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EMPLOYMENT TRIBUNALS

Claimant: **Miss K Wreczycka**

Respondent: **Care In Style Limited**

Heard at: **East London Hearing Centre**

On: **23, 24 & 25 January 2018**

Before: **Employment Judge Russell**
Members: **Mr NJ Turner, OBE**
Mr T Chinnery

Representation
Claimant: **In person**
Respondent: **Mr R Chaudhry (Consultant)**

JUDGMENT

The unanimous judgment of the Tribunal is that all claims fail and are dismissed.

REASONS

1 The Claimant brought claims of unfair dismissal, breach of contract, protected disclosure dismissal and race discrimination by a claim form presented on 15 August 2017. The Respondent resisted all claims.

2 We heard evidence from the Claimant on her own behalf. For the Respondent we heard evidence from Mr Raymond Rigby (Unit Manager), Mr Samuel Snell (Deputy Manager) and Mrs Humairaa Hassan (HR and Finance Manager). We were provided with an agreed bundle of documents and considered those pages to which we were taken in evidence.

3 At the outset of the hearing, the Claimant raised some procedural difficulties with the case. Despite Case Management Orders being made with clear dates for disclosure, agreement of a bundle and exchange of witness statements, the Respondent failed to comply. This was dispiriting. Dates set out in Case Management Orders are not merely aspirational targets. Compliance is not within the gift of the Respondent. In the event, however, the bundle and the witness statements were provided by 19 January 2018 and the Claimant indicated that she was able to deal with the case fairly.

4 The Claimant made an application for specific disclosure. As it was not in dispute that the Claimant had complained that colleagues had improperly signed medication records, we did not consider it relevant or proportionate to order disclosure of the records themselves particularly given the confidential personal information of service users which would be contained therein. We did order disclosure of a support plan for a service user as its contents were directly relevant to the Claimant's understanding of what was required by way of receipts for purchases, an issue at the heart of the disciplinary proceedings against her. The Claimant sought disclosure of minutes of a meeting in 2017 with Mr Snell in which the Claimant raised concerns that another member of staff had acted in breach of the anti-bribery policy. The Tribunal accepted Mr Snell's assurance that reasonable searches had been made but no such minutes existed.

Findings of Fact

5 The Respondent is the provider of care for people with learning disabilities and physical needs. It operates out of three locations, one of which is the Lighthouse. It employs about 50 people, 40 of whom are support workers. At the Lighthouse there were approximately eight residential service users. On any given shift, there were two service users allocated to a support worker. Bearing in mind that this Judgment will be published, we will refer to the service user concerned in this case as X.

6 The Claimant started her employment on 8 March 2010 as support worker. She is Polish. The Claimant was not provided with written terms and conditions of employment until August 2011. This was a breach of the requirements of the Employment Rights Act 1996 but one remedied over six years ago. The Claimant's job duties were to support service users in their daily living at the Lighthouse and in the community, including taking them for meals and helping them whilst shopping. The Claimant was the support worker for X. A care plan was produced in respect of X which included the following.

> "…**I need to remember to ask for receipts. Also to bring home receipts when I have been away with the family at weekends. Staff need to record these on my cash sheets. There are concerns around my memory and an MCA has been completed that identifies I lack capacity when it comes to managing money…**
>
> **…When I do make any purchases, staff need to support me to gain a receipt. This then needs to be put with the petty cash sheet and staff need to make sure that the monies tally up.**"

7 The Claimant is a very experienced support worker and shift leader. She had a clean disciplinary record and was highly regarded by service users, colleagues and family members of the service users. She had received and undertaken extensive training on matters including safeguarding as recently as 2016. The Respondent has an employment handbook which requires staff to comply with its published procedures for handling service users' money at all times. It also operates a service users' finances procedure which, under the heading record keeping, states that the organisation will keep full individual receipts and records of financial transactions with or on behalf of the service users. Where purchases are made on behalf of the service user, receipts will be kept on file. Where the purchase is with the service user's own money, the receipt will be given to the service user but then recorded on the petty cash sheet and retained.

8 Over the course of her employment the Claimant has raised a number of concerns with her employer. In 2010 and 2011, she raised the failure to provide her with written

terms and conditions as required. Between 2011 and 2013, the Claimant raised concerns about changes to the finance policy (delegating petty cash checking to a shift leader) and improper completion of medication records by colleagues. Most recently in January 2017, the Claimant informed Mr Snell that a service user had given a gift to another member of staff, SM, and that SM had given a birthday gift to the same service user. SM is Zimbabwean. The gift given by the service user was worth approximately £3. We accept Mr Snell's evidence that this service user had mental capacity for financial matters. When the Claimant raised the concern, Mr Snell investigated and decided that in order not to hurt the service user's feelings, he would not require SM to return the gift. Instead, Mr Snell decided that the Respondent would reimburse £3 to the service user's petty cash account. Mr Snell was an impressive witness and we accept that he was genuinely concerned to act in the service user's best interests, both financially and emotionally. Mr Snell did not believe that there had been a breach of the anti-bribery policy by SM when she gave the service user a small birthday gift and card. He encouraged small acts of kindness such as this, particularly as many service users had no friends or family. As far as Mr Snell was concerned, there was no issue of transparency and no financial impropriety in the conduct of SM.

9 Other concerns raised by the Claimant during her employment included the absence of rest breaks. The Claimant worked shifts lasting between 6 and 8 hours. Her contract of employment, the most recent version of which was provided in 2016, stated:

> "**Should you work more than six hours consecutively, you are required to take a 20 minute break. However, in circumstances in which the continuity of service is required and there is no opportunity for rest break entitlement, this is permitted provided that an equivalent compensatory rest break is agreed at the convenience of the employer and the employee."**

10 The Respondent did not arrange set times for support workers to take breaks but instead left it to the support worker's discretion to take their break at a convenient time. Records are kept setting out in some considerable detail the day to day activities of the service users whilst they are out in the community and whilst they are at the Lighthouse. The records in the bundle before us regularly recorded times in the course of the day when the service user would be engaged in independent leisure activities such as sitting in the lounge, playing on an iPad or watching television. In other words, there would be downtime during the shift when the support worker could either take their break without seeking cover or ask a colleague to cover without it being too onerous a requirement.

11 The last supervision recording a complaint by the Claimant about rest breaks took place on 13 June 2014. There is no evidence of her complaining thereafter. In her supervision meeting on 20 January 2017, recorded that the Claimant had no concerns about the working environment. There is no evidence that any other support worker raised similar concerns.

12 On or around 8 May 2017, Mr Ray Rigby was informed by the employee responsible for checking petty cash of a possible irregularity in X's petty cash account. The employee told Mr Rigby that when reviewing X's petty cash sheet, she was concerned that a receipt for a meal on 4 May 2017 showed a greater cost than was usual for X. Upon closer inspection, the receipt attached to the file had been cut and part was missing; it showed the total cost of the transaction but not what it was for. On further review of X's petty cash sheet, Mr Rigby found another incomplete receipt. This was for a transaction on 16 March 2017 at a Debenhams store; the receipt showed the total cost of

the items purchased but not the method of payment or whether change had been received. Mr Rigby decided that further investigation was required.

13 We accept as truthful Mr Rigby's evidence that he visited the Debenhams store and spoke to a member of staff. They accessed the computer record of the transaction and provided further information, which they wrote onto a small piece of blue paper which they attached to Debenhams letterhead note paper. The original version of this handwritten note was produced to the Tribunal. It shows that on 16 March 2017 the method of payment was £20 in cash and £20 gift voucher, with £9.95 being provided in change. The relevant record on X's petty cash sheet had been completed by the Claimant and was signed by her. It recorded the items which were purchased and it recorded the amount spent as being £30.05. It did not record the fact that a gift card had been used. This appeared to be to X's financial detriment as the full amount of £30.05 was deducted from the petty cash tally and X lost the full benefit of the gift card which had been given to all service users by management at around Christmas time.

14 With regard to the 4 May 2017 transaction, Mr Rigby obtained the till print out and full receipt from the restaurant. This showed that the total transaction spend of £14.30 was in respect of two meals, one for X and one for the Claimant who accompanied him. Again the Claimant had completed the petty cash sheet and signed the entry as accurate. Given that there were two incomplete receipts and there was concern about detriment to X's finances, the Respondent decided to suspend the Claimant. This was notified to her on 8 May 2017 by hand delivered letter and a text received at 18.25. The Claimant was invited to attend an investigation meeting the following day. The allegation was financial abuse; the Claimant was not given detail of the transactions in question and was not provided with any evidence in support.

15 The investigation meeting took place on 9 May 2017. The Claimant did not object to the lack of time to prepare or allege that she had been given insufficient information fairly to do so. In respect of the May receipt, the Claimant's case was that she had taken X to the restaurant for lunch, they both ate the same meal and as she did not have X's money with her when she got to the till, she used her own money to pay. The Claimant stated that she tore the receipt in half, gave one half to X and retained the other to record her own purchase. The full amount of £14.30 had been entered onto the petty cash sheet in error as she was in a rush because she had training at 1pm. As for the March receipt, the Claimant could not recollect whether or not a gift card had been used or whether change had been given. She accepted that X did have a gift card and it may have been used. When asked why the receipt was incomplete, she claimed it was all she had been given. At the investigation meeting, the Claimant did not alleged that somebody else may have tampered with the receipt as she did at Tribunal. When asked to account for the details of the transaction as confirmed by Debenhams, the Claimant could not do so but did not suggest that the information provided by Debenhams may not be reliable as she has done in the course of these proceedings. The notes of the investigation meeting are signed by the Claimant and the managers as an accurate record.

16 Mr Rigby was not satisfied with the Claimant's explanations and decided that there was a disciplinary case to answer. The matter was referred to Mr Snell, the deputy manager. The Respondent's disciplinary policy provides that for dismissal, the appropriate level of authority is a manager. It also states that this does not prevent a higher or lower level of seniority where a manager is not available or suitable. When informed that Mr Snell would hear the disciplinary, the Claimant did not object.

17 By letter dated 12 May 2017, the Claimant was invited to attend a disciplinary hearing on 15 June 2017. The hearing date was a typographical error and should have read 15 May 2017. In any event, the Claimant did not receive the letter until 17 May 2017 as she was on authorised annual leave. The Respondent did not proceed with the hearing in her absence but rescheduled to 23 May 2017. The Claimant was advised that the matters of concern were failure to follow company rules and procedures, namely care standard procedures in respect of administration and safe keeping of money belonging to vulnerable residents and misappropriation of money on 13 March 2017 and on 4 May 2017. The Claimant was advised that if proven, the allegation could lead to dismissal as a breach of trust. I note here that the revised invitation letter itself contained two errors: the reference to the care standards which did not apply to support workers and incorrectly dating the March receipt (which in fact was dated 16th). The Claimant was provided with the minutes from her investigation meeting with herself, an interview with X, the till print out on 4 May 2017, the evidence obtained from Debenhams, copies of the receipts and a number of petty cash sheets including those for 16 March 2017 and 4 May 2017.

18 The disciplinary hearing took place on 23 May 2017. The day before, the Claimant submitted a statement for use at the disciplinary hearing and a letter entitled grievance. The Claimant stated that the allegations were contradictory and not consistent, that the disciplinary action was being caused or influenced by the fact that she had previously raised concerns that about (i) rest breaks, (ii) a colleague failing to sign a client medication record and (iii) a colleague falsifying a signature on a medication record statement. The Claimant relied upon her long unblemished service and alleged that the disciplinary action being taken was unfair, unreasonable, discriminatory and a breach of contract.

19 In her statement, the Claimant addressed the substance of the transactions on 4 May 2017 and on 16 March 2017 (clearly not confused by the Respondent's error in the invitation letter). The Claimant's case was that she had used her own money to pay for the meal on 4 May 2017, she did not have X's money as a bottle of water had leaked in her handbag, she had cut the receipt in half to separate the bills, she had followed the correct process and attached the receipt to the petty cash sheet but due to her hurry to get to training, she had taken the full amount rather than for one meal only. As for 16 March 2017, the Claimant's case was that X may have purchased additional items to the approximate value of the change. The Claimant accepted that she was aware of the protocol for petty cash and that support workers could not use service users' money but maintained that she had made an error when in a rush to attend training.

20 The minutes of the disciplinary hearing were signed as agreed, after some amendments. It was disappointing to the Tribunal that the agreed minutes were not included in the bundle despite them being provided by the Claimant to the Respondent in disclosure. It was equally disappointing to the Tribunal that the Claimant maintained that she could not answer questions in cross-examination without sight of the amended notes. When eventually provided to the Tribunal in legible form, there were only three amendments in total and all were incredibly minor (£9.99 was amended to £9.98; the phrase "this had happened *for*" was amended to "this had happened *before*" and the words " as [X] did not have buss pass" were deleted; none were relevant to the issues before us). In total, an hour of hearing time was lost and a third day was required.

21 Mr Snell considered the explanations provided by the Claimant and the evidence

before him. He did not accept the Claimant's case and decided that she should be summarily dismissed for gross misconduct. The letter confirming dismissal is dated 24 May 2017 and it sets out the reasons for Mr Snell's decision. Yet again, the letter contains a typographical error as to the date of the disciplinary hearing. Nothing turns on the error but it was sloppy and something of a recurring theme in the Respondent's correspondence.

22 The letter of dismissal does not explicitly refer to an act of gross misconduct. It does however set out Mr Snell's conclusion that the Claimant had misappropriate X's money on each occasion and that her conduct had resulted in a fundamental breach of contract which irrecoverably destroyed the trust and confidence necessary to continue the employment relationship. We accept Mr Snell's evidence that in reaching his conclusion he carefully considered the Claimant's length of service, her experience and the high regard in which she was held. Nevertheless, he concluded that the weight of the allegations overrode all of those considerations. At Tribunal, the Claimant's case was that she suspected that Mrs Nusrat Hassan (the manager at the Lighthouse) had influenced the decision to dismiss her. She adduced no evidence to support her suspicion. We found Mr Snell to be a credible and reliable witness and we accept that the decision to dismiss was his and his alone. The Claimant's earlier complaints formed no part of his reasons for dismissing. Far from the expressions of concern being frowned upon by the Respondent, we find that it welcomed transparency. Mr Snell had previously applauded the Claimant for raising her concerns. A letter from another assistant manager in 2011, Ms Disney, thanked the Claimant for raising concerns about medication management, saying that she was pleased to have staff working so vigilantly and she welcomed the feedback. Mr Snell also had an open door policy. The nature and environment of the Respondent's operation was such that it welcomed staff openly expressing matters of concern. Mr Snell did not penalise the Claimant for raising them with him and he did not dismiss her for it.

23 Mr Snell dealt briefly with the matters raised by the Claimant in her grievance. He noted that the matters raised by the Claimant had been investigated, he had spoken to the individuals concerned in the medication report incidents and had been satisfied that there was no risk to service users or effect upon the Claimant personally. He considered that these matters were irrelevant to the substantiated allegations against the Claimant. This is consistent with the Tribunal's finding that the Claimant's previous complaints were entirely separate to Mr Snell's reasons for dismissal. As for the rest beaks, Mr Snell held that staff had been advised to take short breaks wherever possible and that since this had been brought up in 2013, the Claimant had had further supervisions in which she had stated that there were no further concerns. He concluded that the rest breaks issue had been dealt with to the Claimant's satisfaction. Having had the benefit of hearing Mr Snell give evidence in cross-examination about the medication record errors and the conduct of SM, we found him to be an impressive witness, clearly committed to the care of his service users. His guiding principle was whether the conduct of the employee posed a risk to the welfare of the service user. The medication record issues were simple procedural errors which posed no risk and were not gross misconduct. There was no risk to the service user in the conduct of SM. The Claimant's conduct was, however, in his mind different as it was prejudicial to the financial well-being of the service user and was not a simple mistake but an act of financial misappropriation.

24 After informing the Claimant of the decision to dismiss her, Mr Snell sent a WhatsApp message to other staff in which he informed them of the departure of the

Claimant and two other members of staff. The message did not refer to dismissal and he wished all three individuals well. We accepted Mr Snell's evidence that the purpose of the message was to prevent an awkward situation in the community. It is not relevant to the decision to dismiss or the fairness of the procedure followed.

25 The Claimant was advised of her right of appeal which she exercised by letter dated 31 May 2017. In essence, the Claimant denied that she had acted improperly in respect of either transaction and repeated her earlier explanations. For the first time, the Claimant raised health issues arising from a thyroid problem diagnosed in September 2016. She complained that her grievance had not been properly considered. The Claimant asked for a copy of the care standards which had been referred to in the dismissal letter to be sent to her. It took the Respondent 11 days to send the care standards and those provided were not applicable to the Claimant in any event. The financial standards which are contained in the bundle and which did apply to the Claimant impose largely the same obligations. We accept that the importance of safeguarding the money and financial affairs of vulnerable service users is fundamental. The Claimant knew that she should not spend service users' money.

26 The appeal was heard by Ms Hassan on 23 June 2017. The Claimant repeated her earlier explanations but added that she had told X on 4 May 2017 that she had paid with her own money. The appeal hearing was adjourned until 3 July 2017 to enable the Claimant to adduce further evidence as to her health condition. The Claimant provided blood test results from a Polish doctor in support of her contention that she had mild thyroid problems which, at the reconvened hearing, the Claimant suggested made her tired and could affect her concentration. Ms Hassan considered all of the evidence and upheld the decision to dismiss by a letter of 18 July 2017. She was not satisfied that health was a significant factor in the misconduct and, as with Mr Snell before her, Ms Hassan attached significant weight to the fact that the receipts were not intact. Having seen the original receipt for the meal on 4 May 2017, this was not halved as the Claimant suggested but separated into three parts with one part never provided by the Claimant either on the petty cash sheet or in the disciplinary process. We accept that the irregularity of the receipts was the main reason for Ms Hassan's conclusion on appeal that there had been misconduct by the Claimant.

Law

27 The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996. The Respondent relies upon conduct within section 98(2)(b). The legal issues in a conduct unfair dismissal case are well established in the case of **BHS –v- Burchell** [1978] IRLR 379, namely:

> (1) did the employer genuinely believe that the employee had committed the act of misconduct?
> (2) was such a belief held on reasonable grounds? And
> (3) at the stage at which it formed the belief on those grounds, had the employer carried as much investigation as was reasonable in all the circumstances of the case?

28 Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial

merits of the case. This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

29 The range of reasonable responses test or, to put it another way, the need to apply the objective standards of a reasonable employer, applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision to dismiss, see **Sainsbury's Supermarkets Limited v Hitt** [2002] IRLR 23, CA. As confirmed in **A v B** [2003] IRLR 405, EAT and **Salford NHS Trust v Roldan** [2010] ICR 1457, CA, in determining whether an employer carried out such investigation as was reasonable in all the circumstances, relevant circumstances include the gravity of the charges and their potential effects upon the employee. The gravity of the misconduct is not determinative in assessing the extent of investigation reasonably required. This will also depend, amongst other things, upon the extent to which the employee disputes the factual basis of the allegations concerned and the nature of the defence advanced by the employee, **Stuart v London City Airport** [2013] EWCA 973.

30 The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v- Madden** [2000] IRLR 827, CA. There is often a range of disciplinary sanctions available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563. However, the range of reasonable responses test is not a test of irrationality; nor is it infinitely wide. It is important not to overlook s.98(4)(b) the provisions of which indicate that Parliament did not intend the Tribunal's consideration of a conduct case to be a matter of procedural box ticking and it is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer, **Newbound –v- Thames Water Utilities Ltd** [2015] IRLR 734, CA.

31 Relevant factors in the overall assessment of reasonableness under s.98(4) include, amongst other matters going to the equity of the case overall:

- the conduct of the employee in the disciplinary process (whether they are contrite or go on the offensive);

- disparity where an employer has (i) led an employee to believe that certain categories of conduct will either be overlooked or at least not be dealt with by the sanction of dismissal; (ii) where evidence about decisions made in relation to other cases supports an inference that the purported reason for dismissal is not the real or genuine reason; and/or (iii) decisions made by an employer in truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable to adopt the penalty of dismissal that some lesser penalty would have been appropriate in the circumstances, **Hadjioannou v Coral Casinos Ltd** [1981] IRLR 352.

- A finding of gross misconduct does not automatically justify a finding that dismissal was within the range of reasonable responses, **Brito-Babapulle v Ealing Hospital NHS Trust** [2013] IRLR 854.

- Mitigating factors. These include length of service and disciplinary record

> but neither will necessarily save an employee from dismissal in cases of serious misconduct. Another mitigating factor may be whether the employee believed or had reason to believe that what they did was permitted and, therefore, whether they were doing something wrong.

32 The fairness of dismissal must be judged by what the decision-maker knew or ought reasonably to have known at the time of dismissal. The knowledge of others within the employment organisation is not imputed to him merely because he is employed by the same employer, **Orr v Milton Keynes Council** [2011] ICR 704. It may however be relevant to whether or not the employer has carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

33 In deciding whether the dismissal was fair or unfair, the tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the process was defective, the tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA per Smith LJ at paragraph 47.

34 The Tribunal must have regard to the ACAS Code of Practice which sets out basic principles of fairness to be adopted in disciplinary situations, promoting fairness and transparency for example in use of clear rules and procedures. This includes the requirement that employers carry out necessary investigations to establish the facts of the case.

Breach of Contract

35 The Claimant's claim for notice pay is brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, article 3. It is, in general, for the Respondent to show on the balance of probabilities that the Claimant was in fact guilty of the misconduct alleged to amount to a repudiatory breach of contract entitling it to dismissal without notice or pay in lieu. To be sufficient, the conduct must so undermine the trust and confidence inherent in that particular contract of employment that the employer should no longer be required to retain the employee, **Neary v Dean of Westminster** [1999] IRLR 288. Relevant to this determination will be the nature of the employer, the role of the employee and the degree of trust required.

Protected Disclosure

36 A qualifying disclosure requires a 'disclosure of information' which in the reasonable belief of the worker tends to show, amongst other things, that the health or safety of any individual has been, is being, or is likely to be endangered, s.43B(1)(d) Employment Rights Act 1996. The ordinary meaning of 'giving information' is conveying facts and not simply making allegations, **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38, EAT at paragraph 24. A disclosure can include a failure to act as well as a positive act, **Millbank Financial Services Ltd v Crawford** [2014] IRLR 18.

37 In **Blackbay Ventures Ltd v Gahir** [2014] IRLR 416, the EAT gave helpful guidance as to the approach to be adopted by a Tribunal considering a protected disclosure claim. This emphasised the need not to adopt a rolled up approach but to consider each disclosure by date and content, identify the risk to health and safety in each

case and the detriment (if any) which is caused thereby.

38 For the purposes of section 103A Employment Rights Act 1996, a protected disclosure must be the sole or principal reason for dismissal.

Race Discrimination

39 Section 13 Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats or would treat others. Race is a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that race had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285. Where there is a comparator, the circumstances must be the same or not materially different from those of the complainant.

40 In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove on the balance of probabilities that the treatment was in no sense whatsoever on the prohibited ground. If the Respondent cannot provide such an explanation, the Tribunal must infer discrimination.

41 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 we could conclude that there had been discrimination, **Madarassy** at paragraphs 54-57. The protected characteristic must be an effective cause of any less favourable treatment. We must take care to distinguish between unfair or unreasonable treatment and discriminatory treatment as the two are not the same.

42 Where a discrimination claim is based upon multiple allegations, it is necessary for the Tribunal to consider each allegation individually and also to adopt a holistic approach to consider the explanations given by the Respondent. We should avoid a fragmented approach which risks diminishing the eloquence of the cumulative effect of primary facts and the inferences which may be drawn, for example see **X v Y** [2013] UKEAT/0322/12. We must consider the totality of the evidence and decide the reason why the Claimant received any less favourable treatment.

Conclusions

Unfair dismissal and protected disclosure

43 For the purposes of this Judgment we have accepted that each of the concerns raised by the Claimant throughout her employment were capable of amounting to protected disclosures. The Claimant provided information which in her reasonable belief

tended to show that there had been a breach of legal obligation in respect of provision of written terms and conditions, compliance with medication record requirements, the anti-bribery policy and the obligation to provide rest breaks. The real issue between the parties is whether any of these earlier protected disclosures were the sole or principal reason for dismissal.

44 Based upon our findings of fact, we have found that the entire reason for dismissal was the Claimant's conduct. Her earlier concerns had nothing whatsoever to do with the decision of both Mr Snell and Ms Hassan that her conduct in connection with the transactions on 16 March 2017 and 4 May 2017 was misappropriation of a service user's money in breach of the rules. It is in our view an unhappy feature of this case that the Claimant has sought essentially to defend herself in Tribunal by deflecting from her own misconduct and criticising others. Although not part of her case during the disciplinary process, the Claimant now alleges that there was a management failure to identify the problems sooner. In other words, that the delay in finding her misconduct is an excuse for that very misconduct itself. It is not. Furthermore, we do not accept that there was any material delay on the facts as we have found them.

45 As set out in our findings of fact, Mr Snell genuinely believed that the Claimant had committed an act of misconduct. He was not influenced, pressured or in any way affected by Mrs Nusrat Hassan. The decision to dismiss was his and his alone. As was clear from his evidence, Mr Snell believed that the Claimant's conduct in respect of both transactions had been misappropriation of X's finances. This is an act of dishonesty and a detriment to the best interests of X. We do not accept the WhatsApp message is evidence from which we could infer predetermination or ulterior motive.

46 As for whether or not Mr Snell's belief was reasonable following a reasonable investigation, we took into account the evidence before him. The Claimant had completed and signed the petty cash record for both transactions. There were two receipts which had not been attached to petty cash sheets in their entirety. The information contained within the missing parts was reasonable evidence of wrongdoing - the change which X received on 16 March 2017 was not shown, nor was use of the gift card. Neither fact was entered on the petty cash record. In respect of the meals on 4 May 2017, the missing part of the receipt effectively hid the fact that the total was for two meals, not just the meal enjoyed by X. The petty cash account for X was debited for both meals, irrespective of whether it was the Claimant's money or X's money who paid the bill at the restaurant. The Claimant benefitted from a meal paid by X, a vulnerable service user lacking mental capacity in financial matters. The evidence from the restaurant and Debenhams was credible and confirmed the nature of the additional information which had not been included by the Claimant on the petty cash sheets. On this evidence, Mr Snell formed a reasonable belief in misconduct.

47 Turning to Section 98(4), we are satisfied overall that a fair procedure was followed. Section 98(4) does not require perfection and it is certainly the case here that the Respondent could and should have handled some aspects of the process better. It could and should have given the Claimant more time and information in advanced of the investigation meeting. It would have been better to have provided the appropriate financial procedures in advance and not to have relied upon an inapplicable care standards document. It would have been better not to have made typographical errors as to the date of the meeting and the March transaction. However, the Claimant raised no objection prior to the investigation and was able fully and fairly to advance her explanation

for the misconduct. Any deficiencies at the investigation stage were fully remedied at the disciplinary hearing and on appeal. The Respondent did not seek to proceed in the Claimant's absence on 15 May2017 and the Claimant had five days in advance of the reconvened hearing when provided with adequate information and supporting evidence in which to prepare her defence. As for the care standards document, there was a clear obligation with regard to vulnerable adults to safeguard their finance. The Claimant accepted that she was aware of this and of the appropriate procedure to be followed for record keeping. Nor have we found that there was any breach of the disciplinary procedure in Mr Snell dealing with the dismissal. Overall we find that despite some areas for improvement, the procedure did fall within the range of responses.

48 As for sanction, we take into account the very serious nature of the allegations that Mr Snell upheld. At its heart, Mr Snell found a lack of transparency in respect of handling client money which he concluded amounted to misappropriation. A support worker enjoys a position of great trust with service users who are vulnerable. X lacked mental capacity to deal with financial matters, even if as the Claimant suggested X could recognise a £5 note, which was why he required support with financial transactions. In such circumstances, the duty was upon the Claimant to take every possible step to safeguard his financial interests. Even though the Claimant had an exemplary record and was something of a high flyer, we are satisfied that dismissal did fall within the range of reasonable responses. As a result the claim for unfair dismissal fails and is dismissed.

Breach of contract

49 On balance, we find for the same reasons that the Respondent has shown that there was repudiatory conduct by the Claimant. The conduct of the Claimant was very serious and went to the heart of the relationship of trust and confidence. The receipts were incomplete and the parts missing disguised the fact that the Claimant had enjoyed a meal paid for by X and that X had received change which was not reflected in the petty cash account. We do not accept the Claimant's case that the evidence from Debenhams was not reliable or the Claimant's case as advanced to this Tribunal that some other, unknown, member of staff cut the Debenhams receipt. The breach of contract claim in respect of notice also fails.

Race Discrimination

50 The Claimant's case was not well expressed or particularised but essentially it amounted to a contention that other colleagues were treated more favourably when they were guilty of equally serious misconduct. In respect of the medication records, we are not satisfied that the circumstances of the comparator employees (SM and D) were the same; in fact they were materially different. Mr Snell investigated and was satisfied that there had been an honest procedural error, the service user suffered no harm and the matter had been dealt with transparently to the satisfaction of social services. By contrast, Mr Snell believed that the Claimant's case did not involve a genuine error whether procedural or otherwise but was an act of financial misappropriation. This finding of dishonesty on the part of the Claimant was a material difference.

51 As for the gifts given and received by SM from a service user, we accept that the nature of the alleged misconduct was similar insofar as it related to financial procedures to safeguard residents. However, the nature of the conduct of SM and the Claimant was materially different. The service user who gave and received a gift from SM had mental

capacity, was fully aware of what was being done and had the ability to act. Although the Claimant raised the concern, SM had acted transparently and was not in breach of the anti-bribery policy which we find is not applicable in such cases. It is clearly not intended to nor reasonably could be expected to apply to a situation where a service user with mental capacity seeks or received a birthday or other gift from a member of staff. Mr Snell genuinely believed that no advantage had been taken by SM of a vulnerable service user. That is in stark contrast of the conclusion reached by Mr Snell in the Claimant's case. We conclude that the Claimant has not proved primary facts from which we could conclude that there had been discrimination.

52 Even if the burden of proof had passed, or by focusing on the reason why the Claimant was dismissed and SM was not, we have accepted Mr Snell's evidence. He demonstrated a genuine commitment to protecting service users whilst simultaneously recognising their humanity and individuality. It is this and his different view of the nature of the conduct of SM and the Claimant that led to a difference in treatment. Race simply did not come into it. The Claimant's misconduct was serious, she was not frank in her explanations and did not clearly express contrition or regret.

53 In the course of evidence, the Claimant made further allegations against SM to the effect that she had failed in her duty to deal properly with receipts for monies spent by X whilst on family visits. Although not strictly part of the issues, we considered the allegations as they may have been relevant for the purposes of drawing inferences. The care plan for X identified the need to bring back receipts but if the family did not provide them, we were not satisfied that this was a matter of misconduct on the part of SM. By contrast, in the Claimant's case she was the support worker present at the time of the transactions, she had direct responsibility for the receipts which she received on X's behalf and there was cogent and compelling evidence that she had cut or torn them and then attached them to the petty cash sheets in a way which disguised relevant information. The claim of race discrimination fails and is dismissed.

Rest breaks

54 The claim is advanced by way of a breach of contract, although the term of the contract must be interpreted in a way which is consistent with the provisions of the Working Time Regulations. Regulation 12 provides an entitlement to a break which is taken away from one's work desk. In the Claimant's working environment, having lunch or tea with the service user would not satisfy those requirements. As such, the Claimant's contractual entitlement was to take a 20 minute break, away from the service users, in any shift lasting over six hours. Indeed, the contract made it a requirement of the Claimant that she take a break and provided for an equivalent break if this were not possible. Regulation 12 does not oblige an employer to force an employee to take a break, but only to ensure that the employee can realistically exercise their entitlement and the employer must not dissuade the employee from doing so.

55 On our findings of fact, the Claimant had not raised any concern about taking a rest break since 13 June 2014. The last supervision on 20 January 2017 recorded no concern about rest breaks. There is no evidence that the Claimant was prevented or dissuaded from taking breaks. The Respondent did not proactively schedule a set break time but given the nature of the Claimant's work it is hard to see how such a set break could be scheduled. The needs of a service user are unpredictable and a support worker needs to be flexible to ensure that that service user is cared for. The support worker was

given a discretion to take their break at a suitable time. We have found that there was sufficient "down time" when the service user was engaged in personal leisure activities for the support user to take a break (even if it required asking a colleague to cover). Given the terms of the contract and the practicalities of the day-to-day working therefore we are satisfied that there was no breach of the contractual terms nor of regulation 12.

56 For those reasons all claims fail and are dismissed.

Employment Judge Russell

7 March 2018