



EMPLOYMENT TRIBUNALS

Claimant: Mr J M Akpodiete

Respondent: Continuum Support Care Services Ltd

Heard at: Liverpool (in person) **On: 19, 20 and 21 June and
17 July 2024**

Before: Employment Judge L Cowen

Non-Legal Members: Ms L Heath and Mr R Cunningham

REPRESENTATION:

Claimant: In person

Respondent: Ms Nowells (counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for direct race discrimination fails and is dismissed.

REASONS

Introduction

1. The claimant's claim was heard between 19-21st June and 17 July 2024. At the conclusion of oral submissions, the Tribunal took some time to deliberate, before deciding to reserve judgment. Accordingly, this judgment is issued with full reasons to comply with the provisions of Rule 62 (2) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

2. The claimant, Mr Akpodiete, was employed by the respondent as a registered Home Manager working at a registered Children's Home ("the Home") between

March 2021 and November 2022. The Home was owned and operated by the respondent.

3. The claimant was suspended from his post in August 2022 following allegations of misconduct. The claimant resigned on 26 September 2022. The investigation into his alleged misconduct continued, and it was determined that he had committed acts of gross misconduct. The claimant appealed against this decision, and his appeal was rejected on 13 January 2023.

4. The claimant claims that the respondent discriminated against him in the decision to suspend him, the subsequent investigation and appeal, and the provision of allegedly unfavourable references to future potential employers. The claimant claims that this alleged discrimination was on grounds of race. The respondent denies that the decisions in respect of which the claimant brings his claim were due to race discrimination.

5. The claimant gave sworn evidence. He also produced an email from Michelle Crowther dated 21 June 2024. The Tribunal had regard to this email, but gave it limited weight as Michelle Crowther did not attend the Tribunal to give evidence. The respondent called the following witnesses, who each gave sworn evidence: Melissa Fisher, Peter Mahon and Mark Downey. Their roles are explained further below.

6. The Tribunal also had regard to documents contained in an agreed bundle, a cast list and chronology, as well as further documents that were added to the bundle throughout the hearing, namely: an email from the claimant dated 24 April 2023 that provided additional information in support of his claim, a resignation letter from a colleague of the claimant dated 22 August 2022, a document entitled "Professional Boundaries and Personal Relationships with Children" produced by the respondent and the Children's Homes (England) Regulations 2015.

Preliminary matters

7. On 18 June 2024, the respondent applied to strike out the claimant's claim under Rule 37 of the Employment Tribunals Rules of Procedure 2013. The respondent's application focused on the claimant having not provided a witness statement. The claimant did not produce a witness statement at the Final Hearing. He explained this as due to his lack of understanding that a witness statement was required.

8. The Tribunal considered that the order of Employment Judge Leach made it clear to the claimant that a witness statement was to be provided. However, having regard to Rule 2 of the Employment Tribunals Rules of Procedure 2013, specifically the need to ensure that the parties are on an equal footing (this being particularly relevant in this case which involves the claimant acting as a litigant in person), the need to deal with cases in a way that is proportionate to the complexity and importance of the issues and the need to seek flexibility in proceedings, the Tribunal determined that the claimant would be given permission to rely upon the account he advanced in his claim form, as well as the account advanced at paragraphs (27) – (39) of the Case Management Order of Employment Judge Leach, in which further detail of the claimant's claim was set out.

9. Considering the application to strike out, the Tribunal determined that the claimant's conduct of his claim was not unreasonable; he was a litigant in person who was trying his best to progress his claim properly. Having permitted the claimant to rely on the documents set out above, the Tribunal determined that his claim did have a reasonable prospect of success and that it was necessary to hear the evidence that could be presented. The Tribunal therefore dismissed the application to strike out the claimant's claim.

10. The claimant then sought to adjourn the Final Hearing to permit a witness to attend. There was no witness statement from this proposed witness. The respondent opposed the application to adjourn. Having regard to Rule 2 of the Employment Tribunals Rules of Procedure 2013, particularly the need to avoid delay, the Tribunal determined that further delay would prejudice both parties given the inevitable impact on witness recollection. The Tribunal refused the claimant's application to adjourn.

11. After the claimant's application had been dismissed, the respondent then sought to apply to adjourn the Final Hearing due to issues they anticipated with one of their witnesses attending. The claimant did not oppose this application. The Tribunal also refused this application for the same reasons as it had refused the claimant's application. In the event, all of the respondent witnesses were able to attend and give evidence at the Final Hearing.

Issues for the Tribunal to decide

12. The factual and legal issues for us to decide were, as the parties agreed, unchanged from the list of issues set out in the Case Management Summary prepared by Employment Judge Leach at the Preliminary Hearing on 20 March 2024, subject to certain points being clarified by the Claimant. The List of Issues is included as Annex A of this decision.

13. The claimant's claim was brought on 29 March 2023. It was determined by Employment Judge Leach at the Case Management Hearing of 20 March 2024 that the Tribunal hearing the Final Hearing would determine whether there was conduct extending over a period (a continuing act) for the purposes of section 123(3) of the Equality Act 2010 and/or whether it would be just and equitable to extend time to include any single discriminatory acts that are otherwise out of time.

14. The claimant's complaint about the respondent's treatment of him related to the following four issues:

- i. The decision to suspend the claimant in August 2022;
- ii. The decision to investigate allegations of misconduct – specifically the allegations of breach of professional boundaries and respondent's code of conduct;
- iii. The decision that the claimant had committed acts of gross misconduct which, but for his resignation would have led to his dismissal;
- iv. The decision to reject the claimant's appeal, and;

- v. The provision of unfavourable references to prospective new employers.

15. The claimant claimed that in respect of these issues, he was treated less favourably than someone in the same material circumstances of a different race was or would have been treated. The claimant relied upon a document dated 24 April 2024 in which he identified the following relevant comparators:

- i. “Angela’, a support worker in respect of whom he had raised a safeguarding concern;
- ii. Chloe Ryatt, a registered manager who he said had taken a young person and her children to her horse;
- iii. Susan Curran, a registered manager at one of the respondent’s homes. Susan Curran had interviewed her niece for a position at a care home run by the respondent.

16. The claimant also relied upon a hypothetical comparator.

The Findings of Fact Relevant to the Issues

17. The Tribunal has made the following findings of fact based on the balance of probability from the evidence we have read, seen, and heard. We do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues currently before us.

The claimant’s employment

18. The claimant was employed by the respondent as a Residential Manager of a Children’s Home (“the Home”) operated by the respondent from 8 March 2021. He was a Registered Manager. He was responsible for the management of the Home. Part of his role involved developing and implementing care plans and risk assessments that were produced for residents of the Home. His line manager was Miss Melisa Fisher and his team included six staff under his management, three team leaders and 3 residential support workers.

The circumstances of the claimant’s suspension on 23 August 2022

19. The claimant was suspended from his employment on 23 August 2022. His dismissal was related to his actions towards a resident of the Home. This child will be referred to as “Child A” throughout this decision. Child A was the only resident of the Home when the Claimant was working as Residential Manager.

20. Ms Fisher explained that she had become aware that Child A had developed a friendship with the child of one of the respondent’s employees. She was aware of the two children meeting at a local youth club, and the staff member’s child attending the Home to meet with Child A.

21. This friendship was encouraged by the claimant. He did not dispute that he had encouraged a friendship between Child A and the child of the respondent’s employee. He stated that he was going to enrol Child A at a youth club, and he was told that the child of a staff member went to that youth club, and he thought it would

be a good idea for them to become friends as he was trying to get Child A to build relationships with peers. He stated that he did not see any risks to Child A in the proposed course of action.

22. In his evidence, the claimant confirmed that he did not consult any policy when considering this decision and that his focus was on the legislation that applied to children's homes. He said that following making the decision to encourage the friendship between Child A and the child of the staff member, he did inform Child A's social worker when they made a statutory visit to the Home, and that the social worker was content with the friendship being encouraged.

23. Miss Fisher stated that she discussed Child A's friendship with the employee's child with the claimant during supervision at the end of May, as well as during a telephone call when she became aware of the issue. The claimant did not dispute that this issue was discussed with him in May 2022. The claimant's recollection was that neither he nor Miss Fisher was aware of any policy in relation to professional boundaries at this time. Miss Fisher stated that she was aware of the policy in relation to this issue.

24. The Tribunal was provided with a policy entitled "*professional boundaries and personal relationships with children*". This is undated, but is marked "Reviewed 6th April 2024". The Tribunal was also provided with a policy entitled "professional boundaries and personal relationships with children". This is also undated, but is marked "*reviewed September 2021...next review date September 2022*".

25. The Tribunal accepts that there was a policy in place regarding professional boundaries in 2022. At paragraph [9] of the policy, it is stated that "*relationships between staff's children and children/young persons in the care of the company are strongly discouraged. However, in circumstances where this may arise...this must be managed sensitively...*". The Tribunal accept that the relevant policy in place strongly discouraged the formation of friendships between the children of staff and children in the care of the respondent.

26. The claimant also had a supervision meeting with Ms Fisher on 10 June 2022. The notes from this supervision meeting record do not refer to concerns being raised about the friendship between Child A and the employee's child. They do record concerns that may be summarised as relating to the claimant allowing Child A to do things that other staff members considered to be inappropriate, such as using phones. Notwithstanding these concerns, an entry in relation to the claimant's professional attitude records: "*no concerns. John is a good people person and has a positive professional attitude*".

27. Miss Fisher emailed the claimant on 10 August 2022, raising concerns regarding the developing friendship between Child A and the child of the other employee. The email refers to the claimant and Ms Fisher having discussed "*professional boundaries*". In the email Miss Fisher states she wants to be clear that Child A is not to have any other contact with the member of staff's daughter except at the youth club and via the phone. She states that "*there are to be no other activities or sleepovers. I just want to ensure that you are clear on this matter*". In his evidence, the claimant accepted that Miss Fisher had given him a specific instruction in this email. The Tribunal concludes that Miss Fisher did give the claimant a specific instruction in this email.

28. On 16 August 2022, Child A went shopping in a nearby town centre with the employee's child. The claimant allowed this trip to happen. In his evidence, he explained that he decided to allow this to happen as he knew what would happen if he did not allow it, and his biggest concern was how to manage Child A.

29. On 23 August 2022, Miss Fisher visited the Home. She learned that there were plans for Child A to be visited in the home by the employee's child. The claimant accepted that there were plans for Child A to be visited in the Home by the employees' child that day. He stated that these plans were driven by Child A and he did not encourage this meeting. The claimant also said that he did not consider the children meeting to be a safeguarding concern and that he thought the relevant legislation allows risks to be taken, and that not taking risks can also be unhelpful for a child's development. Miss Fisher stated that having learned of these plans, she suspended the claimant from work, with immediate effect from 23 August 2022. She stated that she did this because there appeared to be a potential safeguarding issue.

30. A letter was sent to the claimant confirming his suspension. The letter states that "*matters have come to my attention that you have failed to follow the Policy and Procedures set at Continuum Support and have not followed a direct management instruction*". In her evidence, Miss Fisher was asked why she had taken the decision to suspend him on 23 August. She replied: "*[the suspension] was due to it being a clear safeguarding concern and a failure to follow a policy and procedure. It was an area that had already been discussed and he failed to follow a direct management instruction, a clear safeguarding concern could put children at risk*".

31. It was suggested to Miss Fisher that she had discussed the issue of Child A's friendship with the staff member's child with the claimant during supervision, and it had been agreed that this was not a concern. Miss Fisher disagreed with this, stating that her recollection was that it had been agreed that is it was agreed that Child A would not be supported to have time with the staff member's child. The claimant also stated in his evidence that Miss Fisher was biased against him and that the issues with Child A gave her "*ammunition*".

32. The Tribunal has had regard to the clear instruction in Miss Fisher's email of 10 August 2022, the agreement that there were plans for Child A to meet the employee's daughter outside the youth club on 23 August 2022 and the policy in place regarding professional boundaries. The Tribunal accepts Miss Fisher's evidence that the reason for the claimant's suspension was her learning of his not adhering to the policies applicable to his work and to the clear instruction she had given him regarding Child A. Miss Fisher was asked whether she had considered options other than suspension and she stated that she felt that given the nature of the incident, there were no further options. The Tribunal have had regard to the serious obligations that apply to those looking after vulnerable children, and accept that Miss Fisher held this view.

33. There was a significant dispute between the claimant and Miss Fisher regarding their recollection of how the decision to suspend the claimant was communicated to him. The claimant stated that Miss Fisher barged into a meeting, stopped the meeting, and demanded that he go with her. He suggested that other people were around when he was suspended, and explained that he found the process humiliating. He also described being asked for his laptop and phone, which he also found upsetting.

34. Miss Fisher states that she did not discuss the claimant's suspension in front of other people, and that they discussed it in an office. She agreed that she asked for his laptop and phone, but that this was due to safeguarding concerns following his suspension.

35. The Tribunal is mindful of the passage of time since these events occurred. It is not possible to reach a clear conclusion regarding the precise circumstances of the claimant's suspension. However, the Tribunal has had regard to the notes of the investigation meeting following the claimant's suspension, during which Miss Fisher states that they had a "private discussion" about his suspension and that it was not discussed in front of others.

36. Although the precise circumstances of the communication of the suspension are unclear, the Tribunal does not conclude that the manner of the claimant's suspension was intended to cause humiliation or distress to him.

The investigation carried out by the respondent

37. The claimant was invited to an investigation meeting on 15 September 2022. The meeting was conducted by Miss Fisher. The claimant stated that Ms Fisher should not have conducted this meeting as she was biased against him. In explaining this bias, he referred to her previous response to his raising concerns regarding other members of staff, and also to her attitude when she had asked him to come in for supervision after he had been awake the night before due to a fire alarm.

38. The claimant had complained about Miss Fisher's conduct to Mr Downey, Company Director of the respondent, on 12 August 2022. In that complaint, he did not make any allegations of racism towards Miss Fisher. In his evidence, he explained that he did not specifically allege racism in that complaint as he was still in employment, and he did not need to say the word racism as it was obvious what was happening.

39. The notes of this meeting record that the claimant was asked whether the relationship between Child A and the employee's child risked a potential conflict of interest and boundaries being blurred. He stated that he was aware of that, and it had concerned him. He was also asked about the email of 10 August 2022. He accepted that in the email he was advised that professional boundaries had been broken. He accepted that neither Miss Fisher nor Child A's social worker had given permission for the staff member's daughter to come to the Home.

40. During the meeting, the claimant explained that what he did was not what had been discussed with Miss Fisher, but that he felt that what he was doing was in Child A's best interests to make progress in relationship building.

41. Following the investigatory meeting, Miss Fisher prepared an investigatory report. The report found that the claimant had acted in breach of policy, refused to undertake clear instructions and had acknowledged professional boundaries had been breached and relevant consents/permissions not obtained. Miss Fisher recommended that the matter progress to a disciplinary hearing.

The disciplinary proceedings instigated by the Respondent and the claimant's resignation

42. Following the investigation meeting of 15 September 2022, 22 September 2022, the claimant was invited to a disciplinary meeting. The claimant then tendered his resignation through a letter dated 26 September 2022. The respondent decided to continue the disciplinary proceedings notwithstanding this resignation.

43. In his evidence, Mr Downey explained that the decision to continue with the disciplinary proceedings was due to the duty of care that the respondent had to children in its homes and to the wider social care field; it being important that proper information is held regarding the suitability of a staff member to work in that role so it being important to see the investigation of allegations of gross misconduct through to their conclusion. Mr Mahon also said in his evidence that he could recollect other employees who had resigned but in respect of whom disciplinary proceedings continued; he gave one example of a staff member who resigned when an investigation began and that investigation continued despite their resignation.

44. The disciplinary meeting took place on 1 November 2022. It was chaired by Mr Peter Mahon, Responsible Individual and Service manager, Head of Training and designated safeguarding officer with the respondent. The claimant attended this meeting. Mr Mahon concluded that the claimant had breached the respondent's policies and procedures and had failed to follow direct management instructions. It was determined that the claimant would have been dismissed due to gross misconduct. The claimant was notified of this outcome on 4 November 2022.

The claimant's appeal against his dismissal

45. The claimant appealed against his dismissal. The appeal hearing was held on 21 December 2022 and was chaired by Mr Mark Downey, Company Director of the Respondent. The notes of the appeal hearing record that during his appeal, the claimant asserted that someone independent (i.e. not Miss Fisher) should have carried out the investigation into his conduct; that he was treated harshly compared to other employees; that he was treated harshly because of complaints and issues he had with service managers at the time and he complained about the conduct of his line manager regarding his working hours.

46. When asked whether he had failed to follow a direct instruction, the claimant stated that it was being made to sound like he broke the instruction, but he was listening to the young person's voice and he thought he should listen to that voice and did not think that there was any safeguarding issue. The Tribunal concludes that during the appeal hearing, the claimant did accept not obeying the management instruction, but continued to express the view that there were good reasons for this action and that he was acting in the best interests of Child A. The claimant did not raise race discrimination as an issue during the appeal hearing.

47. In his evidence, Mr Downey explained that it was common practice for a line manager to carry out an investigation, and he did not consider this created bias in the investigation. He also stated that the claimant did accept breaching company policy, and so in relation to the appeal hearing, his fact-finding role was limited. Mr Downey decided to dismiss the claimant's appeal. A letter was sent to the claimant confirming that all of his appeal points had been rejected.

The Respondent's provision of references to potential employers of the Claimant

48. The claimant states in his claim form that the respondent has attempted to cause him reputation damage by giving negative references to a potential employer. The Tribunal was provided with the following references that had been provided to the claimant:

- i. Reference for Fledglings Child Care provided by Mr Downey dated 1 September 2023. This reference refers to the claimant being dismissed for not following direct instructions and that this led to him being dismissed for gross misconduct. It also states that the referee believes the claimant to be honest, trustworthy and a good practitioner.
- ii. Reference for Alpine 4 Care Service provided by Mr Downey (undated). This reference refers to the claimant being dismissed for not following direct instructions and that this led to him being dismissed for gross misconduct. It also states that the claimant has the qualities to be "*an excellent and outstanding manager*"
- iii. A reference provided to cfscare dated 17 November 2022. This reference states that whilst employed by the respondent, there were concerns around his practice which led to safeguarding concerns, and that he was taken to disciplinary and dismissed on grounds of gross misconduct. It goes on to say that it is not company policy to provide an opinion as to the character of an applicant or their suitability for employment.
- iv. A reference provided to Great Minds Together by Mr Downey, dated 21 December 2022. This reference makes no reference to any disciplinary proceedings or their outcome, and states that it is not company policy to provide an opinion as to the character of an applicant or their suitability for employment.

49. In his evidence Mr Downey described the procedure for providing references. He explained that he would have conversations with prospective employers and that they would seek further information as part of their recruitment procedure and in compliance with Ofsted requirements. He explained the references provided to Fledglings Child Care and Alpine4care Services as being his response to questions that they asked him in their requests for information.

50. Mr Downey stated that the reference to Great Minds Together was more limited than the other references as it was requested prior to the conclusion of disciplinary proceedings, and so Mr Downey did not want to give details of those disciplinary proceedings as it may be unfair, given they could at that stage, have been concluded in a way favourable to the claimant.

51. Mr Downey was asked by the claimant whether he had treated him differently in the way that he provided references about him. Mr Downey stated that in his view the references were balanced, and that he considered it to be an honest reference. He stated that they communicated that the claimant was "*a good professional who is slightly misguided*". The Tribunal accepts Mr Downey's account of the references he gave and the reasons for them. The Tribunal has had regard to the positive things

asserted in the references, and concludes that they do present a balanced account of the claimant's work, and they make clear the very positive aspects of his work and professionalism. The Tribunal accepts Mr Downey's account of the requirement to share information when providing references for those acting as registered managers.

The treatment of other employees

52. The claimant also advanced the respondent's conduct towards three other employees demonstrated that the respondent had treated others more leniently than him.

53. The claimant submitted that "Angela" was a support worker who came to work at the Home. The claimant stated that he had raised a safeguarding concern in relation to Angela for giving a young person her phone. He stated that the young person had access to Angela's personal phone and had uploaded a selfie to Angela's Instagram account. The claimant stated that this should have been investigated and reported to the LADO in line with safeguarding procedures. Miss Fisher stated that she was not aware of Angela allowing a young person to use her mobile, and she was not aware of the claimant raising this as an issue.

54. The claimant submitted that Chloe Ryatt was a registered manager at a home in a different location, and that she had taken a young person and her children to her horse. Miss Fisher stated that she was not aware of Chloe Ryatt taking a young person and her children to see her horse. In relation to this allegation, Mr Mahon and Mr Downey referred to each child having their own care plan, and so it would not be possible to consider whether this amounted to a breach of the care plan or a breach of policy.

55. The claimant submitted that Susan Curran interviewed her niece against the respondent's safer recruitment policy and raising a conflict of interest. Miss Fisher states that Ms Curran's niece had informed the respondent that she was related to a member of staff, and that 2 people interviewed her, and another manager completed safer recruitment with Ms Curran's niece.

56. The Tribunal concludes that very limited information has been presented regarding the circumstances of these three individuals. However, from what has been placed before us, the three cases presented involve single alleged breaches of relevant policies, and do not involve disobeying a direct management instruction. The conduct of these individuals is therefore materially different to that accepted by the claimant.

The law

57. Section 13 (1) of the **Equality Act 2010** states:

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

58. Lord Nicholls in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** gave guidance as to the approach an employment Tribunal should consider when determining a direct discrimination complaint:

“7. ...In deciding a discrimination claim one of the matters employment Tribunals have to consider is whether the statutory definition of discrimination has been satisfied. When the claim is based on direct discrimination or victimisation, in practice Tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the 'less favourable treatment' issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the 'reason why' issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the Tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.

8. No doubt there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined.

...

11. ...employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others.”

59. Section 23 (1) of the **Equality Act 2010** states that:

“On a comparison of cases for the purposes of section 13, 14, 19 or 19A there must be no material difference between the circumstances relating to each case”

60. The time limit for Equality Act 2010 claims appears in section 123 of the **Equality Act 2010** as follows:

“(1) Proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable...

(2) ...

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it”.

61. The Tribunal has also reminded itself of the burden of proof in discrimination cases, with reference to section 136 of the **Equality Act 2010**:

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

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

The parties' submissions

62. The Tribunal heard closing oral argument by both parties, and had received written closing submissions from the respondent, which had been provided to the claimant. These are not repeated here but have been considered and taken into account in reaching this decision.

The Tribunal's conclusions

63. The claimant submits that the following decisions were due to his being treated less favourably by the respondent due to his race:

- i. The decision to suspend him in August 2022;
- ii. The decision to investigate allegations of misconduct;
- iii. The decision that the claimant had committed acts of gross misconduct;
- iv. The decision to reject the claimant's appeal, and;
- v. The provision of unfavourable references to prospective new employers.

64. The Tribunal has considered whether the claimant has proven facts from which it could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances of a different race was or would have been treated.

65. The Tribunal has determined that the comparators relied upon by the claimant are not in the same material circumstances as the claimant. None of these individuals had allegedly disobeyed a direct management instruction, and none of these individuals were alleged to have breached company policy on more than one occasion. For these reasons, the Tribunal concludes that they are not appropriate comparators upon which the claimant can rely.

66. The Tribunal does conclude that the treatment of these individuals could be evidence to which the Tribunal can have regard when considering how a hypothetical comparator may have been treated by the respondent (per **Gould v St John's Downshire Hill 2021 ICR 1 EAT**). However, the Tribunal concludes that the circumstances of these individual's alleged errors or breaches of policy were entirely different to the claimant's admitted conduct.
67. In relation to "Angela", she was not a registered manager, and the claimant would himself have been responsible for investigating and managing any errors/breaches of policy on her part. In relation to Chloe Ryatt, there was limited information presented regarding her conduct, but it did not appear to involve the encouraging of a friendship between her child and a child that was being looked after by the respondent. In relation to Susan Curran, it does not appear that comparable safeguarding concerns would be raised by her conduct.
68. Most significantly, the actions of these three individuals did not involve alleged repeated breaches of policy, unlike the claimant's conduct, and their conduct did not allegedly involve the clear disregard of a management instruction.
69. The treatment of these individuals therefore does not provide a basis upon which the Tribunal can reach inferences regarding how a hypothetical comparator might have been treated. The Tribunal has therefore considered how a hypothetical comparator might have been treated without reference to the treatment of the three individuals relied upon by the claimant.
70. In relation to the decision to suspend the claimant, the Tribunal accepts that encouraging a relationship between Child A and the employee's child was a breach of the company policy on professional boundaries. The claimant was not disciplined immediately when his role in encouraging this friendship came to light. The respondent may be said to have taken a constructive, and perhaps lenient, approach to his conduct at this stage.
71. Turning to the claimant's subsequently conduct, the Tribunal finds that Miss Fisher gave a clear instruction to the claimant in her email of 10 August 2022 that there should be no other contact between Child A and the employee's child other than at the youth club and on the phone. The claimant failed to adhere to this instruction, and there was a plan for the children to meet at the Home on 23 August 2022.
72. The Tribunal accepts the evidence of Miss Fisher that her decision to suspend was based on the seriousness of this conduct and the safeguarding concerns that it raised. The Tribunal therefore concludes that there is no evidence upon which it could conclude that in deciding to suspend the claimant on 23 August 2023, he was treated less favourably than how someone in the same material circumstances of a different race was or would have been treated.
73. The Tribunal has concluded that there is limited evidence of the manner in which the decision to suspend the claimant was communicated to him. However, the notes of the investigation meeting of 15 September 2022 suggest that the decision to suspend was communicated in private. The Tribunal consider Miss Fisher's explanation of her decision to take the

claimant's laptop and phone to be credible, and consistent with the seriousness of the safeguarding concerns raised. The Tribunal conclude that the circumstances of the communication of the decision to suspend do not provide evidence upon which it could be inferred that the decision to suspend was racially motivated. The Tribunal also conclude that the claimant's previous complaint against Miss Fisher of 12 August 2022 does not provide any evidence from which it could be found that her conduct was racially motivated.

74. In relation to the decision to investigate the claimant, the Tribunal concludes that based on the evidence available to Miss Fisher, there was good reason for the investigation to proceed. The claimant was a registered manager of a care home looking after vulnerable children. There was clear evidence that he had breached the policy in relation to professional boundaries. There was clear evidence that he had failed to adhere to a management instruction.
75. In these circumstances, the Tribunal concludes that the claimant has not proven facts from which it can be concluded that in deciding to carry out an investigation into the claimant's conduct, the respondent treated the claimant less favourably than how someone in the same material circumstances of a different race was or would have been treated.
76. In relation to the decision to continue with the disciplinary proceedings following the claimant's resignation, the Tribunal accept that this was due to the obligations of those employing care home managers to be able to provide a full picture of the conduct of their employees to potential future employees.
77. In relation to the conclusion that the claimant was guilty of gross misconduct, the Tribunal conclude that there were grounds for this decision that were unrelated to the claimant's race, namely the claimant's admitted breach of company policy, admitted failure to adhere to a clear management instruction, and his ongoing justification of his conduct.
78. In these circumstances, the Tribunal concludes that the claimant has not proven facts from which it can be concluded that the decision to pursue disciplinary proceedings and the outcome of those proceedings amounted to subjecting the claimant to less favourable treatment than how someone in the same material circumstances of a different race was or would have been treated.
79. In relation to the rejection of his appeal, the Tribunal conclude that the findings of the appeal were reasonable given the information presented at the appeal hearing. The Tribunal accept that it was usual practice for a line manager to carry out an investigation. The Tribunal accept that given the claimant's acceptance that the claimant had breached company policy and failed to obey management instructions, the scope of the appeal was very limited, and the conclusion that it would be rejected was reasonable. The Tribunal therefore concludes that the claimant has not presented evidence from which it can be concluded that the decision to reject the claimant's appeal subjected him to less favourable treatment than how someone in the same material circumstances of a different race was or would have been treated.

80. In relation to the provision of references, the Tribunal accepts that the respondent had an obligation to provide information regarding the claimant's conduct to prospective employers. The Tribunal concludes that no evidence has been produced from which it can be concluded that the provision of the references relied upon amounted to less favourable treatment than how someone in the same material circumstances of a different race was or would have been treated.
81. The Tribunal has therefore concluded that in respect of all the decisions complained of by the claimant, the claimant has not proven facts from which it could be concluded that the claimant has been treated less favourably than how someone in the same material circumstances of a different race was or would have been treated.
82. The Tribunal therefore concludes that the claimant has not provided sufficient facts upon which the burden of proof in section 136 of the Equality Act 2010 should shift to the respondent. For this reason, the claimant's claim will be dismissed.
83. In any event, had the claimant succeeded in demonstrating facts upon which the burden of proof should shift to the respondent, the Tribunal would have concluded that the respondent has demonstrated that the decision to suspend, the subsequent investigation and its findings, and the decision to reject his appeal were not due to the claimant's race, but were rather due to his having breached company policy and due to his having failed to obey a direct management instruction. The Tribunal was able to make a firm finding as to the reason for the treatment in question so even if the burden had shifted it would have been satisfied by the respondent.
84. The Tribunal would have concluded that the provision of references was not due to the claimant's race, but was due to the obligation upon those employing registered managers of care homes to ensure that potential future employers are aware of all relevant matters pertaining to the conduct of previous employees.
85. Given the conclusions above, the Tribunal did not go on to determine the whether the discrimination complaints were made within the time limit in section 123 of the Equality Act 2010.

Employment Judge L Cowen
Date: 10 October 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
15 October 2024

FOR THE TRIBUNAL OFFICE

Public access to employment Tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Annex A

Complaints and Issues

1. Time limits

- 1.1 Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 2 November 2022 may not have been brought in time.
- 1.2 Were the discrimination complaints made within the time limit in [section 123 of the Equality Act 2010]? The Tribunal will decide:
 - 1.2.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?
 - 1.2.2 If not, was there conduct extending over a period?
 - 1.2.3 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?
 - 1.2.4 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:
 - 1.2.4.1 Why were the complaints not made to the Tribunal in time?
 - 1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Direct race discrimination (Equality Act 2010 section 13)

- 2.1 What are the facts in relation to the following allegations:
 - 2.1.1 The decision to suspend the claimant in August 2022
 - 2.1.2 The decision to investigate allegations of misconduct – specifically the allegations of breach of professional boundaries and respondent’s code of conduct.
 - 2.1.3 The decision that the claimant had committed acts of gross misconduct which, but for his resignation would have led to his dismissal.
 - 2.1.4 The decision to reject the claimant’s appeal.

2.1.5 The provision of unfavourable references to prospective new employers (Fledglings Child Care, Alpine 4 Care Service, cfscare and Great Minds Together)

2.2 If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances of a different race was or would have been treated? The claimant says s/he was treated worse than Angela, Chloe Ryatt and Susan Curran AND in the alternative, the claimant relies on a hypothetical comparison.

2.3 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of race?

2.4 If so, has the respondent shown that there was no less favourable treatment because of race?

3. Remedy for discrimination

3.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

3.2 What financial losses has the discrimination caused the claimant?

3.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

3.4 If not, for what period of loss should the claimant be compensated?

3.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

3.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

3.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

3.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.9 Did the respondent or the claimant unreasonably fail to comply with it?

3.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

3.11 By what proportion, up to 25%?

3.12 Should interest be awarded? How much?