EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs H King	**v**	Housingandcare21

Heard at: Watford **On:** 30 July 2018, 1, 2 and 3 August 2018

Before: Employment Judge Tuck

Members: Mrs M Castro and Ms S Hamill

Appearances
For the Claimant: In Person.
For the Respondent: Mr A McMillen, Counsel.

JUDGMENT

1. The claim of discrimination because of race or harassment related to race fails and is dismissed.

2. The claim of unfair dismissal succeeds.

3. If the respondent had followed a fair procedure the Tribunal finds that it would have dismissed the claimant fairly by 22 August 2017, some 6 months after the appeal hearing.

4. The Tribunal did not consider a reduction of the compensatory award by reason of the claimant's conduct to be just and equitable in all the circumstances of this case.

5. The claimant is entitled to a basic award of £2223.68.

6. The claimant is entitled to a compensatory award made up of:

   6.1. £14,000 for loss earnings in the period between 22.12.16 – 22.8.17
   6.2. £658 for loss of pension
   6.3. £400 for loss of statutory protection.

7. The claimant is therefore entitled to £3281.68; additionally £14,000 is the prescribed element relating to the proscribed period between 22/12/16 and 22/8/17.

REASONS

1. By an ET1 presented on 10 May 2017 complaining of race discrimination and unfair dismissal, the claimant set out the facts which had led to her being summarily dismissed. It was confirmed at this hearing that there was no claim for wrongful dismissal before the Tribunal. The claimant describes herself as black British. In this matter there were two preliminary hearings, the first before Employment Judge Manley on 22 September 2017 which led to an order for further information and clarification be given, and the second before Employment Judge Lewis on 6 March 2018. Reading those two documents, the issues which were to be determined by us were as follows:-

Unfair dismissal

2. The respondent admits to having dismissed the claimant, relying on the potentially fair reason of conduct. The Tribunal is therefore to apply the well-known Burchell test from the case of British Home Stores v Burchell [1978] and ask firstly, whether the respondent had a genuine belief in the conduct in question. Secondly, whether that belief was based on such investigation as was reasonable in all the circumstances, and thirdly, whether dismissal was within the range of reasonable responses.

Race discrimination

3. In relation to race discrimination, Employment Judge Lewis set out definitively the issues to be determined, but as the claimant was in person did not consider it proportionate or necessary to specify for each act complained of, whether it was said to be direct discrimination contrary s.13 of the Equality Act 2010 or harassment contrary to s.26 of the Equality Act 2010. We have therefore considered each of these issues under both headings. The issues were as follows:-

   (1) …..

   (2) That Mr Sawers made an unannounced visit to the claimant's property.

   (3) Mr Sawers threw toilet paper at the table where the claimant was sitting in the course of a quiz competition;

   (4) Mr Sawers called the claimant "a loner";

   (5) "The letterbox allegation" that Mr Sawers falsely accused the claimant as speaking through a letterbox to a resident;

(6) The claimant was denied the opportunity to go to an overnight conference event in Manchester;

(7) That a supervision note was created by Mr Sawers in the knowledge that it was untrue.

(8) …..

(9) The claimant also states that her suspension and investigation were motivated by her race in that a white woman would not have been treated in the same way that she was. That the disciplinary, grievance and appeal hearings were also tainted by her race and that a white woman would not have been subjected to such treatment.

Evidence

4. We heard evidence from the claimant who presented, in addition to her statement, a small clip of documents which were marked as 'C1'. This contained amongst other things, character references and accounts from people who did not give oral evidence before us. The respondent called three witnesses:

4.1 Mr Martin Sawers, Retirement Housing Manager, he was at all material times the claimant's line manager and was the investigating officer in the matters which led to the claimant's dismissal.

4.2 Aminda Liddar, Retirement Housing Manager who heard the disciplinary hearing.

4.3 Teresa McKenna, Head of Operations and Support, previously Head of Retirement Housing who heard the claimant's appeal against dismissal and her grievance.

We had a joint bundle of documents of 475 pages.

5. In relation to any accounts which were set out of the events in question which were not tested in oral evidence or attach such weight to them as is appropriate in the circumstances considering that they had not been subjected to cross examination.

6. For the most part, the Tribunal read such documents as we were referred to, although the Tribunal note that there were many relevant documents that we were not taken to by the parties, but about which the tribunal members asked witnesses.

The facts

7. The claimant commenced part time employment with the respondent via an agency on 11 November 2013 covering for a period of ill health of another

court manager. She was recruited into a permanent post as a retirement housing court manager later in November 2013.

8. We were referred to a training document which sets out various programmes and certificates of training, many of which are called "Year 1 essentials". These included; customer relations, diversity and inclusion, tenancy management loss and bereavement courses. All of these were recorded as against the claimant's name as not completed. Mr Sawers gave evidence that a new computer system had been introduced in 2015 or 2016, but we note that basic life support course that the claimant had done in September 2014 is recorded on this system. We had no positive evidence as to any training that the claimant was actually afforded.

9. It is apparent in early 2014 the claimant raised some complaints about her then line manager and that her working relationship with that line manager was somewhat fractious. The line manager described the claimant in October 2014 as being rude and off-hand, and consistently shouting over her, and having the tendency to talk-over her. It seems - but is not entirely clear - that the claimant considered some of the treatment that she had received at the hands of that line manager to be because of her skin colour, and in the course of a much later grievance hearing in February 2017 in relation to that line manager there was a question asked of the claimant, "Why do you think I'm treating you like this?". To which the claimant answered, "It is the colour of my skin". At that time, she thought that a Mr Paul McLaughlin was supportive and noted that Martin Sawers was sympathetic to her when he initially took over as her line manager.

10. At Christmas time of either 2014 or 2015 (it is not clear which) a quiz for area managers was arranged. Mr Sawers gave detailed evidence about how he brought boxes of Celebrations chocolates for the winning team and four toilet rolls to go to the loosing team, to tell them to 'clean up their act'. His evidence was that the claimant was on the loosing team. The claimant did not recall whether hers was the loosing team but certainly it was not the winning team and she confirmed that all the four members of her team were each given a toilet roll. Three members of the team were white and the claimant was the fourth member.

11. In March 2015 Mr Sawers was promoted to retirement housing manager and in that period on one occasion he turned up to the claimant's court unannounced. The claimant had never had a manager turn up to her place of work before this, without having made a prior appointment.

12. During the period when Mr Sawers was the claimant's line manager it is his evidence that he observed the claimant did not mix with other court managers at area meetings and tended to be apart from the others. The claimant described herself as the only black employee. The respondent initially replied that in her court there was only her and one cleaner, such that this was unsurprising. Thereafter, the respondent referred to itself as having a diverse workforce seemingly referring to the national picture. We were provided with no statistics. The ET3 records the respondent employs

3,500 in Great Britain, having some 11,000 retirement housing properties for social rent and houses more than 12,000 residents. The claimant was part of Central 6 region which was managed at the material time by Mr Sawers and was made up of 24 court managers and assistant court managers. We understand that there is on average one court manager to every 50 or so residents. The claimant was the only black court manager of the 24 in her region during her employment.

13. Mr Sawers accepts that it is probable that at some point he called the claimant a loner. The claimant clearly regarded this as offensive and related to her race. Mr Sawers saw it as a matter of fact and a comment made irrespective of race. Despite the claimant stating that she felt isolated and emphasised that she was a 'lone worker' on a number of occasions this was not addressed by anybody. The claimant therefore did not discuss with any other court managers whether they too had received unannounced visits so as to satisfy herself that she was not being targeted because of her race. Mr Sawers said that he would 'pop in' to a court manager if he was passing between the respondent's properties. It seems however that the March 2015 visit was his only unannounced visit to the claimant's court until the investigation meeting of 16 November 2016 discussed below.

14. We were not provided of any examples of Mr Sawers going to other courts on an ad hoc basis, however we do accept the evidence of him and Ms McKenna that there is nothing inherently wrong or suspicious about a manager going to a court without a pre-arranged appointment. We also accept the account given by Ms McKenna's during the course of the grievance hearing she conducted on 9 February 2017 - that following a restructure in March 2015, managers were required to visit courts every 8 weeks and encouraged to get out and amongst planned visits to take the opportunity call into courts if they were in the local area. We also note that it was in this period that the claimant perceived Mr Sawers to be sympathetic towards her.

15. We have seen that the claimant had a short period of ill health in April 2015 and that during her return to work meeting with Mr Sawers she referred to suffering from stress and being subjected to malicious complaints from residents. The written record of the return to work meeting, under a heading of 'training' states that Mr Sawers went through guidelines on conducting meetings, including how to keep control, setting timescales for agenda items and not allowing residents to disrupt the meeting. We were given no further information or detail about what this training consisted of or whether any documentation was provided setting out these guidelines.

16. In April 2016 a 'Stepping Ahead Staff Engagement' series of events was planned across the country. Venues at which it was to be hosted included Manchester and Cambridge. The notice gave details of how those wanting to claim overnight expenses could do so and did not suggest that staff had only to attend their closest venue. The claimant applied to go to a course in Manchester. She then had a series of email exchanges with someone called Cheryl Osborne (who worked in the central administration office) and

was informed that Martin had asked that she book herself on the conference in Cambridge so that 'stepping ahead' would then not require her to have overnight accommodation.

17. On 18 April 2016 the claimant replied saying that she had been given a choice of venue and that if she was denied her choice she would rather not attend any conference.

18. Despite seeing the claimant the next day, on 19 April 2016, there is no evidence that Mr Sawers at any time expressed to the claimant that he was concerned about her isolation from those within her cluster, nor that he told her that all her other contemporaries were going to the Cambridge event such that this would be an opportunity to fraternise with them. There is no evidence that he encouraged her to go on a conference event so as to decrease her feelings of isolation. It appears that once the claimant said that if denied her choice of venue she would not attend at all, was followed up at all.

19. On 19 April 2016 the reason Mr Sawers saw the claimant because he attended the court at which she worked in order to conduct a mediation meeting with resident 4 and his wife. Resident 4 had sometime earlier called the claimant "a bloody mock". In cross examination the claimant was asked if she considered this to be a racist comment or word; she answered no, but that she had found it derogatory. There had been some exchange between resident 4 and the claimant about the issue of drains. On 19 April Mr Sawers took contemporaneous notes of the meeting. The resident and his wife both accused the claimant of lying and the claimant accused the residents of lying. Both parties are recorded to have been shouting at each other and over each other. We note that the resolution at the end of the meeting was that the wife of resident 4 would speak to the claimant, and that claimant would simply not speak to the husband from then on.

20. We accept that the claimant felt genuinely harassed. In her oral evidence she continued to deny that she had shouted in the meeting, but said on a number of occasions that she had to defend herself against lies and that she "had to be assertive when the person was telling lies about her". We noted that the claimant was assertive in this hearing in answers to cross examination without shouting or raising her voice. We have considered carefully the conflicting evidence between the claimant and Mr Sawers on this point and considering in particular his contemporaneous notes, on balance we accept the evidence of Mr Sawers and the broad accuracy of his manuscript note. We see no reason why he would in April 2016, months before any disciplinary was envisaged, incorrectly record the events of a meeting at which he convened with a stated aim of trying to mediate between the claimant and the residents.

21. We note that despite Mr Sawers himself witnessing the claimant shouting at residents in a meeting he did not seek to tackle this behaviour, either by putting in place training for the claimant, a performance management plan, issuing her with an informal verbal or written warning or even words of

advice about the inappropriateness of rising to the heated situation and using words like “liars” and “lies” and shouting at residents. We note the evidence of Ms McKenna that residents can be challenging and might shout but that managers must not retaliate by shouting back. We do not accept that Mr Sawers was seeking to stereotype the claimant as a shouting black woman, but accept the fact that she was shouting which is why we find it is a startling omission that no action at all arose after this situation.

22. In early June 2016 the manager of another court, a Mrs O’Rourke was violently assaulted and she along with a resident who had come to her aid were hospitalised. In the course of that assault Mrs O’Rourke bit her assailant. The assailant was as we understand later convicted of the assault in a criminal court.

23. On 22 June 2016 the claimant held a meeting which was open to residents to discuss the purchase of new cushions for a residential lounge. It appears that that meeting led to some residents becoming angry, seemingly about the procurement procedure for purchasing the cushions and where the money was to come from. The claimant perceived that she was being treated very badly in the course of that meeting. The later investigation showed that some residents shared that view. The distress which had been caused to the claimant was explained by her in the course of her next supervision with Mr Sawers on 7 July 2016. The initial notes of that supervision made no reference at all to the ‘cushions meeting’, and therefore on 11 July the claimant emailed Mr Sawers and asked that the document be amended. Mr Sawers responded by essentially cutting and pasting a great deal of that email exchange about the events of 22 June into the ‘any other business’ section of the supervision record.

24. One of the things that the claimant told Mr Sawers was that two of the residents who were present at the meeting had been disgusted at the behaviour of a third resident towards her and that one of them said she thought that the behaviour of the resident who had shouted at the claimant had a racial undertone. Mr Sawers’ reaction was to write a formal letter to the claimant saying that the respondent would not tolerate racial abuse in anyway and would take appropriate action against any perpetrators. He also provided the details of the employee assistance programme. It is not clear to the Tribunal what appropriate action against the perpetrators would ever consist of. We note that it was not the claimant at that point saying that the abuse had been racist, but that residents told her that they perceived it as such.

25. This matter was returned to later in July but in the meantime on 19 July at a team meeting, the incident with Mrs O’Rourke was discussed and that led to the entire team receiving training in conflict resolution. We have no evidence as to what that training session consisted of and indeed whether the claimant stayed to attend it. At that meeting the claimant was informed the manager of her ‘buddy court’ would be leaving on 22 July. The ‘buddy’ system was such that managers would be expected to provide cover for each other as necessary, for example due to holidays, sickness or vacancy

of post. The claimant objected to going to her buddy court as she had to travel there by way of public transport and she did not consider that she had enough time in her working week to travel there and provide support there as well as doing her substantive job at her own court.

26. On 28 July 2017 Mr Sawers sent an email to the claimant confirming that she was duty bound to cover the other court, but that he would also have another court manager assist, such that each of them would provide 6 days cover in the month ahead. He went on to say in light of her previously having mentioned that the job was stressful and that she got exhausted by her workload, "I would like to suggest you perhaps book an appointment with our OH team who may be able to offer solutions or advice". Between the 29 July and 14 August 2016 the claimant was off sick and her GPs certificate noted that that was due to workplace stress.

27. On the 3 August 2016 Mr Sawers was scheduled to go to the claimant's court to interview residents about the 22 June 'cushions meeting'.

28. On 17 August a return to work interview took place between the claimant and Mr Sawers. By this time, if serious about supporting the claimant in her role, it was clear to the Tribunal that there were obvious signs she was not coping. If the April mediation incident had not led to highlighting a need to offer training or support, or to consider the claimant's suitability in her role, the incident following the 'cushion meeting' certainly should have done. The Tribunal note that Mr Sawers had 24 court managers in his region and therefore a large number of people to supervise, but nevertheless considered that his reactions were very slow. He did not interview residents about what seems to have been a fractious meeting not until some 6 weeks after the event and did not share the outcome of this with the claimant for almost 8 weeks. Mr Sawers scheduled an 'anti-social behaviour' meeting with residents on 8 September but told us in evidence that nobody turned up; he said, "I sat in an empty room".

29. On 13 September, some 5 days later, Mr Sawers met the claimant to discuss what he had been told by residents about the cushions meeting. It is apparent, having read these various accounts, that a couple of residents perceived the claimant to have been aggressive and to have shouted at them, and a couple of residents perceived their fellow residents to have been rude to the claimant, one noting that "they mock the way that Hannah (the claimant) walks and the way that she talks" and saying that they felt that it may be racist. One particular resident said that the incident had been a "brutal vicious attack" on the claimant, and yet another said, "I think people don't like her because she's black" and "they are sometimes rude to her saying that can't hear her". The outcomes from that 13 September meeting were that the claimant 'was to raise any issues of concern and make Martin aware of them to be addressed'. This is precisely what the claimant had done and as to how Martin was to address it, the meeting records that he was conducting a meeting on 8 September. This was some 5 days previously. He had had that meeting and nobody had turned up. So, it

seems that there was no resolution after what had on these numerous accounts been a difficult meeting for all involved.

30. On 7 October 2016 a resident who had been terminally ill died. The claimant had in August 2016 signed as a witness, a handwritten note from this resident in which he said that when he died he only wanted one of his daughters to be able to enter his property and nobody else. When the claimant arrived at work on the morning of 10 October she was told by one of the daughters of the resident - who was standing outside as the claimant walked into work - in answer to the claimant's enquiry as to her father's health that he had "gone". The claimant logged onto her computer and then in short order went to the flat of the now deceased resident. She said that she knocked on the door and then went in and that she stood in the hallway with the family. They asked if she wanted to go into the living room to see his body and she described herself as being emotional and upset, and did not want to see the deceased. She reminisced with the family. It is apparent to the Tribunal the suggestions put to the claimant that she should ignore the family and not offer her condolences, and simply sit in her office rather than go and pay her respects was alien to her.

31. The claimant has told us that one of the daughters of the deceased resident mentioned to her, that the direct debit for the rent on the flat was due on Monday 10 October and asked the claimant about notice period. The claimant said that notice was usually four weeks but that it was a matter for the family and they could go earlier to avoid paying additional rent, it was a matter for them. The claimant confirmed in her evidence that she has had to deal with the death of a number of tenants over her previous three years of employment and there had been occasions where she has extended the notice period beyond four weeks. It makes no financial difference to the claimant as to whether a flat is empty or not, and there was nothing personally for her to gain in moving in a new tenant sooner rather than later. At some point on 7 October one of the daughters handed to the claimant a handwritten note confirming giving notice on their father's tenancy to stop on 9 October, some 2 days later. The claimant entered that into the system and which then generated a pre-printed form to confirm giving of notice. Mr Sawers said that such a pre-printed form was not necessary where there had been handwritten notice, but nevertheless this was given by the claimant at some point to one of the daughters who signed that as well.

32. Also at some point - the chronology of events on 7 October being unclear - the son-in-law of the deceased went to the office and told the claimant that the family did not want her to go into the property uninvited. The claimant says that he was aggressive towards her and he slammed the door. The direct debit for the tenancy of the flat seems to have been taken on 10 October despite notice having been given for it to end before then. It is apparent that this was a matter by which the family were not very happy.

33. On 2 November the claimant had a supervision with Mr Sawers. As he left that supervision he was handed a letter from the three daughters of the deceased and they complained about:

> "the inconsiderate conduct of your current warden you have at the court, at some point she just entered Dad's property with no warning while Dad was deceased in his lounge. Within a few hours of this she had completed Dad's end of tenancy agreement from Monday 10 October and to add insult to injury a further months' rent for Dad's property was taken.".

Mr Sawers made a record of the account that the daughters gave him on that day, it is before us at documents page 390 a to c. Mr Sawers said that he had emailed this account to the claimant on or after 2 November. We have no copy of that email. Mr Sawers made reference to some new computer system, but we note that we have numerous emails both before and after that date to and from him. There seems to be a comprehensive email elsewhere but no in relation to this note. The claimant denies seeing this document until a second bundle of documents was produced for the hearing. It is agreed that it was disclosed late. It is apparent that this document was not before the disciplinary hearing. There is no copy of it within the disciplinary documents.

34. On 16 November Mr Sawers attended the claimant's court without any warning that he was coming, in order to conduct what was called an informal investigation meeting. We note that at the outset of that there was no reference back to his having spoken to the claimant on 2 November about the events on the day of the resident's death, and there was no reference back to the notes that he says he had already sent to the claimant. We accept the claimant's evidence that she did not see the note Mr Sawers purports to have made on 2 November until the disclosure process in these proceedings.

35. On 16 November having turned up unannounced in order to discuss the events surrounding the aftermath of death of the resident and the complaints of the daughters, the claimant said that she had not been aware that he was coming and did not want to speak to him until she had consulted her Trade Union representative. She was told that it was an informal meeting and she did not have the right to be accompanied. The claimant then asked for time to read the relevant employment policy document. The note that Mr Sawers made on 17 November records:

> "I informed Hannah that I was not prepared to wait until she had done this and she could be assured I would not be giving her incorrect information. I was following correct procedures."

36. Mr Sawers then records in a formal document headed 'Informal investigation interview' a series of questions that he asked. The claimant's response was that she would not comment on anything until she had spoken to her Trade Union representative and she answered each question "No comment".

37. Mr McMillan in his submission said that it was good to have a meeting while events were fresh and "to stop people from going off for advice". We have considered the submission that it was for the claimant to go back to

Mr Sawers and tell him that she was now ready to answer questions. We note that the purpose of the investigation meeting is for an employer to find out the relevant facts. Mr Sawers had been aware of this for some two weeks and had not thought it sufficiently urgent to go immediately. He said he did do so because he had understood the claimant was off sick. She was not. Mr Sawers did not get any relevant facts from the claimant on 16 November, but we are very clear that the onus should be on him to finish the interview by making it clear what the next steps would be to give an opportunity to the claimant to go and get advice if she saw fit and then to answer the questions, or alternatively give her written copies of questions at that point and invite her to answer them in writing. It appears to the Tribunal that Mr Sawers had no interest in following up on this interview and we reject the submission that the burden was entirely on the claimant. Moreover, she was not made aware that any such burden rested upon her.

38. The claimant did provide written answers to the questions Mr Martin had put to her on 16 Nov, at some point after her dismissal. Ms McKenna agreed that she had seen written answers; however they were not in the bundle before us and we were provided no explanation as to why that was. Nothing more happened in relation to this incident until the suspension on 28 November, some 12 days later.

39. Meanwhile, however on 23 November an incident happened in the resident's lounge. The claimant had been organising a Macmillan coffee morning and a particular resident had told the claimant that she had a £5 donation to pass on to her from an anonymous donor. It seems that at some point the resident told the claimant that she had handed over the £5. The claimant assured the resident that she had not done so. The claimant considered that she was being accused of thieving. The situation escalated and on the afternoon of 23 November the claimant emailed Mr Sawers wanting to raise a formal complaint against the resident who had accused her of stealing. She ended her email saying "I am kindly requesting for an investigation into all the problem going on at the court. This is getting too much for me and I am only trying to do my duties". It's apparent that a telephone conversation between the claimant and Mr Sawers thereafter took place and the claimant sent a further email an hour or so later. In the course of that email the claimant said that the resident had said, "You think this is about me being racist" to which the claimant replied that she could report them to the Police because "since being on this court I have been subjected to lots of verbal attacks, accusations and molestations from some of you".

40. On the morning of 24 November at 9.15am the resident in question phoned Mr Sawers. The resident said that the claimant had "gone berserk" and was shouting at her in the communal lounge and residents said that the claimant "pulled the racist card all the time". The Tribunal note that an hour or so after that phone call Mr Sawers replied to the email the claimant had sent the night before thanking her for the information in relation to her concerns, and saying:

> "Rather than a formal complaint this should be dealt with as anti-social behaviour, and we have discussed the anti-social behaviour policy previously. I would like to remind you that you should be recording this case as you feel the resident is causing you distress, alarm or harassment. Please ensure you copy me into the details of the anti-social behaviour case when you have opened it."

41. We find it surprising that that is what he had to say in an email and hour after this resident had phoned and giving a very different account of the same incident. On the afternoon of 25 November at 5.15pm a second resident, a friend of the first resident phoned him and added her voice to the complaint stating that the claimant had "acted like a woman possessed and was screaming and shouting at the first resident, and that it was all over £5 that had been mislaid".

42. On 28 November Mr Sawers attended the claimant's court and handed her a letter of suspension. She was told that her immediate suspension was not a disciplinary action or an implication of guilt but was a holding action "pending the outcome of an investigation". The claimant was requested to handover her identification pass and all company documents and was escorted off the premises. There is a dispute of fact as to whether she called the residents who had made the complaint racist when she saw them on the way out or not. Despite the claimant's suspension being 'pending the outcome of the investigation' there is no suggestion that any further investigation interviews or enquiries took place after 28 November.

43. On 30 November the claimant received a letter saying that the investigation manager had concluded the disciplinary investigation and recommended a disciplinary case to answer. There was no investigation report but the claimant was given copies of her interview notes of 16 November (which she had replied 'no comment' to every question), the handwritten letter of complaint from the three daughters of the deceased resident and copies of the accounts given by the two residents complaining about the £5 incident. The claimant was told that she was to face four allegations:

    (1) Entering the resident's property without permission, specifically the deceased's flat, without warning which resulted in complaints.

    (2) Serious and unacceptable behaviour and conduct and shouting at a resident on 23 November.

    (3) It is alleged that your actions in respect of (1) and/or (2) had the serious adverse effect on the reputation of Housingandcare21.

    (4) Failure to comply with Housingandcare's tenancy agreement in asking the deceased's family to clear the flat within two days.

44. The disciplinary hearing was scheduled to take place on 6 December 2016, however the claimant's Trade Union representative was not available at that time. The claimant of course is entitled to be accompanied by a Trade Union representative and is entitled to ask for a re-arrangement of the hearing if they are not available. The hearing was then re-arranged to take

place on Tuesday 13 December 2016. On 13 December the claimant attended her GP who signed a note on the 14 December recording that she was unfit for work for a period of two weeks due to an upper respiratory tract infection and due to work related stress.

45. On 15 December 2016 the claimant was told that the hearing would take place on 20 December 2016. Her Trade Union Representative asked for copies of the daily record checks and court diaries. She was told that they would not be provided because they had no relevance to the allegations. It does not appear to this Tribunal that the purported relevance was enquired about. Ms Liddar told us that when the letter of 15 December was sent setting the date of the hearing for 20 December, it was known to the respondent that the medical certificate dated 14 December stated that the claimant would be unwell for a 2 week period. The hearing of 20 December was therefore scheduled for a time when the sick note was one week old and would not expire until 27 December.

46. On 19 December 2016 the claimant assisted by her daughter emailed the respondent apologising and stating that she was not well enough to attend the hearing the following day, and noting that her doctor's certificate lasted another week. Her email was acknowledged and she was told that the hearing would go ahead with or without her on 20 December. She was advised that if she was unable to attend she could provide written submissions by 9am the following day. The claimant did not do so. She did not attend on 20 December and Ms Liddar having taken advice from an HR helpline considered it appropriate to go ahead in the absence of the claimant. This was despite her having no account whatsoever from the claimant in relation to the allegations from the daughters of the deceased resident. Whilst Ms Liddar had the claimant's emails of 23 November, (those having been acknowledged in the letter dated 30 November) the claimant had been told that if she wanted to rely upon them she had to bring copies along to the disciplinary hearing. So, it is not apparent whether the claimant's account about the altercation over £5 was considered or not.

47. Ms Liddar confirmed in her evidence that she had <u>not</u> been aware at the disciplinary hearing of what Mr Sawers says the claimant had said to him on 2 November. I.e. that the claimant denied having given the tenants two days' notice to clear their father's possessions with the reply "God forbid, one mentioned that a direct debit was due on Tuesday. I told them it is up to you when you choose to end the tenancy and explained that it is normally four weeks, but it is up to the family".

48. On 20 December the claimant sent by recorded deliver, a detailed letter of grievance to the respondent. This was in large part about the way in which she had been suspended and the procedure which had led to the disciplinary hearing. Ms Liddar having conducted the hearing in the absence of the claimant and <u>before</u> receiving the letter of grievance, phoned the claimant on 22 December and told her that she was being dismissed summarily. A letter confirming that dismissal was sent on 4 January. That letter sets out each of the four allegations and notes the limited evidence

that she has had and upheld each of the four allegations. In relation to the shouting in the lounge on 23 November she did say that she had considered two emails to Martin Sawers but noted that there was nothing in these emails to change her finding of having shouted at the resident and therefore upholding the charges. The letter concluded by stating that due to the nature of findings and the dismissal resulting in the claimant being removed from working within a regulated activity, that the matter would be referred to the Disclosure and Baring Service.

49. On 4 January the claimant wrote a formal letter of appeal. In stark contrast to the speed of arranging the disciplinary hearing the appeal hearing was not convened to take place until February 2017. It was initially proposed for 7th and then moved to 9th. That hearing was conducted by Ms McKenna who is the line manager of Mr Sawers. She conducted it in two parts, the first relating to the dismissal and the second relating to the claimant's grievances. Ms McKenna described to us - as she to the claimant when she attended these hearings - that she had a large bag of documents. To us Ms McKenna said that that consisted, she thought, of most of what was in the bundle. She was not able to be specific. She interviewed the claimant and had a notetaker present. She told us that she interviewed Mr Sawers but did not take any notes. She did receive a great deal of evidence from Mr Sawers and it is not apparent as to whether that was provided at all or in part to the claimant. It is apparent that whilst Mr Sawers gave the note of 2 November to Ms McKenna, that was not a note that was provided to the claimant at that time; it is therefore apparent that at least some of the information before Ms McKenna was not made available to the claimant.

50. Mr Sawers stated in his witness statement:

> "As a gay man, I am very familiar with the concept of equal opportunities, and related policies and best practices. We receive regular training and any updates to our equal opportunities policies or procedures are communicated to us – this applies to both the roles Hannah and I were in at the time."

51. In a similar vein, Ms McKenna stated that she had previously supported an employee at a previous employer who had "suffered dreadful racial harassment" and that her "own background is Irish Catholic and living in Birmingham following the pub bombings in 1974. I know what racisms is. I lived through it with myself and my parents."

52. We heard no evidence about any training or updates in relation to equality and were struck that in the face of the claimant on numerous occasions raising the issues of feeling as though she had been discriminated against, the respondent seemed to require evidence of racially abusive language as the only example of discrimination they might understand. There appeared to us to be no appreciation that discrimination may not be overt or obvious, and for example when hearing residents say that the claimant was mocked about the way in which she walked and talked, or of the claimant saying that she was laughed at when people passed her. There was no consideration whatsoever as to whether she might be being subjected to less favourable

treatment or a hostile environment because of or related to her race. The respondent did not provide or attempt to provide the claimant with any strategies or techniques to address or diffuse situations, to de-escalate events as they arose. We were struck in particular that the only reply to the claimant's complaints seems to have been to tell her record anti-social behaviour so that it could be dealt with, but there was no evidence whatsoever as to what this dealing with it consisted of, save for one meeting to which nobody turned up.

53. We have also on the other hand taken into account that the claimant has on some occasions adopted quite extreme language to describe events in circumstances where it did not appear to us to be warranted. For example, when her appeal hearing was scheduled to take place in Birmingham where Ms McKenna was based the claimant in her witness statement described this as "inconsiderate and vindictive" despite the fact that when she asked for a venue closer to home the meeting was moved to take place in Peterborough. Similarly, she described how speaking over her, being accused as speaking over her manager was "inhuman" treatment, and indeed interpreted events at being aimed at her even when they were patently not, such as toilet rolls being brought in advance to give to four members of the loosing team of a quiz by way of an attempt to joke at despite three of the recipients being white and this clearly being a pre-determined joke to whichever team happened to lose.

The Law

Test for unfair dismissal

54. S.98 of the Employment Rights Act 1996 provides:

> "**98 General**
>
> (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—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) …

(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 reasons 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."

55. The burden of proof is of course on the employer to show a potentially fair reason for dismissal. In a case where the reason relied upon is conduct, the well-known guidance emanating from British Home Stores v Burchell provides that it is appropriate to consider whether the employer had a genuine belief in the misconduct, formed after such investigation as was in all the circumstances reasonable, and whether dismissal was within a range of reasonable responses.

56. It is trite law that it is not for this ET to substitute its view for that of the employer. The manner in which the Employment Tribunal should approach the determination of the fairness or otherwise of a dismissal under s 98(4) was considered and summarised by the Court of Appeal in Tayeh v Barchester Healthcare Ltd [2013] IRLR 387. The Court of Appeal confirmed that appeals to concepts of perversity are out of place in the consideration of the reasonableness or otherwise of the dismissal: the approach that has to be applied is simply that of the 'band of reasonable responses'.

57. The prohibition against direct discrimination is contained in s.13 of the Equality Act 2010 which provides:

"**13 Direct Discrimination**

(1) 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. S.23 of the Equality Act 2010 provides:

"**23 Comparison by reference to circumstances**

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

59. S.26 defines harassment as follows:

> "**26 Harassement**
>
> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

60. Section 136 EqA provides for the so-called "reversal of the burden of proof":

> "**136 Burden of proof**
>
> (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.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

61. The correct approach to the predecessor version of this provision was authoritatively set out in Igen Ltd v Wong [2015] ICR 901. The Court of Appeal in Ayodele v Citylink Ltd [2017] EWCA civ 1913 have this year confirmed that it remains appropriate to consider in the first place whether the claimant has established a prima facie case of discrimination before the 'burden shifts' to the respondent to have to justify the treatment. To move the burden of proof there must be something more than merely a difference in treatment and difference in protected characteristic, as highlighted in Madarassy v Nomura International [2007] ICR 867.

Submissions

62. Mr McMillan provided submissions along with copies of Igen Ltd v Wong, and Riley and Sandwell Metropolitan Borough Council [2018] ICR 705. He supplemented those submissions orally. He said that there was disjuncture between things as they happened and how the claimant perceived them, and her lack of credibility went not only to the race discrimination claims but also to the unfair dismissal claim. He submitted that the dismissal was fair as Ms Liddar had diligently examined all the material before her and that in relation to the sick certificate "It's common to have a cough in December and it was a reasonable assumption that the claimant was fit enough to

attend a disciplinary meeting. Obviously obtaining further evidence will be best model practice, but in the real world decisions cannot be deferred indefinitely." He submitted that if there was any unfairness the outcome would have been the same in the event perhaps for a modest delay, save perhaps for a modest delay and that the claimant contributed 100% to her dismissal.

63. The claimant made oral submissions and in particular outlined the impact these events had had on her, and how she felt that her character had been inpuned.

Conclusions on the issues

Race discrimination

64. The claims of race discrimination pursued in these proceedings are by and large against Mr Sawers during his management of the claimant, and then latterly against those who dismissed the clamant and upheld that decision - although the latter appears not to have been appreciated by those witnesses who commented that they did not think that Mr Sawers would ever discriminate.

65. The various allegations that the claimant has been subjected to racist behaviour from the residents is not an issue for us and not a matter on which it is proper for us to express a view.

66. The claims before us are listed at paragraph 8 of the record of case management:

66.1 8.2 - The unannounced visit. Mr Sawers did make an unannounced visit to the court where the claimant worked in March 2015 shortly after he was promoted to area manager. We note that during her grievance hearing in February 2017 the claimant recorded that Mr Sawers seemed sympathetic at that time. We accept the evidence of Mr Sawers and Ms McKenna that it is not uncommon practice for a manager to visit a court on a random day unannounced, and that following the restructure in April 2015 that practice had been particularly encouraged by the respondent. In any event, we do not consider that the claimant has shown a prima facie case of why this unannounced visit is because of or related to her race so as to constitute either direct discrimination or harassment.

66.2 8.3 - 'toilet paper'. The claimant did not ask any questions of Mr Sawers about the incident of toilet paper being thrown at or given to her table. It was in Christmas of either 2014 or 2015. Indeed, she was asked in closing submissions whether this was something that she was pursuing having accepted that she was on a team of four, the other three of whom were white and all of whom had received a toilet roll. The claimant confirmed that she did wish to pursue this claim but was unable to give any answer as to why this incident was because of or related to her race. The claim whether one of direct discrimination or of harassment is simply not made out.

66.3 8.4 - 'loner'. We accept that Mr Sawers is likely to have called the claimant "a loner" and we accept that the claimant perceived this to be an insult, particularly when she had frequently complained about feeling isolated as a lone worker. We have considered the fact she was the only black employee of the 24 in her region at the relevant time, and we do consider that this enough to shift the burden of proof in this matter. Mr Sawers' explanation was that he observed that the claimant was often alone and did not engage with her co-workers at regional meetings. We accept that he would in these circumstances have made this comment regardless of the claimant's ethnicity and we find that the comment was not because of or related to her race. His failure however to seek to proactively alter her observed isolation is one of the matters that we have considered in relation to the events which led up to the claimant being charged with misconduct and later dismissed.

66.4 8.5 - 'letterbox'. This allegation was not easy to understand, the claimant had seen Mr Sawers call through a resident's letterbox on one occasion. Both the claimant and Mr Sawers agreed that this happened. Mr Sawers gave clear evidence that he did not consider this to be an inappropriate practice. The claimant could not recall the circumstances of her being reprimanded for shouting through a letterbox and it is difficult to see - him having done it himself - why Mr Sawers would reprimand her for doing this. We do not accept the factual assertion made that the claimant was told off for shouting through a letterbox and accordingly this claim is dismissed.

66.5 8.6 - 'Manchester'. There was nothing to warn the claimant that she was unable to apply to attend the conference in Manchester or to incur overnight expenses. We note that whilst before us Mr Sawers said that his rationale for refusing that venue was based on cost and on the fact that it would provide an opportunity for the claimant to socialise with her contemporaries. The contemporaneous correspondence mentioned only avoiding overnight expense. Mr Sawers gave no evidence of discussing this issue with the claimant even though he saw her the day after the email exchanges. This seems to have been another missed opportunity for Mr Sawers to express to the claimant that he had heard her concerns of feeling isolated, that he took them seriously and that this provided an opportunity to engage with her cohort. If this had been in his mind at the time, it is most unfortunate that he did not take what was an easy opportunity. It seems to us that he was primarily motivated by avoiding a cost of a hotel and indeed he told us that he had been refused the chance to go out of region. We find that as such he had financial motivations in mind and whichever court manager had made the request regardless of ethnicity he would have refused it. We cannot conclude that this behaviour was because of or related to the claimant's race.

66.6 8.7 - Supervision note. The respondent submitted that this complaint was about the record made on 7 July 2016 of the supervision when the claimant raised her concerns about what had happened in the June meeting with the residents about cushions. This appears to be the substance of the complaint. It is apparent that the initial note of the supervision on 7 July contained nothing about what had clearly upset the claimant. It is also apparent that on 11 July she set out in an email the

matters which she thought should be recorded within her supervision notes and that Mr Sawers then added under a heading of 'Any other business' the content of their email exchanges by cutting and pasting it onto the form. In these circumstances we are not satisfied that Mr Sawers created a note in the knowledge that it was untrue which is how the allegation is put. In any event, we cannot see any connection between that and race.

66.7 Hearings - We accept that the investigation, disciplinary hearings were conducted in accordance with the advice given by HR. We set out below our findings as to the inadequacies of the approach, which led to our finding that the dismissal was unfair. However, we cannot find they were tainted by discrimination, and in this regard the claimant has failed to shift the burden of proof.

66.8 Discriminatory dismissal - Finally, we have considered very carefully whether any part of this dismissal - which we have found to be unfair - also amounted to less favourable treatment on grounds of race. We have reminded ourselves that unreasonable or unfair treatment itself does not mean that it is discriminatory and we are satisfied that a hypothetical white female comparator would have been treated in the same way that the claimant was. We do not consider that Mrs O'Rourke was an appropriate comparator (as submitted by the claimant) because the material circumstances in which she bit somebody who was attacking her were quite different to the situations that the claimant found herself in with residents verbally shouting at her. I

67. The claim for race discrimination is dismissed.

Unfair dismissal

68. The effective date of termination was 22 December 2016. At that date, any belief Ms Liddar had into the misconduct of the claimant was not based on a reasonable investigation. The Tribunal considered carefully the fact that they must not substitute their own view for that of the employer, and considered carefully the guidance in Sainsburys Supermarkets v Hitt, that the range of reasonable responses test applies to each of the stages of Burchell test. However, the investigation which is said to have taken place in this case is not within any range of reasonableness.

68.1 On 16 November, having told the claimant she could not be accompanied to an interview, she was not even permitted time to read a policy document let alone be accompanied by anybody.

68.2 The onus was clearly on Mr Sawers as investigating officer to return to the claimant after she answered "no comment" on 16 November, either with questions in writing or for another meeting.

68.3 We are surprised particularly given the large size of this employer that the investigation officer produced no summary or report of his findings.

68.4 The decision to deny access to the court diaries and other contemporaneous records was made by the respondent without any consideration as to the potential relevance of their content.

69. The decision to go ahead with the hearing on 20 December in the absence of the claimant was unreasonable. There are certainly circumstances when an employer faced with an employee who has had a lengthy period of sickness absence must "in the real world" take decisions and carry on with its business. There are circumstances in which it will be reasonable to go ahead in the absence of an employee, but this was not such a circumstance. The length of sickness by 20 December had been just 7 days. The reason for the postponement on 13 December still applied on 20 December, and the rationale - repeated like a mantra by the witnesses and the respondent's representative in closing submissions – "that an inability to attend work did not equate to an inability to attend a meeting" was unsatisfactory. It was a conclusion that was reached without asking the claimant, without asking her doctor or without asking any of the occupational health experts who are available to this large employer. Mr McMillan's assumption that the claimant had "a cough" and his discounting entirely the claimant's stress, was found by the Tribunal to have lacked any foundation in evidence.

70. Ms Liddar's evidence was that she considered entering the property of a resident without being invited, to be gross misconduct *in any circumstances*. She gave the example of terminating the probationary period of one of her own staff members for just such an act. This struck the Tribunal as showing a prejudging of the issue. The circumstances facing the claimant on 7 October were not straightforward. The fact of the death of the resident to whom she had clearly been close. The fact that she herself was upset by his death, her knowledge that the family were in the flat and indeed just behind the door in the hallway. Her account that she knocked before entering. None of these matters were details which were before Ms Liddar when she made her judgment.

71. We have considered whether any defects of the dismissal hearing were remedied on appeal.

71.1 Ms McKenna was the appeal officer, and was also Mr Sawers' line manager. She appears to have accepted without question all of the accounts that Mr Sawers has put to her. The Tribunal note that in an organisation of this size it would have been entirely possible and plausible to have somebody outwith that chain of management considering the appeal.

71.2 The claimant <u>did</u> attend the appeal hearing and so was able to give her account of the various incidents. She also apparently gave written answers to what had been asked in the investigation interview of 16 November.

71.3 Thereafter Ms McKenna interviewed three residents, two about the £5 incident and one other. That other resident retracted much of what he was reported to have told Mr Sawers some months earlier and some 6 weeks after the cushion meeting. His retraction seems to have been relied upon quite heavily without exploring why he had changed his account, or exploring with Mr Sawers whether the first account given had been incorrectly recorded.

72. In summary, there was further investigation, and crucially for the first time in relation to some of the matters, there was an account from the claimant. We have considered whether that was sufficient to bring this investigation within a range of what was reasonable in order to give rise to a genuine belief and thereafter a dismissal which was within a range of reasonable responses. We are not satisfied that it did. Ms McKenna told us she had a big bag of documents and that they consisted of most of what was in the bundle. There was no record of what was before her, she was unable to tell us. There was a union case document which we do not have and we have no explanation for its omission. There was an answer sheet from the claimant addressing the suspension interview questions - which we do not have and there is no explanation for its omission. Ms McKenna asked questions of Mr Sawers but chose not to take notes. Ms McKenna in fact sent an email shortly before concluding her decision letter, saying that:

> "I have a huge amount of info from Martin evidencing support. So as confirmed I will be upholding the dismissal."

What that huge amount of evidence about support consisted of, the Tribunal has is unaware.

73. Mr McMillan warned us not to conflate any inadequacies in dealing with the grievance with the consideration of the appeal against dismissal and in our view he is correct to so warn us.

74. We note that in relation to the incident about the £5 note, this is not of a dissimilar nature to what had happened before when the claimant was called a "bloody mock" and had the mediation in April 2016, and the meeting about the cushions in June 2016. All three matters came back to the claimant being in conflict with residents. We are surprised that Mr Sawers heard two accounts from residents by the morning of the 25th November, was still telling the claimant 'to record the fact the events of 23rd November as anti-social behaviour'.

75. We do not consider that the claimant had been equipped with the correct tools to do this job. There is no evidence that she had sufficient training to effectively de-escalate situations. Rather when day to day situations arose whether over blocked drains, cushions or missing £5 notes they seemed to escalate and explode into huge altercations. The £5 note incident was not a 'one-off' incident which has taken the respondent by surprise. It was (or certainly ought to have been) apparent to Mr Sawers that the claimant was not effectively dealing with potential conflict situations. Having failed to warn or coach the claimant after the April and June incidents, it was not reasonable in these circumstances, to consider the November £5 incident to amount to gross misconduct.

76. In relation to the deceased's tenancy, the claimant's account that the family raised with her the question of ending the tenancy is entirely consistent with the documents that they have produced. The claimant giving the choice to

the family as to when the tenancy ends is also entirely consistent with her previous practice. To conclude that she had tried to throw the family out on two days' notice lacked any plausible factual basis, and the tribunal cannot accept that any genuine belief in such misconduct was formed after a reasonable investigation. The claimant did print off the pre-printed form to confirm the end of tenancy having already received a handwritten note, and we accept the account of the respondent that this was wrong – but it is certainly not gross misconduct.

77. That leaves the entering of the property of the deceased. Mr Millan pointed out to us the boundaries policy, and emphasised the importance of tenants knowing that they are able to engage in independent living and will not have staff walking into their properties. However, this was not a day to day situation. A resident to whom the claimant had been quite close had died and she wanted to express her condolences. It appears from the claimant's account of the son-in-law coming to her office and asking her to not enter without being invited, that the claimant did in some way misjudged the situation. However, we do not accept that this was conduct which was so culpable that the claimant ought to be dismissed summarily.

Polkey/ Contribution.

78. The respondent relies upon the case of Polkey to ask us to consider had a fair procedure have been followed what difference it would have made. In considering what might have happened after a fair hearing it is necessary for the Tribunal to engage in a speculative exercise. One way in which to do this is to give a percentage chance of the claimant being dismissed. Another is to consider how long employment might have gone on. Either is open to the tribunal.

79. The Tribunal is well aware that as a speculative exercise it may be right, it may be wrong. However, the judgment of this industrial jury with the expertise of non-legal members who have a long history in industry and in the work place has led to the Tribunal to form the following view:

79.1 We find that had a fair procedure had been followed in February 2017, it would have been apparent that the claimant had received inadequate support from Mr Sawers, inadequate training, and had not been provided with any guidance to remedy to the issues that the she had been raising. Taking all these matters into account, alongside the claimant's conduct, we consider it likely that the claimant would have been given a warning.

79.2 Thereafter, it is likely that the respondent would have sought to monitor what the claimant was doing.

79.3 Our view is that six months after the February hearing, it would have been more likely than not that the claimant would have been dismissed. It appeared to the Tribunal that there were underlying issues with the claimant's communication skills with some residents. It appears that the claimant found the situation very stressful and indeed had mentioned it in a

supervision in the summer of 2016 the possibility of being unable to cope and leaving the respondent's employment. We are not suggesting that this employer (despite having 3,500 employees) had a formal performance management programme for a set period that it could have followed. However, any employer who is acting fairly towards relatively long serving employee would have been duty bound to consider either giving an employee the tools and skills which they needed to do the job, or, after a period of giving warnings and those tools not being used effectively, would then dismiss the employee from the job with notice.

79.4 Doing the best we can and considering all facts that have been before us as we have heard, we think it a period of 6 months following the February hearing is the approximate period that this would have taken and an appropriate one in the circumstances.

80. We have gone on to consider in relation to the unfair dismissal whether the claimant's conduct was such that she ought to have any basic or compensatory award reduced. We do not consider that the claimant's conduct on the day that one of the residents died and she sought to offer her condolences and then answer the queries of the family of the deceased about how they could avoid paying a further months' rent were such that it is just and equitable to make any reduction in the award. We recognise that a complaint letter was written and that that included complaining about the claimant, however it also complained about the fact that having cleared their late father's premises within two days they were still charged rent.

81. In relation to 23 November 2016, it is more likely than not that the claimant was shouting at the resident who had accused her of thieving and we have no doubt that this is conduct which could be culpable so as to make it just and equitable to reduce any compensatory award. However, as set out in our findings above we do consider the respondent had failed to equip the claimant to deal with such situations and we note in particular that Mr Sawers had choose not to progress to a disciplinary the behaviour he witnessed in a mediation meeting in April 2016 when he had seen the claimant shouting at residents. We consider that such culpability in relation to the claimant's conduct as there is, is entirely reflected in our finding that had the respondent have acted fairly and sought to better equip her for the challenges of dealing with difficult residents, it is unlikely that that would have been successful and more likely than not that it would have led to her fair dismissal by August of 2017. In these circumstances we decline to make any reduction to any compensatory award under s.123 of the Employment Rights Act 1996.

REMEDY

82. The tribunal went on to consider the appropriate remedy in this case.

83. Evidence and submissions: The respondent questioned the claimant. The Respondent it accepted that whilst she was unwell it was not unreasonable

that she had failed to apply for alternative employment. She had been on state benefits since her dismissal. Once the claimant returned to better health, she did commence looking for work. The respondent contended that had her employment continued she would have been off sick as the illness predated the effective date of termination of employment. The claimant's contract of employment provided for full pay for a period of 12 weeks of sickness absence.

The Law

84. S.119 of the Employment Rights Act 1996 sets out the method of calculating a basic award.

85. S.123 of the ERA 1996 states that the compensatory award shall be such an amount as the Tribunal considers just and equitable in all the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal insofar as that is attributable to action by the respondent.

86. The Employment Protection (Recoupment of Benefits) Regulations 1996 applied to payments of compensation under s.123 of the Employment Rights Act 1996 in respect of compensation for loss of wages for a period before the conclusion of the Tribunal proceedings. Regulation 4(1) states that when the regulations apply no regard should be had in assessing the amount of monetary award to the amount of any job seekers allowance or income related employment and support allowance amongst others which may have been paid to or claimed by the employee for a period which coincides with any part of the period to which the prescribed element is attributable. The prescribed element is so much of the relevant monetary award as is attributable to the loss of earnings sustained in the period prior to the Employment Tribunal proceedings.

Conclusions

87. For the reasons given in the liability judgment the Tribunal did not consider that it was appropriate or just and equitable to make any deduction from the compensatory award for contributory conduct on the part of the claimant. However, for the reasons given in that judgment the Tribunal was of the view that the claimant would have been fairly dismissed by 22 August 2017 had a fair procedure have been followed and she had been given a chance to improve her performance.

88. The Tribunal considered the submissions of the respondent that the claimant was ill before dismissal and would have continued to be ill after dismissal in any event. The Tribunal rejects such submissions unhesitatingly. The claimant's two-week period of ill health in December 2016 was due to work related stress and an upper respiratory tract infection.

We accept the evidence of the claimant that this was largely a reaction to the way in which she had been treated in the period up to and including her suspension. Thereafter her low mood, stress and sleeplessness were a direct consequence of the treatment she had suffered at the hands of the respondent. Had she not suffered that treatment she would have been fit to work and certainly we are satisfied that any periods of illness she may have suffered whilst being performance managed would not have exceeded the 12 weeks for which she would in any event have received full pay.

89. In these circumstances it is appropriate to award to the claimant loss of earnings for the 8 month period we find her employment would have continued had the dismissal have been fair, that is to say between the 22 December 2016 the effective date of termination until 22 August 2017, in addition to a basic award.

_____
Employment Judge Tuck

Date: ……12 September 2018.

Sent to the parties on:24 September 2018

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For the Tribunal Office