Case Number: 3212810/2020V

STO/RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Hounvio**

Respondent: **Larchwood Care Homes (South) limited**

Heard at: **East London Hearing Centre** **On: 13 – 15 October 2021**

Before: **Employment Judge O'Brien**
Members: **Ms A Berry**
Ms J Henry

Representation:

Claimant: In person

Respondent: Mr Menon of Counsel

JUDGMENT

The judgment of the Tribunal is that

1. **The claimant's complaint of unfair dismissal pursuant to s98 of the Employment Rights Act 1996 fails and is dismissed.**

2. **The claimant 's complaint of direct race discrimination fails and is dismissed.**

REASONS

1 ***This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video (although the respondent was able to join only by telephone for most of the hearing). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that we were referred to are in a bundle of approximately 570 pages and a witness statement, the contents of which we have referred to where necessary below. Both parties were content with the way in which the hearing was held.***

2 On 13 October 2020, the claimant presented claims for unfair dismissal and unlawful discrimination (subsequently confirmed to be limited to a complain of direct race discrimination). The respondent resisted the claims in a response dated 14 December 2020.

ISSUES

3 The claimant in essence alleges that, whilst he had committed the acts of which he was accused, these were common-place and necessary in the context of chronic understaffing at the respondent care home, and that he was singled out unfairly and/or for discriminatory reasons. Had he been treated fairly and equally he would not have been dismissed.

4 The respondent in turn argues that the claimant was the subject of extant warnings (including a final written warning) for similar acts of misconduct, that the admitted acts were safety-related and so justified irrespective of whether others were allegedly doing similar acts, and that the claimant was treated no differently than anyone else would have been in the circumstances.

5 The issues were identified by Regional Employment Judge Taylor in her note of a preliminary hearing held on 24 March 2021 and we need not rehearse them here.

EVIDENCE AND SUBMISSIONS

6 Over the course of the two-day hearing, the Tribunal heard evidence from the claimant and from Mr Taylor and Ms Wilkinson on behalf of the respondents. The latter 2 witnesses gave evidence on the basis of a written summary of evidence and witness statement respectively. The claimant gave evidence on the basis of his grounds of complaint and an additional document submitted in response to the respondent's grounds of resistance. The parties both relied on a bundle of documents comprising approximately 570 pages. We were also provided during the hearing with CQC reports on the respondent care home published on 10 June and 15 December 2020.

7 The parties each made oral submissions. We took these into account in their entirety when determining the issues in the case. It was agreed that we would give judgment on liability and would determine remedy if necessary after handing down judgement. However, given the factual overlap with issues of liability, it was agreed that we would deal at this stage with whether it was appropriate to make any reduction for contributory fault and or the inevitability of dismissal (**Polkey**).

FINDINGS OF FACT

8 In order to determine the issues as agreed between the parties, we made following findings of fact, resolving any disputes on the balance of probabilities.

9 The claimant was employed by the respondent as a care worker from 6 June 2013 until his dismissal on 10 June 2020 with payment in lieu of notice. The claimant was an experienced care worker who knew or could reasonably have been expected to know the respondent's policies applicable to his work as well as the standards expected generally from those working in the care sector. During the hearing, the claimant admitted that he was aware of the relevant policies and procedures.

10 On 16 July 2019, the claimant was given a first written warning by the respondent for two offences committed on 30 May 2019: failing to follow the instructions of a senior carer; and walking off shift without permission. The warning made clear that it would remain active on the claimant's file for a period of 12 months after which it would be disregarded if no repetition of the type of misconduct in question occurred. He was told that the following improvement was expected: acting in a professional manner at all times, working collaboratively and respectfully with his work colleagues; and not leaving shift without express authorization. He was warned that the likely consequence of insufficient improvement was further disciplinary action.

11 A CQC inspection took place on the respondent care home over three days in February 2020, as a result of which the home was placed in special measures. Amongst the many criticisms were the following comments about safety and staffing levels:

11.1 Although staff had received moving and handling training, we observed 9 separate incidents whereby staff performed unsafe moving and handling practise. On each occasion staff placed people at potential risk of harm by placing their hands under people's armpits when assisting them with transfers from a wheelchair to a comfortable chair and vice versa. This technique is unsafe, can hurt and cause injury because the person's armpits and shoulders have too much pressure on them. Wheelchairs were placed directly in front of the chair and not at an angle to make transfer safer for the person being transferred and for start providing support.

11.2 Staff rosters viewed for the period 23 December 2019 to 26 January 2020 showed staffing levels as stated by the peripatetic manager were not always maintained. Insufficient staffing levels and poor deployment of staffing meant people on the 1st floor did not receive their breakfast in a timely manner. On the first day of inspection, staff did not complete people's personal care until 11:30 AM. People were left in the dining room for long periods of time despite having finished their breakfast earlier as there was no-one available to assist them to the communal lounge.

11.3 The systems in place for planning and reviewing staffing levels were not effective to ensure safe numbers of staff for the needs of people using the service. There were staff vacancies high rates of start sickness and usage of agency staff.

11.4 Sufficient numbers of staff were not deployed effectively to meet people's needs. This demonstrated a breach of regulation 18 of the health and social Care Act twenty 08 (regulated activities) regulations 2014.

12 The claimant told us that he was present when the CQC inspection took place. We infer from the fact that the CQC report made no mention of people's pads being changed by a single carer when their care plan suggested that two were necessary that neither the claimant nor any other member of staff did so when being observed by the CQC inspectors.

13 On 24 April 2020, within the operative period of the earlier written warning, the claimant was given a final written warning for a number of offences including in particular poor moving and handling of a resident. In that regard it was found that the claimant had hoisted a resident alone when procedures required that two members of staff assist with hoisting. The claimant's explanation was that he was aware of the requirement for two

members of staff but that the home had been short staffed, he had wanted to help the resident, he felt confident being able to move the resident alone and so he "took the risk". The respondent considered each of the offences to be serious breaches of policy resulting in residents' safety being put at risk knowingly by the claimant, so as to justify a final written warning irrespective of the earlier written warning. He was told that the final written warning would remain active on his file for a period of 18 months and that certain improvements were expected, including making sure that all manual handling procedures that he used were within in line with the respondent's policies and procedures. He was further warned that the likely consequence of insufficient improvement was further disciplinary action.

14 In May 2020 a staffing risk assessment was undertaken for the home which identified staff levels of 6 staff to 44 residents at night (a ratio of 1 to 7.3 residents). Those six staff comprised 4 carers and two seniors. We see from the rotas that quite regularly at least one of those carers was agency staff. We were told by Ms Wilkinson and have no reason to doubt that the industry standard is that the ratio should be no worse one member of staff for every 10 residents overnight.

15 On 7 May 2020, the claimant was on night shift working on the first floor with an agency carer called Terrence and a senior carer called Lauren. Lauren told the claimant and Terrence that they were to do personal care together for the residents classified as 'doubles' (those residents who required two people to assist with personal care) but to do the 'singles' (those residents for whom the assistance of a single carer for personal care was sufficient) separately. Lauren told them that she would be off the floor for part of the evening because she had other duties to attend to. The claimant formed the view that Lauren was trying to avoid work, argued with her about the amount of work it would leave for him and Terrence to do and went to complain to the team leader, Joanna.

16 Later on that shift, Lauren saw that the claimant had changed the incontinence pad of one of the doubles (a resident known as Jack or John) on his own and reported him the following morning for failing to obey her instructions and for not following home procedures. Jack's care plan includes the following:

> "Jack requires the assistance of two carers for his personal care, he can become very verbally and physically abusive towards staff, if this occurs staff are to leave him and return in five to 10 minutes…he requires assistance with all of his personal care, he is not able to help with any of his care."

17 On 11 May 2020, the claimant was suspended with immediate effect and an investigation commenced into alleged poor moving and handling of a resident. The investigation was carried out by Lianne Parkin, home manager. She spoke to or had statements from the claimant, Lauren, and Joanna.

18 At the first investigatory meeting, on 11 May 2020, the claimant denied having given personal care on his own although he did admit to arguing with Lauren. He did, however, admit to changing pads on his own and claimed that 'everyone did it'. At a subsequent investigation meeting on 14 May 2020, the claimant made reference to helping out with shifts because he could not count how many times the home had been short staffed, to which Leanne replied that staffing had not been an issue since she had started at the home. He was asked to provide names of staff who changed pads on their own but declined to do so. He admitted that he had changed Jack's pad on his own.

19 Leanne does not appear to have specifically asked either Lauren or Joanne if changing 'double' residents' incontinence pads solo was commonplace. We understand that Lauren and Joanne are both white, although we also understand the Terrance (to whom she spoke about doing doubles) is black.

20 Leanne wrote an investigation report on the incident on 15 May 2020, which was provided to the claimant on 19 May 2020 under cover of a letter inviting him to a disciplinary hearing on 22 May 2020 before Mr Taylor, peripatetic manager. The letter also included the statements, notes and policy extracts referred to in Leanne's report.

21 At the disciplinary hearing, Mr Taylor asked the claimant about his changing Jack's pad. The following exchange is relevant:

> Mr Taylor - if you believe that a resident is wet and you check if they're wet, how are you managing to check that pad on your own, when they require two members of staff to provide support?
>
> Claimant - it depends on the capacity of the resident, the position that the resident is in. I don't know if you have but maybe you've been a carer, John is difficult for people, if he's in a good mood you can do whatever. The time I got there, I was waiting for the agency and John knows me very well, I said John we're here to change your pad do you mind and he said "go on then". So I used the opportunity to change the pad and John moved for me, there was no struggle. The agency member then came and we both changed John's position to make him more comfortable
>
> Mr Taylor - did you do all of this on your own?
>
> Claimant - I only took the pad off on my own
>
> Mr Taylor - can you clarify what type of support it states in his care plan?
>
> Claimant - it does say he's a double
>
> Mr Taylor - if it clearly states that John requires double meaning two carers to assist, then this means double support. Therefore all we can construe from this is that you were on your own in the room with the gentleman and this could put the resident at you at risk as he has been assessed as requiring two people
>
> Claimant - I am clear on that and I understand. I didn't personally go to do it on my own, the agency staff member was already coming. Maybe the manager doesn't understand that we work on unit 4 on our own because the two go to unit 3 as they have more doubles, but we only have 4 doubles in unit 4. Everyone does that, not only me. If I go to any double - we do not give personal care, we only change their pad.

22 The claimant sought later to distinguish between personal care and merely changing an incontinence pad as well as repeating his assertion that everybody changed pads on their own. Mr Taylor suggested to the claimant that there were ways to flex staffing around the house so that doubles were always attended to by 2 carers. When Mr Taylor asked the claimant if he understood that not following the care plan could put residents at risk, the claimant nodded. When Mr Taylor asked the claimant about his final written warning for, amongst other things, a breach of moving and handling procedures, he claimed to have

learned from that warning and sought to distinguish between hoisting a resident and changing a pad. Mr Taylor did not agree that there was any distinction.

23 The disciplinary meeting also considered the claimant's response to the allegation that he had not followed Lauren's instructions. However, for the reasons we set out below it is not necessary to go into any details. However, he did accept that he and Lauren had got into an argument.

24 The claimant did assert that Lauren was making the allegations against him to get him into trouble out of retaliation. He did suggest that Joanne should be brought to the disciplinary hearing to confirm that everybody changed pads on their own. However, Mr Taylor did not think that was an appropriate step to take. It was Mr Taylor's view that, even if the practise was widespread it did not mitigate the claimant's guilt.

25 Mr Taylor took into account what the claimant had said in the disciplinary hearing, the evidence in the investigation report and the fact that he was subject to an extant written warning for failure to follow instructions from a senior carer and a final written warning for inappropriately hoisting a resident and concluded that the claimant had no insight into the severity of his actions and continued to place himself and others at risk. He concluded that the claimant should be dismissed. By letter dated 10 June 2020, Mr Taylor terminated the claimant's employment with immediate effect but with a payment in lieu of notice.

26 The claimant appealed on 14th of June 2020. His three grounds were that: Mr Taylor did not take into account the circumstances surrounding the events, and specifically staff shortages leading to the expectation that staff would perform two person tasks on their own; that he was entitled to challenge the management instruction of Lauren; and that Leanne had taken a dislike to him and made his life difficult. He did not, notably, raise allegations of race discrimination nor indeed did he repeat his claim that Lauren was taking revenge on him.

27 The claimant's appeal was heard by Ms Wilkinson. For the first time the claimant asserted that the home had a policy stating that two male carers could not assist on 'doubles' together thus forcing him to do a 'double' on his own. The claimant told us that there was no written policy to that effect at the home but that it was a well-known restriction in the care sector. He has provided no evidence that that is the case moreover he had previously made it clear to Mr Taylor that he and Terrence had in fact completed Jack's personal care together. Consequently, we do not accept that there was any such policy. He accepted that he had changed Jack's pad on his own but insisted he was 100% certain he had not done anyone else on his own.

28 The claimant raised with Ms Wilkinson his belief that there was a culture of short staffing at the home. When Ms Wilkinson asked the claimant why, if he felt that there were problems which management were not addressing, he had not reported his concerns to the CQC or safeguarding, the claimant said that the CQC knew about it and that the managers knew about it. He did not during the appeal suggest that his dismissal or indeed the way in which the allegations had been investigated were racially discriminatory.

29 Ms Wilkinson considered the points raised by the claimant but nevertheless upheld his dismissal. Before reaching her decision, Ms Wilkinson spoke to a number of individuals. There is a brief note of her conversation with Leanne, dealing with his specific allegation that Leanne had made his life difficult. She also spoke to Leanne about the claimed culture of carers doing doubles alone, which Leanne denied. Regrettably, we have not been taken

to a note of that discussion, nor is there any record of Ms Wilkinson's discussions with Joanna, Kenneth (another permanent carer on the night shift who is also black) and Lauren. They all denied that carers were doing doubles on their own.

30 The claimant sought to suggest that Ms Wilkinson was lying about having spoken with these latter individuals suggesting that she, as an experienced manager, should know to keep written evidence of such inquiries. Ms Wilkinson conceded that her failure to do so was unwise and we agree. However apart from one or two minor mistakes, Ms Wilkinson's evidence was clear, cogent and consistent and we accept that she was telling us the truth.

31 In reaching her decision to uphold called the dismissal, Ms Wilkinson agreed with Mr Taylor that the claimant had acted in a way unsafe to both him and Jack. Furthermore, she told us and we accept that it would be no mitigation even if others were misconducting themselves in the same way. However, she had investigated the point and accepted that this was not widespread practise.

THE LAW

Unfair Dismissal

32 Pursuant to s94 of the Employment Rights Act 1996 (ERA), an employee is entitled not to be unfairly dismissed by his employer.

33 Section 98 ERA provides:

> (1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it—*
> *…*
> *(b) relates to the conduct of the employee,*
> *…*
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*
> …

34 It is for the employer to prove its reason for dismissing the claimant and that it is a potentially fair reason. Thereafter, the Tribunal will determine the question of fairness pursuant to s98(4) ERA with no burden of proof on either party.

35 'A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee.' (**Abernethy v Mott, Hay and Anderson [1974] IRLR 213**).

36 Where the reason for dismissal is conduct, the Tribunal will consider whether the employer held a genuine belief in the employee's guilt, reached on reasonable grounds following a reasonable investigation. As said in **British Home Stores Ltd v Burchell [1978] IRLR 379**:

> 'What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the Tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the Tribunal to examine the quality of the material which the employer had before him, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being 'sure' as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter 'beyond reasonable doubt'. The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion.'

37 The question in each respect, and in respect of the sanction of dismissal, is whether the employer acted within the range of reasonable responses (**Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**); the Tribunal must not substitute its own view of what the employer should have done (**Iceland Frozen Foods Ltd v Jones [1983] ICR 17**). The dismissal process must be considered in its entirety. To that end, a defective appeal might in all the circumstances render unfair a dismissal which to that point had fallen within the range of reasonable responses (**West Midlands Co-operative Society v Tipton [1986] AC 536**); alternatively, the appeal might cure a dismissal which to that point had been unfair (**Taylor v OCS Group Ltd [2006] ICR 1602**).

38 Pursuant to s118 ERA, where a tribunal makes an award for unfair dismissal it shall comprise a basic award and a compensatory award.

39 The Tribunal may nevertheless reduce both basic and compensatory awards to reflect the employee's culpable and blameworthy conduct. In respect of the compensatory award, the conduct must have caused or contributed to the dismissal (s123(6) ERA), and in respect of the basic award the conduct must have occurred prior to dismissal or notice of dismissal (if given) and it must be just and equitable to make a consequential reduction (s122(2) ERA). In **Nelson v BBC (No.2) [1979] I.R.L.R. 346**, the Court of Appeal clarified that blameworthy conduct could also include conduct that was 'perverse or foolish', 'bloody-minded' or merely 'unreasonable in all the circumstances'

40 If an employee is unfairly dismissed by reason of a procedural defect, the Tribunal may make a reduction in compensatory award to reflect the chance that he would have been dismissed in any event, pursuant to s123(1) ERA and **Polkey v AE Dayton Services Ltd**.

41 If a party fails unreasonably to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, a Tribunal can increase or decrease (as appropriate) any compensatory award for unfair dismissal by up to 25%, if the Tribunal considers that it is in the interests of justice to do so (per s207A of the Trade Union and Labour Relations (Consolidation) Act 1992 and s124A ERA).

Race Discrimination

42 An employer must not discriminate against an employee by dismissing him or subjecting him to any other detriment (ss39(2)(c)&(d) of the Equality Act 2010 (EA)).

43 A person directly discriminates against another if because of a protected characteristic he treats that other less favourably than he treats or would treat other people (section 13 EA). Race is such a protected characteristic. Section 23 EA provides that 'on a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to the case.'

44 Pursuant to s136 EA, if there are facts from which the Tribunal could decide in the absence of any other explanation that a person contravened the provision of the Act, the Tribunal must hold that the contravention occurred unless the employer can show to the contrary.

45 The key question is why the treatment complained of occurred. A Tribunal must be alert to the fact that individuals will rarely admit to discriminatory behaviour event to themselves and draw whatever inferences are appropriate from secondary findings of fact (**Igen Ltd v Wong [2005] IRLR 258**). However, as observed in the case of **Madarassy v Nomura International plc [2007] IRLR 246**, it is not sufficient to show merely a difference in treatment and a difference in characteristic; there must be 'something more' to indicate a connection between the two. Similarly, unfair or unreasonable treatment of itself is insufficient to shift the burden of proof onto the respondent **Bahl v Law Society [2003] IRLR 640** per Elias J at para 100, approved by the Court of Appeal at **[2004] IRLR 799**).

CONCLUSIONS

46 Consequent to our findings of fact above, we have reached the following conclusions.

47 It is not in issue that the claimant was dismissed by the respondent. We are satisfied from the findings above that Mr Taylor, when deciding to dismiss the claimant, had in mind and was motivated by the claimant having admitted to arguing with Leanne and to changing Jack's pad alone when Jack was designated a double, and by the claimant being the subject of two extant warnings for similar offences including in particular a final written warning for offences including hoisting an individual alone when two members of staff were required. These are manifestly matters of conduct.

48 Given that the claimant had admitted the offences, albeit that he had sought to justify them, Mr Taylor undoubtedly had reasonable grounds to believe that the claimant was guilty. In any event we are satisfied that the evidence before Mr Taylor and which he took into account would have constituted reasonable grounds even had the offences been denied.

49 One point raised by the claimant in his defence does not appear to have been investigated by either Leanne or Mr Taylor: his claim that the changing of pads solo was commonplace. However, Leanne asked the claimant to provide names of those he alleged did the same practice and he declined to do so. We only have to be satisfied that the investigation fell within the range of reasonable responses available to a reasonable employer. Given the claimant's refusal to give specific examples, we accept that it was open to Leanne not to conduct a wide scale investigation in the context of the claimant's disciplinary hearing. Even if we had felt this to be a material defect in the investigation, we find that it was cured when Ms Wilkinson spoke to Kenneth and the managers about this point.

50 The claimant's admitted behaviour was unsafe both to himself and to Jack and was a repetition of behaviour for which he was a subject of extant (indeed a recently given) final written warning in circumstances which were strikingly similar. Dismissal fell well within the range of reasonable responses.

51 In the circumstances it is unnecessary to go on to consider contribution, Polkey or ACAS uplift. However, even if we had been satisfied that the dismissal was in some way unfair, we would still have found the claimant contributed 100% to his own dismissal and would have made no award.

52 Turning to the claimant's complaint of direct race discrimination, he complains in a nutshell that the respondent only spoke to white members of staff when investigating the allegations against him. We are invited to infer from that that his dismissal was materially influenced by his race.

53 For the same reason that we consider Leanne's investigation to have fallen within the range of reasonable responses we feel unable to reach that conclusion. The claimant had refused to identify specific individuals who followed the same practice as him. Perhaps more importantly to the race claim, however, is the fact that on his case both black and white colleagues were following the same unsafe practise and yet no one race was singled out for punishment, merely the claimant. The claimant's case is that he was singled out because he had argued with Lauren, not because he was black. In short, there is simply nothing from which we can draw a causal connexion between his dismissal or indeed the investigation and the claimant's race.

Employment Judge O'Brien

15 October 2021