being and delightful and easy to do business with and straightforward and honest……..

7 .It's about managing groups, which is this sort of highly egocentric group

8.…some of these sub-continent elements, what you end up with long –term resentments and grievances and all sorts of stuff. They are their own worst enemies. You could see that today.

9. *They mix and match in their heads differently, They're not clear thinkers*

10. *He needs a bloody long walk off a short pier*

11. *Chill pill? He needs a good slap*
12. *An unbelievable group. Vile actually*

21. The claimant appealed against his dismissal, challenging the findings and the severity of sanction. He also raised a procedural issue as a finding of unfounded and derogatory remarks was made in relation to a new comment, not part of the notified disciplinary charges. [698-700]. The respondent acknowledged this procedural error and withdrew the allegation prior to the appeal.

22. The appeal was heard on 15 April 2015 by Mr Julian Lee, Chair of the NHS Trust Board and took the form of a review of the evidence. The claimant was accompanied by a colleague Consultant. [730-738]. On 26 May 2015, Mr Lee wrote to the claimant with the outcome of his appeal, which was to uphold the original decision to dismiss. [737-738]

Submissions

23. Counsel for the parties presented detailed written submissions which they spoke to. They have therefore not been reproduced in the judgment but have been taken into account, along with the authorities referred to.

CONCLUSIONS

Direct Race Discrimination claim

24. The complaint, as set out in the agreed issues, is that the respondent directly discriminated against the claimant because of race by subjecting him to disciplinary procedures and ultimately dismissing him.

25. The disciplinary procedures for doctors and dentists has various parts and in considering the question of race discrimination, we looked separately at each stage, as they applied to the claimant. We did so on the basis that an act of discrimination at one stage of the process does not necessarily infect actions taken at other stages.

Did the respondent treat the claimant less favourably than his comparators by its decision to open an MHPS investigation.

26. Dealing first with the issue of comparators, it was submitted by the respondent that the doctors were not the right comparators and that the correct comparator was a hypothetical non white senior clinician with management responsibilities, addressing subordinate staff in a closed meeting and in doing so making racist remarks. We disagree. Section 23 EqA does not require the comparators circumstances to be identical in every way, which is what the respondent has sought to achieve by its hypothetical construct. Further, the respondent's hypothetical comparator includes features that are not material i.e. the seniority of the claimant, which was not a factor in the decision to carry out an MHPS investigation.

27. In our view, the circumstances relevant to the claimant's treatment i.e. being investigated under the MHPS disciplinary process, were that a complaint of racism had been made against him based on comments he had made in the presence of other staff. Those circumstances applied equally to the comparators in that the claimant made a complaint of racism based on comments made by the 3 Complainants. In both cases, the

comments in question were not in dispute and were evidenced by a transcript of a recording of those events. We are satisfied that there were no material differences between their circumstances and find that the Complainants were the right comparators for this part of the claim.

28. Mr Altman told us that he decided that the Complainants' grievances against the claimant should be investigated under the MHPS disciplinary process because he was of the view that the allegations against him were serious as they were allegations of bullying, harassment and discrimination. This covered the allegations made in the original collective grievance as well as the new allegations relating to the transcript. The claimant raised a grievance against the 3 Complainants of racial harassment based on comments he found racially offensive. His complaint against them was not investigated under the MHPS. We therefore have a difference in treatment and a difference in race. However, we know from the case: Madarassy v Nomura International PLC [2007] IRLR 246 that this is not sufficient to shift the initial burden upon the claimant. We therefore looked to see whether there was something more.

29. We have referred at paragraph 4 above to the historically poor relations between the respondent and its BME staff and the steps taken to address this, which included a commitment by the Trust to take a proactive and robust approach to investigating allegations of race discrimination. In accordance with the Dignity at Work policy, the claimant was sent a letter informing him of the Dignity at Work investigation against him; the specific allegations made by the Complainants and the terms of reference. [100] He was also written to when the terms of reference were extended to include 4 additional allegations. [260-262] The claimant was interviewed by Mr Alemoru about the allegations and responded to them.

30. In relation to the claimant's grievance against the 3 Complainants, although he was told that Mr Alemoru's terms of reference would be extended, they were not. to deal with his grievance. No extended terms of reference were issued and the 3 Complainants were not interviewed about the claimant's allegations. Indeed we there was no evidence at all before us that they were even aware of the claimant's grievance – we were not shown any letters from the respondent informing them of the allegations; equivalent to the one sent to the claimant.

31. We have also considered the respondent's approach to the complaint of Jane McNevin, referred to at paragraph 7 of our findings. We are satisfied from the evidence that Miss McNevin was dissuaded from pursuing a formal complaint against the Doctors. Mr Graham White, Director of HR, was apparently concerned that such a complaint could be construed as victimisation. At that stage, the only potential protective act was the Doctors' collective grievance against the claimant, which did not involve Ms McNevin. It seems to us that if Mr White was concerned about Ms McNevin's complaint, those concerns would have magnified when it came to the to the claimant's grievance, particularly as his complaint was one of racial harassment. The same Mr White gave advice to Mr Altman on how the claimant's grievance should be dealt with and on whether to refer the grievance against him to MHPS.

32. All of this gives the impression of the respondent wanting to keep the claimant's grievance below the radar in order not to rock the boat of its fragile relationship with the BME. We consider this to be the "something more" that shifts the burden to the respondent to provide an explanation for the difference in treatment of the claimant, vis a vis the MHPS investigation.

33. It was put to Mr Altman by Mr Matovu that the reason he opened an MHPS investigation when he did was because it was the only way that he could exclude the claimant from the workplace. Such a reason might have provided a non-discriminatory explanation as the only way a doctor can only be excluded is under the MHPS process and such action can be taken to assist an investigative process where there is a risk that their presence will impede the gathering of evidence. There seemed to be a tacit acceptance by the claimant that he could not have returned to the same department during the investigation and there had been some preliminary discussions about redeploying him temporarily; however nothing came of this. Mr Altman was adamant that this was not his motivation for instigating the MHPS and we have taken him at his word. He told us that he did so because the allegations against the claimant of bullying, harassment and race discrimination were serious and could amount to gross misconduct.

34. In the case of the claimant's grievance against the 3 Complainants, the respondent's reason for not opening an MHPS investigation was because it was felt that their

comments were not racially offensive or serious enough to warrant this. The way Mr Altman put it when giving evidence was that the claimant's comments on their face were objectively offensive and potentially racist whereas the comments of the Complainants were adjectives which were not objectively offensive on their face. It is unclear whether the matter was analysed in that way at the time or after the fact but what this demonstrates is that the respondent had effectively dismissed the claimant's grievance before the matter had been investigated or reported on by Mr Alemoru.

35. We feel that the subjective opinions of the respondent's officers (Altman and White) were very much influenced by race. The claimant is not an ethnic minority, he is white British and does not fit the normal profile of a person subjected to racial harassment and we believe that this unconsciously affected the respondent's attitude towards his complaint. It is inconceivable that the respondent would have been dismissive of his complaint had he been an ethnic minority, mindful, no doubt of the backlash that this would create from the BME Network. We have already referred to the respondent's concerns about potential victimisation of the Complainants in respect of Ms McNevin's complaint. We consider that that would also have been a factor in the respondent's decision.

36. In light of the above, we are not satisfied that the respondent's explanation has nothing whatsoever to do with race and for that reason, we find that it has not discharged the burden of proving that it did not discriminate against the claimant in its decision to open an MHPS investigation.

Did the respondent treat the claimant less favourably than his comparators because of race by requiring the claimant to attend a disciplinary hearing?

37. On 6 November 2014, the claimant was invited to attend a disciplinary hearing. This was because of Mr Alemoru's conclusions in the MHPS investigation report that the claimant had a case to answer of race discrimination in relation to a number of his comments. [621-623]. Conversely, Mr Alemoru concluded that the 3 Complainants had no case to answer in relation to the claimant's grievance. Their circumstances at this point were therefore materially different to the claimant's.

38. Much of the claimant's case focused on criticisms of Mr Alemoru's findings though he makes no allegation against Mr Alemoru personally in respect of his investigation or his conclusions. In any event, Mr Alemoru was not an employee of the respondent and no claim has been made against the respondent based on his actions. Mr Alemoru's report was very detailed and his conclusions fully explained. Whilst we do not necessarily concur with all of his views, they were objectively reasoned and we are satisfied that he was entitled to reach the conclusions he did in relation to the grievances of the Complainants and the claimant's grievance against them.

39. We also find that, having instructed Mr Alemoru for his expertise, it was reasonable for Mr Altman to rely on the conclusions in the MHPS report as the basis for inviting the claimant to a disciplinary hearing. That decision was separate from and not reliant on the initial decision to instigate the MHPS investigation, which we have found to be discriminatory. The conclusion of the report would have led to a disciplinary hearing regardless of the initial decision. Had Mr Alemoru concluded that the claimant had no case to answer, as it did in respect of the Complainants' Dignity at Work complaint, the MHPS investigation would have ended at that point and there would have been no disciplinary action. Taking all of this into account, we are satisfied that the decision to invite the claimant to a disciplinary was not an act of direct race discrimination.

Did the respondent directly discriminate against the claimant because of race by dismissing him?

40. The claimant was dismissed for gross misconduct because the respondent concluded, following a disciplinary hearing, that he was guilty of race discrimination and racial harassment. The disciplinary hearing was conducted by Dominic Ford, Director of Corporate Affairs and Company Secretary, who had had no involvement in the earlier investigations. He sets out his findings in detail in the dismissal letter. [692-697]. The claimant raised a number of criticisms about the dismissal decision though it is trite law that unreasonableness does not equate to discrimination. We are satisfied that the claimant was dismissed because of his conduct. The circumstances of his comparators were materially different in that they were not facing similar conduct charges and we are satisfied that a non white hypothetical comparator would have been dismissed in similar circumstances. The direct discrimination claim relating to the dismissal is not made out.

Is the claim of direct discrimination relating to Mr Altman's decision to open an MHPS investigation out of time?

41. As we have only found a one off act of direct race discrimination, arguments about acts extending over a period do not arise. The decision to open an MHPS investigation was taken around 14 July 2014 so by virtue of section 123 EqA, the discrimination claim should have been presented before the end of 3 months from that date i.e. 13 October 2014. It was presented on 22 May 2015. The claim was therefore presented over 7 months out of time. We have gone on to consider whether there are just and equitable reasons to extend time.

42. We remind ourselves that an extension of time must be the exception rather than the rule and that it is for the claimant to prove his case as to the reason for the delay. Robertson v Bexley Community Centre [2003] IRLR 434 We have also taken into account the judgment of Mrs Justice Smith in British Coal Corporation v Keeble [1997] IRLR 337, and the factors derived from section 33(3) of the Limitation Act 1980.

43. We have considered the balance of prejudice, which neither party addressed us on. If we refuse an extension, it will not simply be a case of the claimant losing the opportunity to pursue his claim; he will not receive a remedy for a claim we have concluded is well founded. On the other hand, as we have heard all of the evidence, the respondent will suffer no prejudice over and above having to pay compensation in respect of an out of time claim.

44. The claim was presented 7 months out of time, more than double the primary time limit, and no reasons were put forward by the claimant for the delay. Counsel for the claimant made submissions on the time issue but these were focused solely on whether there was a continuous act of discrimination extending over a period. That argument of course fell by the wayside following our findings.

45. In our view, the absence of any explanation is the overriding factor in this case and it is difficult to see how, in those circumstances, it can be just and equitable to extend time. Habinteg Housing Association Limited v Holleron UKEAT/0274/14/BA

46. We have therefore decided not to extend time and in those circumstances have no jurisdiction to deal with this particular allegation.

Dismissal

47. We are satisfied that the claimant was dismissed by reason of his conduct and, in accordance with the case: *British Home Stores v Burchell [1980] ICR 303*, we have considered whether the respondent held a genuine belief in the claimant's guilt based on a reasonable investigation of the circumstances.

48. The allegations were of discrimination, harassment and the making of unfounded and derogatory remarks about colleagues. These were said to be breaches of the Dignity at Work policy [864] and (in respect of the discrimination and harassment allegations) breaches of the Equality, Diversity and Human Rights Policy. [888] The allegations were based on the comments made by the claimant, as contained in the transcript recording and reproduced in the dismissal letter. [693] As there was no dispute about what was said, the investigation focused on how those comments could reasonably be interpreted. Dominic Ford reviewed the management case prepared by Mr Altman, the MHPS investigation report and the claimant's written submissions. In order to determine whether the comments were racially offensive, Mr Ford considered their context by listening to the recording, reading the transcript and linking a number of the remarks. He also listened to the claimant's explanation and heard from Mr Altman and Mr Alemoru at the disciplinary hearing.

49. Using the numbering in the dismissal letter, in respect remarks 8 & 9 (….*these subcontinent elements and ….they mix and match in their heads differently*) - which were considered to be the most serious - the claimant told the disciplinary panel that they had been taken out of context. He said that they were not a reference to the complainants but a general comment about doctors who trained outside the UK who become resentful when changes are put in place that cause restrictions on the expansion of their practice. [684,] The claimant said something similar in evidence before us when he said that the long term resentments were about the system and the way it gives preferential treatment to home grown doctors. [415]

50. That explanation was not accepted by Mr Ford and we can understand why. If the comments were about non UK trained doctors generally, that does not explain why they were expressed as "sub-continent elements" rather than, for example, overseas doctors. The fact that the complainants were from the sub-continent and had raised grievances suggests that those observations were specific and personal to them. We therefore consider that the respondent was entitled to reject the claimant's explanation and conclude that the comments were a reference to the complainants and their racial background.

51. Similarly, the respondent was entitled to conclude by reference to comments at paragraphs 3 & 4 that the claimant was, without justification, making an unfavourable comparison based on race of the reliability of Lola Arimoku, a Registrar of Nigerian origin, with that of Ms Martin, a registrar from Australia. The claimant's explanation (that this was a general discussion about the problem of shift swaps and the difficulties that arise if the swap is not reciprocated) [413 -415] was rejected on the basis that there was no need for the reference to Nigeria or Australians in that context. Although it was suggested that the claimant did not refer to Lola's nationality in the text only to the country, he confirmed in evidence that he knew her to be of Nigerian origin.

52. It was submitted on behalf of the claimant that the Burchell test had not been made out in relation to remarks 8&9 as the allegation had been of direct discrimination and the legal test for direct discrimination had not been met. We disagree. Mr Ford found that the comments were racially offensive and derogatory and caused offence to the complainants. In other words, they amounted to harassment. That the allegations were originally labelled discrimination instead of harassment is not, in our view, fatal. This was a disciplinary process where Mr Ford was deciding whether the claimant had committed an act of misconduct under the respondent's disciplinary policy. He was not performing the role that we are tasked with. The way in which the remarks were being viewed by the respondent and their effect on the complainants was clearly spelt out in the disciplinary invite letter so the claimant knew the case he had to answer. The remarks breached the respondent's Equality, Diversity, and Human Rights Policy, as did the remarks at 3 & 4. They also breached the Dignity at Work policy (along with remarks at 10 & 11).

53. In the dismissal letter, Mr Ford included an additional allegation (remark 12 "*An unbelievable group Vile actually"*) that was not originally part of the case against the claimant and which he did not have an opportunity to make representations on. This was a procedural error but one which was not, in our view, significant. We say that because it was peripheral to the main allegations (3&4 and 8&9) and had little bearing on the outcome. Also, it was overturned on appeal so any defect was corrected at that stage.

54. We are satisfied that, overall, the respondent carried out a reasonable investigation and that the Burchell test was made out.

Was the sanction of dismissal reasonable?

55. As to the decision to dismiss, although the disciplinary policy provides for a final written warning for a first offence of a very serious nature, which this was, the disciplinary code makes clear that the examples of Gross Misconduct are not exhaustive and we are satisfied that the conduct in question was of a type that would generally fall within this category. The Equality, Diversity and Human Rights policy contemplates this as it provides at paragraph 5.7 that breach of the policy may lead to disciplinary action, including dismissal. [901]

56. Mr Ford took the view that the claimant's begrudging apology and his assertion that the only sanction should be further diversity training strongly suggested a lack of understanding of the seriousness and impact of his conduct. We note that whilst the Dignity at Work policy applies to all staff, managers have a proactive role in promoting an environment where bullying, harassment and discrimination are unacceptable and will not be tolerated. [870] The respondent was therefore entitled to take into account the claimant's seniority as a Consultant Surgeon and Clinic Director and how this undermined his role in assessing the seriousness of the breach.

57. It was submitted that there was a lack of parity of treatment between the claimant and the complainants in that he was dismissed for his remarks and no action taken against them. However, as there was no finding of racial harassment or discrimination against them, their situations were not comparable to the claimants. Mr Ford referred

in his evidence to a Richard Howell, Consultant, who had been dismissed for similar behaviour based on race in the past. We are therefore satisfied that the respondent has acted consistently.

58. Although the decision may appear harsh, given the provocation the claimant was subjected to from the Complainants and given his length of service, taking all of the above matters into account, we consider that the dismissal was in all the circumstances fair.

Wrongful Dismissal

59. We are satisfied that the conduct amounted to gross misconduct and that the respondent was contractually entitled to dismiss the claimant without notice. The wrongful dismissal claim therefore fails.

Judgment

60. The claim of direct discrimination in respect of the opening of an MHPS disciplinary investigation on or around 14 July 2014 is struck out for want of jurisdiction as it is out of time. All other race discrimination claims fail.

61. The unfair dismissal claim fails

62. The wrongful dismissal claim fails.

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Employment Judge Balogun
Date: 26 September 2016