EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr M Taj	**AND**	Bickenhall Mansions Management Ltd

Heard at: London Central **On**: 8-10 May 2017

Before: Employment Judge P Stewart
Ms O Stennet
Mrs E Ali

Representation
For the Claimant: Mr J Neckles, Representative
For the Respondent: Mr A Ohringer, of Counsel

JUDGMENT

The various claims made by the Claimant are all dismissed.

REASONS

1. Bickenhall Mansions is a property in Bickenhall Street, Marylebone, London comprising 224 apartments. The owners for the apartments are shareholders in the Respondent company which manages the building. The company is run by a board of directors comprising some seven of the shareholders all on a non-executive basis. The company employs a property manager to whom three people report. One of these is a handyman/plumber another is a painter and decorator.

2. The Claimant was employed by the company as an in-house decorator. It appears that he started work for the company in August 2002 but he was dismissed in July 2017. He now claims that he was unfairly dismissed and that he was discriminated against on the grounds of race. In addition, he has contractual claims for his notice pay and outstanding accrued holiday pay.

3. On 29 March 2016, the Claimant started a period of absence from work which was attributed to sickness. He supplied sick notes over the period that he was ill. One of these dated 17 May was received but was not signed by the doctor concerned. Further, it failed to state the time period over

which he would be unable to work. The property manager at the time was a woman called Ms Slatter. She left the company on 27 May 2016 and was replaced on 13 June 2016 by Ms Lindsay Clarke. One of the things that Ms Clarke did on her first day at work was to have a conversation with the Claimant who, at 1020 hours, had phoned to speak to her. He explained that he wished to return to work on Monday 20 June. Ms Clarke asked him if he was 100% fit to return and his response was that he was awaiting another podiatry appointment.

4. The sick notes that had been supplied by the Claimant, referred to him being not fit to work because of "foot pain": no further details were given. Ms Clarke advised the Claimant that the sick note dated 17 May was deficient in containing no statement of the period of time that he could be unable to work. Further, it was not signed so it would need to be returned to the GP to be signed. She asked the Claimant how long the sick note was for and the Claimant said it was for one month. On that basis, Ms Clarke pointed out that his current sick note would expire on 16 June and he would therefore need another note from Friday 17 June. This led to the Claimant asserting that in those circumstances he would return to work on Friday 17 June as opposed to Monday 20 June.

5. In the event, the Claimant did not attend for work on either Friday 17 June or Monday 20 June.

6. The Claimant caused another sick note to be delivered by hand to the Respondent, this one stating that he was unfit to work from 16 June to 17 July. As with previous sick notes that had been supplied, the cause of his being certified not fit to work was said to be "foot pain". It was also said that he was awaiting a podiatry appointment. In the circumstances, with the Claimant having been off work for what was now approaching three months, Ms Clarke decided to formalise her request for further information.

7. She prepared and sent out a letter dated 22 June to the Claimant at the address which was on internal file that served as a personnel file. The address used was Flat 3, Hildrop Crescent, London N7 0JF. With this letter, she returned the sick note that had been supplied for 17 May as it required amendment. She pointed out that, by that stage, she had now asked the Claimant three times to get that sorted out and it represented a serious breach of his contract. She explained that as things were, the situation was that the Claimant had taken unauthorised absence and such absence was a disciplinary offense. She urged the Claimant to ensure that the Respondent received a correctly signed and dated sick note by return. She concluded the letter by saying this:

> Due to the length of time that you have been off sick with no real explanation other than "foot pain" and the fact that I have asked you three times now to provide the correct documentation for your absence for the period from 17 May to mid June, I would now like you to attend an investigation meeting with myself in the office at 1500 on Monday 27 June.

Please do call me on the above number if you have any questions.

8. Ahead of the meeting on 27 June, Ms Clarke prepared notes to use as cues for questions to ask when she met the Claimant. In this task, she was assisted by Ms Vedia Johnson, who was the Deputy Chair of the Board of Directors of the Respondent company. The questions were geared to determine whether the Respondent wished the Claimant to attend a consultant at the Respondent's expense in order to obtain further information. On Friday 24 June, the Claimant telephoned and spoke to Ms Clarke. He asked what the meeting on Monday was about as he had received the letter dated 22 June. Ms Clarke explained that it was to be an investigation meeting as he had been off work for three months and that the Respondent needed to ascertain the actual diagnosis and the long-term prognosis.

9. At the conclusion of the conversation, Ms Clarke's understanding was that the Claimant was going to attend the meeting on 27 June. The Claimant however, did not attend the meeting on 27 June and made no call to say that he was not attending. In consequence, Ms Clarke called him later that day and was surprised to hear the Claimant deny that he had not received the letter dated 22 June. Ms Clarke could not understand this given the conversation by telephone on 24 June. The Claimant did ask her what would happen next and Ms Clarke said that she would speak to the directors and let him know.

10. Ms Clarke had a meeting with certain of the directors on 28 June. Following that, she telephoned the Claimant and advised him that he needed to come in for a meeting on Wednesday 29 June. The Claimant enquired as to what the meeting was about and she advised him that it was an investigation meeting regarding his long-term sickness. She made reference to her letter of 22 June and the conversation concluded with both parties saying they would see each other the following morning on Wednesday 29 June at 10am.

11. On the Wednesday morning, Ms Clarke arrived at her office at 7.45am. At approximately 8.20am, she was advised by the head security guard (not an employee of the Respondent) that the Claimant had called him and had advised the security guard that he would not be attending the investigation meeting. He had not supplied any reason to the security guard as to why he was not going to attend.

12. Ms Clarke's evidence was that by this stage she was becoming very concerned at the Claimant's conduct in that he had agreed to attend two meetings and then had not turned up for either. After consulting with Ms Johnson, Ms Clarke decided to invite him to a disciplinary meeting on Monday 4 July. She set out the invitation in a letter which was dated 30 June. That letter appears to have been prepared on 29 June in that Ms

Clarke makes a reference in the body of the letter to her having had a meeting with the directors "yesterday (28 June)".

13. In the letter, she rehearsed the failure of the Claimant to attend the two meetings and pointed out that (1) there was still a period from 17 May when the Respondent did not have a duly signed sick note from the Claimant's GP and (2) that the only explanation provided for his illness was "sore foot: awaiting podiatry". She continued:

> Consequently, as we do not have the requisite sick note confirming your absence you are advised that your absence is unauthorised absence. Additionally, you have repeatedly failed to attend a meeting to discuss your illness or contact me to advise that you will not be attending (contrary to company discipline policy).
>
> This has continued be gross misconduct due to the protracted and persistent nature of your actions not to co-operate with management instructions. Therefore, you are invited to a disciplinary meeting to discuss these allegations which will be held on Monday 4 July at 1000 in the office of Bickenhall Mansions with Vedia Johnson, Director. You have the choice to be accompanied at the hearing by a work colleague or an accredited trade union official of your choice.
>
> You should be aware that if you fail to attend the meeting then a decision will be taken, in your absence and this may result in your summary dismissal.
>
> Please confirm to Vedia Johnson by email, which the address was given, that you are attending and, if you bringing someone with you, confirm who that person will be and, if they are a trade union official, provide details.

14. On 30 June, the Claimant telephoned and spoke to Ms Clarke at her office. He asked for a copy of his contract. In consequence, that was enclosed with her letter of 30 June along with a copy of the staff Handbook. On Friday 1 July, the Claimant telephoned the office and spoke to Agnes Opoku who was a temporary administrator in the office. He advised her that he would not be able to attend the disciplinary hearing on 4 July. He said he was going to another doctor's appointment later in the following week. In consequence, the disciplinary hearing that was scheduled for 4 July did not take place.

15. Ms Clarke sought advice from Ms Leslie Thompson. Ms Thompson was a HR consultant employed by the company to advise on an occasional basis. Ms Clarke also sought advice from Vedia Johnson who was the deputy chairman of the board. When she was cross-examined, Ms Clarke was asked about the letter of dismissal which she prepared and sent out on 7 July 2016. In that letter, she rehearsed the history of the matter and the failure of the Claimant to have attended on two investigatory meetings and one disciplinary meeting and said:

> I then wrote to you on 30 June stating it was not acceptable to leave a message with another member on the team and I asked you to attend the disciplinary meeting due to the fact that that you had not attended the above two meetings which exacerbated the protracted and persistent nature of your actions not to co-operate with management instructions. As I explained in my previous letter, this is considered to be gross misconduct.

> The meeting was to be held with Vedia Johnson and her details were given to you so that you could contact her directly. However, again, you telephoned and spoke to someone in the office on Friday afternoon saying that you would not be attending the meeting.
>
> As a result of the protracted and persistent nature of you not co-operating with management instructions, I conclude that you do not intend to be bound by you contract and I therefore perhaps would advise you that this constitutes gross misconduct and therefore as per my letter 30 June, a decision has been taken in your absence and you are summarily dismissed without notice as from today's date.

16. Ms Thompson provided some assistance to Ms Clarke in the drafting of both her letter for 30 June 2016 and the letter of dismissal dated 7 July 2016. Ms Johnson ran her own property company and consequently had HR experience, something the other leaseholders who formed the board of directors lacked.

17. Ms Clarke, Ms Thompson and Ms Johnson were called to give evidence by the Respondent and there was an apparent contradiction in their evidence. Ms Clarke asserted that Ms Johnson was part of the board and that there had been a collective decision taken to dismiss the Claimant. By the board, she indicated she meant the Chair, Mr Sudia Tanner, and the Deputy Chair, Ms Johnson. She was clear that Ms Johnson participated in the collective decision to dismiss.

18. Ms Johnson, on the other hand, denied that she had been party to the decision to dismiss. She accepted that she had advised in the process because as she pointed out she had some experience in HR matters. However, the advice she gave to Ms Clarke was to the effect that it was important that Ms Clarke make her own mind up as to whether she, as the executive manager to whom the Claimant reported, could work with the Claimant. Ms Thompson asserted that "it was decided" that Ms Clarke would make the decision regarding the Claimant's failure to attend the two investigation meetings and the disciplinary hearing, thereby leaving Ms Johnson to hear any appeal. She did not say, and was not asked, who made that decision but it seems to us that, properly, this was the one collective decision that was made. It corresponded with the advice which both Ms Thompson and Ms Johnson gave Ms Clarke. We think Ms Clarke interpreted the encouragement to make up her own mind as to whether she could work with the Claimant as being the Board participating in the decision to dismiss. In so far as the evidence of Ms Clarke appears to be at odds with that of Ms Johnson and Ms Thompson on that issue, we prefer the evidence of the latter two witnesses.

19. There was an issue about the address to which letters were sent to the Claimant. The address on the file of the Respondent was Flat 3, Hildrop Crescent, London whereas the address should have been Flat 3, 19 Hildrop Crescent, London. However, we find as a fact that the letter of 22 June was received by the Claimant notwithstanding the incorrect address because, on 24 June, he had a conversation with Ms Clarke about the letter. The letter of 30 June was received by the Claimant because he was able to phone and

speak to Ms Opoku indicating he would not be able to attend the disciplinary meeting on 4 July. Furthermore, the letter of 7 July was received by him notwithstanding the address that was used because, on 11 July, the Claimant was able to call the office and speak to Ms Opoku requesting to speak to Ms Johnson because he had received the dismissal letter.

20. On 20 July, the Claimant hand delivered a letter indicating that he wished to appeal his decision. The letter was dated 14 July. Included in the letter was a paragraph in which the Claimant said:

> For the avoidance of doubt, I did not receive your letter dated 22 June until 9 July, when I received a pack of documents containing the 22 June letter and 7 July letter.

21. On Monday 25 July, Ms Johnson phoned the Claimant and advised him that she would be hearing his appeal and that it would be held on Monday 1 August at 1400 hours. She advised that she would be sending all the necessary paperwork to him and he should phone her if he had not received it by Wednesday 27 July. The letters went out that day to the address Flat 3, Hildrop Crescent. On 29 July, the Claimant phoned Ms Johnson's mobile shortly after 5pm, a call she was unable to answer. The Claimant did not leave a message. He then texted her to say that he had not received the letter regarding the meeting for Monday 1 August.

22. This prompted Ms Johnson to call the Claimant and let him know that she was disappointed, that she was only hearing on 29 July that her letter had not arrived given that she had requested him to let her know if the letter did not arrive by 27 July. She then double-checked with the Claimant as to the address and the Claimant confirmed that it was Flat 3, Hildrop Crescent. Ms Johnson then heard the Claimant's daughter advising from the background that the correct address was in fact Flat 3, 19 Hildrop Crescent.

23. On Saturday 30 July, Ms Johnson posted another pack of all the documents to the Claimant plus a letter stating that the appeal meeting would be on 9 August 2016 at 3pm and asking him to call her on her mobile to confirm where he would like to meet. In due course, the meeting was rescheduled for 10.30am on Friday, 12 August 2016. The Claimant attended accompanied by Mr John Neckles. The Respondent had made an offer to the Claimant of providing a taxi so that he would be able to attend the hearing but, in the event, he and Mr Neckles arrived under their own steam for the meeting. Present at the meeting were Ms Johnson, the Claimant, Mr Neckles and Ms Thompson who took notes and advised on procedure. Ms Johnson acted as the appeal manager.

24. At the start of the appeal hearing Mr Neckles chose to set out what he determined the appeal heading should be about:

> 1 Disputed Evidence

2 The Severity of the Award

3 Breach of Procedure

4 Unjustifiable Dismissal

5 Dismissal for a reason related or connected to his disability

25. We record that that was the only time that it was asserted in any way that the Claimant was dismissed for a reason related to or connected to his disability. We further note that, at that time, there was no suggestion that the dismissal was an act of discrimination on the grounds of the Claimant's race. That allegation was only made on the ET1. Nothing on the ET1 was said about the dismissal being for a reason related to or connected to his disability.

26. Reading the notes that were made by Ms Thompson of the appeal hearing, it is evident that the Claimant made a number of statements about what letters he had received and what knowledge he had which are inconsistent with the events that we have already described. However, the noted lack of consistency was consistent with the evidence that he gave us of the events leading up to the appeal hearing. We formed the view that no reliance could be placed upon any assertion made by the Claimant as to when he had received a letter of when and how he knew he was expected to attend a meeting.

27. An example of this is found in the notes of the appeal hearing where he asserted that the letters of 22 June, 30 June and 7 July were received by him along with a letter of 29 July. Those three letters had been addressed to Flat 3, Hildrop Crescent. He asserted that he had repeatedly explained to the Respondent that he had not received the letters. However, as we have already commented it was apparent that, on 24 June, the Claimant in a phone call to Ms Clarke indicated that he had received a letter dated 22 June and therefore knew that he was being invited to attend a meeting on 27 June.

28. After the conclusion of the appeal hearing, Ms Johnson considered the matter and wrote on 22 August 2016 indicating that she was upholding the original decision to dismiss. Thereafter she set out in approximately three full pages her reasons for upholding the decision. The Claimant in due course filed his claim form with the Employment Tribunal and the matter has come before us. As we have indicated, we heard evidence from three witnesses on behalf of the Respondent and also from the Claimant together with his representative Mr Neckles who provided a short statement and gave evidence himself. Mr Neckles provided a draft list of issues which contained the following headings:

1 Unfair dismissal contrary to Section 98 of the Employment Rights Act 1996 and Article 30 of the Charter of the Fundamental Rights of the European Union (2000/C 364/1).

2 Direct race discrimination, contrary to Section 13 of the Equality Act 2010 and Article 30 of the Charter of the Fundamental Rights of the European Union (2000/C 364/1) and Section 39(2)(b)(c) and (d) of the Equality Act 2010. Wrongful dismissal pursuant to Section 86 of the Employment Rights Act 2016.

The Law

29. We have been inundated with case law on behalf of the Claimant. Mr Neckles has provided us with a folder containing 15 cases which is additional to the Charter of Fundamental Rights of the European Union and two judgments in respect of that Charter. One is **Internationale Handelsgesellschaft MBH v Einfuhr-Und Vorratsstelle Fur Getreide Und Futtermittel,** Case 11/70 of the European Court and **The Rugby Football Union v Consolidated Information Services Ltd formerly Via Gogo Ltd (In liquidation) 2012 UKSC 55**.

30. Mr Ohringer provided us with an outline submission and a copy of the report of the case of **Taylor v OCS Group Ltd [2006] ICR 1602**. We accept the outline of the issues that Mr Ohringer put in his outline submission. In dealing with unfair dismissal, the first question for the Tribunal was what was the reason for dismissal. We were satisfied that the Respondent had demonstrated that the reason for dismissal was misconduct.

31. We have regard to the legal principles set out in **British Home Stores v Burchell [1980] ICR 303** and **Sainsbury Supermarkets Ltd v Hitt [2003] ICR 111**. The first question under the **Burchell** test was, did the dismissing officer of the Respondent have a genuine belief that the Claimant was guilty of gross misconduct. We formed the view that there was a genuine belief held by Ms Clarke that the Claimant was refusing to obey lawful management instructions. Secondly, at the time that she formed that belief, she had reasonable grounds for so doing and, thirdly, at that time the Respondent had carried out as much investigation as was appropriate in all the circumstances.

32. Mr Neckles on behalf of the Claimant asserted that it was unfair that, as he saw it, Ms Johnson, the person hearing the appeal, had been involved in the decision to dismiss and therefore Ms Johnson was acting as a judge in her own cause. For the reasons that we have set out before, we do not consider that the decision that was made to dismiss when properly analysed included or entailed involvement by Ms Johnson.

33. Mr Neckles further asserted that it was unfair that Ms Clarke acted as the allegation maker, the investigator and the decision maker, a combination of role which he asserted made the decision to dismiss unfair. However, with such a small organisation having to deal with straightforward failure to comply with lawful management instruction, it did not seem to us that it was necessary for the separation of roles that Mr Neckles contended for.

34. Applying **Burchell**, we do not see that there had been any failure or fairness in the way in which the Respondent dealt with the Claimant. What started

off as an attempt properly to manage a capability issue foundered in the face of a refusal on the part of the Claimant to comply with instructions to come and discuss his condition. It seemed to us that the employer was entirely justified in coming to the conclusions that it did.

35. We regard the decision to investigate the failure on the part of the Claimant to comply with managerial instructions as well within the band of reasonable responses of an employer. Furthermore, we regarded the categorisation of the misconduct as being gross misconduct warranting the sanction of dismissal to be within the band of reasonable responses of an employer. Therefore, we dismiss the allegation of unfair dismissal.

36. Turning to direct discrimination on the grounds of race, we accept that in order to succeed in a claim for direct discrimination the Claimant must show:

(a) that he has suffered a detriment;

(b) that in suffering that detriment he has been treated less favourably than a real or hypothetical comparator; and

(c) that he has suffered that less favourable treatment because of a protected characteristic.

37. Mr Ohringer has reminded us that to establish the treatment was because of a protected characteristic it must be shown that the named individual (or a number of individuals) who subjected the Claimant to a detriment was (or were) consciously or sub-consciously influenced by the protected characteristic. Unless the Claimant identifies the alleged discriminator or discriminators, that exercise cannot be conducted and the claim will fail. He cites the case of **Reynolds v CLFIS UK Ltd [2015] IRLR 562**. He also draws to our attention the well-known case from the Court of Appeal of **Igen Ltd v Wong [2005] ICR 931** and the guidance given by the Court of Appeal to Tribunals on applying the shifting burden of proof. We accept that the starting point of any claim of discrimination is for the Claimant to point to some credible evidence to suggest that the less favourable treatment was because of the protected characteristic. If the Claimant cannot do that, the claim will fail. The burden of proof does not shift to the Respondent unless the Claimant has raised facts from which the Tribunal could conclude in the absence of an adequate explanation that the Respondent committed an unlawful act of discrimination.

38. In the course of argument, Mr Neckles on behalf of the Claimant argued the way in which the Claimant had been discriminated against has been that he was of a different ethnic origin to those who had dismissed him. As the dismissal was alleged to be unfair, therefore there was established discrimination on the grounds of the difference in ethnic and racial origin. We note that in **Madarassy v Nomura International Plc [2007] IRLR 246** the Court of Appeal made it clear that:

> The court in *Igen v Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate 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.

39. In our view, there was nothing to indicate that the dismissal of the Claimant was connected to the difference of status between him and those that were dismissing him. We note that the Claimant himself in his evidence said at the time of the appeal meeting on 12 August, he did not consider himself to have been discriminated against on the grounds of race. Furthermore, that meeting was the first time that he met the person who dismissed him, Ms Clarke, and would thus have known there to be a difference in racial origin between himself and Ms Clarke.

40. As regards the arguments that were put forward by Mr Neckles in respect of the Charter of Fundamental Rights of the European Union, it seems to us that the response of Mr Ohringer are valid. Firstly, Article 30 of the Charter applies only to European derived rights. Mr Ohringer drew our attention to paragraph 28 of the decision of the Supreme Court in **The Rugby Football Union** at paragraph 28 where Lord Kerr said:

> Although the Charter thus has direct effect in national law, it only binds member states when they are implementing EU law--art 51(1). But the rubric, 'implementing EU law' is to be interpreted broadly and, in effect, means whenever a member state is acting 'within the material scope of EU law'.

41. As Mr Ohringer pointed out there is no European law of unfair dismissal. An Employment Tribunal has the jurisdiction given to it by Parliament. It does not have jurisdiction to consider complaints under the Charter of Fundamental Rights of the European Union. Furthermore, even if Article 30 does apply, every worker has got the right to protection against unjustified dismissal which is given in the protection against unfair dismissal. In **Turner v East Midlands Trains Ltd [2013] ICR 525**, the Court of Appeal confirmed that the band of reasonable responses test is sufficiently flexible to accommodate and respond to human rights arguments. In addition, as was explained by the President of the EAT, Langstaff J, in **City & County of Swansea v Gayle [2013] IRLR 768**, an Employment Tribunal cannot adjudicate upon any freestanding claim of a breach of human rights. The case must be determined applying the applicable employment legislation.

42. Therefore, we do not accept that, in resolving these claims, we should determine them by reference to the Charter of Fundamental Rights of the European Union.

43. Turning to the question of wrongful dismissal, we were satisfied that the behaviour on the part of the Claimant justified the employer treating that

behaviour as being gross misconduct. In those circumstances, we consider that the claim for wrongful dismissal fails.

44. We heard no evidence concerning the accrued holiday pay and, for that reason, dismiss that claim.

45. In case our analysis of the claims of either unfair dismissal or discrimination are wrong, we will say something about remedy. We note that the Claimant's evidence was that he continued to provide sick certificates to the Department of Work and Pensions up to and including 12 January 2017. Indeed, on 22 December 2016, a new statement was issued that he was not fit for work for a period from 22 December 2016 through until 22 February 2017. Thus, we conclude that he would have suffered no loss up to that date.

46. In the schedule of loss that has been put forward, the proposition is advanced that the Claimant would need a period of 10 years minimum to find a job in the same field let alone an alternative or similar post bearing in mind the state of this current job market, his age and race. We reject that proposition. If he was fit and able to work we are confident that neither the current job market nor his age or race would preclude him from being able to earn a wage. Indeed, we note that documents supplied by the Respondent show that in March 2017 he was able to provide services of painting and decorating to a resident of Bickenhall Mansions, a task for which he attended Bickenhall Mansions on six days.

47. If we are wrong about the procedure that was followed by the Respondents in that we have failed to find it defective in some respect, we believe that a proper procedure would have resulted in a dismissal certainly within the period of time for which the Claimant was certified to be off sick.

48. In the aftermath of his dismissal, the reason for the Claimant being unfit to work developed from a sole reason of foot pain to several reasons being foot pain, diabetes, depression and alcoholism. We see no reason to conclude that a proper procedure, had it been complied with, would have avoided the development of those illnesses.

49. In any event, we take the view that there has been a contribution to his dismissal. It seems to us that the behaviour of the Claimant in later denying what he had previously accepted – that he had received a letter inviting him to an investigatory meeting - contributed to the decision by the employer to dismiss him. Further, his failure to cooperate so as to prevent his manager being able to take an informed on his inability to work in the light of the stated reason for which he was off work sick was a contributing factor to his dismissal. We are of the view that this justifies a 100% reduction in the compensation to which he might be entitled should our decision on unfair dismissal be flawed.

50. To conclude, we dismiss all the claims that the Claimant has made.

Employment Judge P Stewart
30 July 2017