Case Number 1303915/2018
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms S Sikpa		**Black County Partnership NHS Foundation Trust**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
(RESERVED DECISION)

HELD AT Birmingham **ON** **1 – 4 March 2021**

EMPLOYMENT JUDGE GASKELL **MEMBERS:** **Ms J Malatesta**
Mr P Wilkinson

Representation
For the Claimant: **Ms E Lanlehin (Counsel)**
For Respondent: **Ms G Roberts (Counsel)**

JUDGMENT

The unanimous judgment of the tribunal is that:

1 Pursuant to Section 108(1) of the Employment Rights Act 1996, the claimant's claim for unfair dismissal is dismissed for want of jurisdiction.
2 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaint of direct race discrimination, pursuant to Section 120 of that Act, is dismissed.

REASONS

Introduction

1 The claimant in this case is Ms Sarah Sikpa who was employed by the respondent, Black Country Partnership NHS Foundation Trust, as Counselling Psychologist, until her dismissal on 11 May 2018. The date of the commencement of the claimant's employment with the respondent is a matter of dispute between the parties to be determined by the tribunal. The respondent admits that the claimant was dismissed on 11 May 2018. The reason given by the respondent for the claimant's dismissal was that her licence to practice as a Psychologist had been suspended by the Health & Care Professions Council

(HCPC); and that this was a substantial reason pursuant to Section 98(1) of the Employment Rights Act 1996 (ERA).

2 Following her dismissal, by a claim form presented to the tribunal on 21 August 2018, the claimant brings claims for unfair dismissal; direct race discrimination; and breach of contract. The claimant asserts in the claim form that her employment with the respondent commenced on 12 February 2015 and that, therefore, by the time of her dismissal on 11 May 2018, she had the two-year's time service required to bring a claim for unfair dismissal. The claim for breach of contract was withdrawn at a Preliminary Hearing conducted by Employment Judge Britton on 29 May 2019.

3 In response to the claim, the respondent asserts that the tribunal has no jurisdiction to hear the claim for unfair dismissal as its case is that the claimant's employment did not commence until 1 November 2016 - and that, accordingly, at the time of her dismissal on 11 May 2018, the claimant did not have two-year's service. The respondent further asserts that the claimant was dismissed for a substantial reason and that the dismissal was fair. Finally it is the respondent's case that the claim for race discrimination is wholly without foundation.

4 In simple terms therefore, the issues for determination by the tribunal are as follows: -

(a) Was the claimant time-served to enable her to bring a claim for unfair dismissal pursuant to Section 108(1) of the Employment Rights Act 1996 (ERA)?
(b) If so, was the claimant's dismissal fair or unfair by reference to the framework set out in Sections 94 & 98 ERA?
(c) Was the respondent's decision to put the claimant through an investigation and dismissal process; and ultimately to dismiss her, tainted by race discrimination?

At this stage, the tribunal has only considered matters relating to questions of liability. If the claimant were to succeed with any aspect of her case, remedy would be dealt with separately.

The Evidence

5 In the race discrimination claim, the burden was upon the claimant to establish before the tribunal facts from which the tribunal might properly infer that race discrimination had occurred. In the unfair dismissal claim, the burden was upon the claimant to establish that she was time-served. If she was able to discharge these burdens, then the burdens would transfer to the respondent to prove the reason for the claimant's dismissal and that it was a potentially fair

reason pursuant to Section 98(1) ERA and to prove that discrimination had not occurred. In the light of these competing burdens, the parties were agreed that the claimant would present her case first. The claimant gave evidence on her own account and did not call any additional witnesses.

6 The respondent relied on the evidence of three witnesses: -

(a) Mr Scott Andrew Humphries - Director for Children, Young People & Families and Learning Disability Services who was the dismissing officer in this case.
(b) Mr Chris John Masikane - Director of Operations who dealt with the claimant's appeal.
(c) Mrs Judy Griffiths - Director of Workforce who provided HR support to Mr Masikane and also gave evidence with regard to the respondent's treatment of potential comparators.

7 In addition, the tribunal was provided with an agreed bundle of documents running to approximately 432 pages. We have considered those documents from within the bundle to which we were referred by the parties during the Hearing.

8 We found Mr Humphries; Mr Masikane; and Mrs Griffiths to be consistent and compelling witnesses. The evidence they gave remained consistent during cross-examination; their evidence was consistent with each other; and it was consistent with contemporaneous documents. Where it was appropriate to make concessions they did so. We have no hesitation in accepting them as truthful and reliable witnesses.

9 The claimant was a less satisfactory witness. She was not dishonest and did not set out to mislead the tribunal at all. But, she was adamant that only her interpretation of the facts was correct - often despite clear evidence to the contrary. She asserted throughout that the situation had been caused by a mistake on the part of HCPC; but, in our judgement, there was no basis to conclude that there was any mistake. The claimant's evidence with regard to the HCPC Review Hearing on 21 March 2018 was quite astonishing: -

(a) The claimant was aware of the hearing but chose not to attend. Her case was that she had arrangements in place to attend remotely - but she had no evidence to suggest any such arrangements were made. There was nothing in writing; not even an email confirmation. Further, it appears that the claimant was unaware of the time that she would be required to attend remotely; or the manner of such remote attendance (on one occasion she stated that it would be by telephone on another by video).

(b) The claimant was at work with the respondent on the day of the hearing but had made no arrangements to ensure her availability to attend remotely.
(c) The claimant stated that arrangements were in place for her supervisor to attend the hearing remotely to support her. But again there was no evidence anywhere to suggest that any arrangements for such attendance had been made.
(d) It was the claimant's case that she had received verbal confirmation from the HCPC Case Manager that HCPC had received all of the claimant's submitted documentation. But, without some proper cross-referencing, how could the Case Manager be aware of what the claimant had submitted? The claimant appears to have disregarded any possibility that some documentation might have gone astray.

10 Suffice to say that, where there are disputes as to the facts, we prefer the evidence given by the respondent's witnesses to that given by the claimant. It is on this basis that we have made our findings of fact.

The Facts

11 When the claimant first worked for the respondent she was employed by an agency by the name of Pulse Healthcare Limited (Pulse) who specialised in the provision of clinical and other staff to healthcare trusts and organisations. Whilst employed by Pulse the claimant completed timesheet each week for the hours worked: this had to be signed off by an authorised manager from the respondent; and it was submitted to Pulse who then invoiced the respondent for the claimant's services. There is documentation in our bundle which confirms this arrangement. The claimant has not produced any documents (which must have been available to her with reasonable diligence) evidencing the contractual arrangement existing between her and Pulse; but she confirmed that she was paid by Pulse for the hours worked for the respondent. The claimant did not receive any payment from the respondent; and, when she took holidays, she received payment from Pulse. The claimant accepted that, during such periods, Pulse did not receive any payments from the respondent. Although during the relevant period, the claimant did not take any sick leave, she assumed that the same arrangement would apply if she had.

12 The claimant was insistent (although again she had not produced any relevant documentation) that her placement with the respondent by Pulse commenced in February 2015. The respondent's documentation indicates that the arrangement commenced in October 2015. We find that October 2015 is the correct start date.

13 The claimant informed us that she had commenced work with Pulse in 2013; and, prior to being placed with the respondent, she had worked for Pulse at another NHS Trust. The claimant also confirmed (although she had no recollection of actually doing so) that there was no obstacle to her working for Pulse at other NHS Trusts whilst also working for the respondent - for example at weekends when she did not work for the respondent.

14 As the claimant was providing clinical services within the respondents organisation, she was assigned a Clinical Supervisor. But there is nothing to suggest that the respondent had any other management role regarding her. The respondent would deal direct with Pulse: there is no evidence that the respondent had any power or authority to discipline the claimant during this period; and nothing to indicate that the claimant was required to give the respondent (as opposed to Pulse) any notice of termination of her employment.

15 Whilst placed with the respondent and employed by Pulse, the claimant applied for and obtained a substantive post with the respondent. It appears from the documentation that the recruitment process commenced in February 2016; the claimant was ultimately successful; and commenced a substantive post on 1 November 2016. The claimant's evidence before us was that there was no change in her day-to-day duties; responsibilities or supervision. On appointment, claimant attended a two-day induction programme; she received a contract of employment; she was now entitled to holiday pay payable by the respondent; she was entitled to, and obliged to give, 12 weeks' notice of termination; she was provided with the respondent's bullying and harassment policy, disciplinary policy, equal opportunities policy and grievance policy; and she was enrolled into the NHS pension scheme.

16 In 2018, the respondent underwent a reorganisation on the merger of Black Country Partnership NHS Foundation Trust and Dudley and Walsall Mental Health Partnership NHS Trust. As part of the reorganisation, the claimant was appointed to the role of Senior Applied Psychologist (Youth Offending Team) – Wolverhampton.

17 In 2014, the claimant had been working as a Practitioner Psychologist at the Cambrian Group. Between March and August 2014, concerns arose with regard to the claimant's clinical practice in relation to as many as 9 Service Users. The concerns were investigated by HCPC leading to a hearing before the Conduct & Competence Committee on 19 - 20 September 2016. The finding of the Committee was that the claimant's fitness to practice was impaired. The Committee imposed upon the claimant a Conditions of Practice Order (CPO) for a period of 18 months with a review of her practice and her compliance at the end of that period.

18 The investigation, and the Fitness to Practice Hearing with HCPC all arose during the time that the claimant was employed by Pulse and placed with the respondent. The respondent was aware of the claimant's difficulties; it provided support to her through the process; and the CPO did not prevent the claimant from securing her substantive role with the respondent in November 2016.

19 It is the claimant's case that she substantially complied with the CPO. However, even by own evidence, she failed to comply with at least one of the Conditions - Condition 1(a), which required the submission of written records of any clinical intervention undertaken by the claimant within 28 days. In evidence the claimant confirmed that she had sent these written records on a quarterly basis.

20 The review of the CPO was conducted by the Conduct & Competence Committee on 21 March 2018. The Hearing took place in London commencing at 10am and was scheduled to last all day. The claimant did not attend.

21 We have had the opportunity to carefully consider the written determination of the Committee. The Committee found that the claimant had voluntarily absented herself from the Hearing: there is nothing in the written determination to indicate any prior arrangement by the claimant to attend the Hearing remotely. The Committee also identified 9 areas where the claimant had failed to comply with the CPO. The decision of the Committee was to the effect that the claimant would be suspended from practice from 18 April 2018 for a period of six months with provision for a review prior to the expiry of that period on 18 October 2018.

22 The claimant was advised of the outcome by letter dated 22 March 2018. (She had not thought it necessary or appropriate to enquire as to the outcome the previous day.) The letter informed her of her six-month suspension from practice; the letter did not state that the suspension was only effective from 18 April 2018; although the letter did enclose a copy of the written determination. It is unclear precisely how the respondent became aware of the suspension, but, most likely, it was informed by the claimant sometime around 27 March 2018. At that time, the respondent was unaware that the suspension did not take effect immediately.

23 The effect of the suspension from practice was that the claimant could not continue to practice as a Psychologist - the role for which she was employed by the respondent. Accordingly, on 3 April 2018, the claimant was suspended from her employment pending an opportunity to meet and discuss the implications of the suspension. By a letter dated 16 April 2018, the claimant was invited to such a meeting; she was advised in the letter that a possible outcome of the meeting was that her employment could be terminated or that she may be redeployed; the

claimant was advised that the meeting would follow the “principles” of the respondents disciplinary policy. The claimant was informed of her right to be accompanied at the meeting.

24 The meeting went ahead on 11 May 2018: it was chaired by Mr Humphries who was supported by Ms Jenni Carr-Smith - HR Business Partner and Ms Wendy Harrison-Frazer - Consultant Clinical Psychologist. The claimant attended the meeting unaccompanied. Like this panel, Mr Humphries and his colleagues was somewhat astonished by the claimant’s response to events. She was adamant that she had done nothing wrong: despite the HCPC findings to the contrary, she insisted that she had fully complied with the CPO; despite the HCPC finding that she had voluntarily absented herself from the Hearing, the claimant insisted that she had made proper arrangements to attend the Hearing remotely and that she had made similar arrangements for the attendance of her Clinical Supervisor. However, such arrangements were not evidenced in writing; and there was no indication that the claimant had made any adjustments to her working day (or requested her Clinical Supervisor to make such adjustments either) to enable remote her attendance at the Hearing. The claimant simply indicated that she had been expecting a telephone call; and, when no call came, she is assumed that the Committee had been satisfied with her compliance and that the CPO would be lifted. The claimant asserted that her suspension from practice arose because of an administrative error at HCPC.all Mr Humphries concluded that the claimant’s attitude towards the situation was blasé: in our judgement this conclusion was entirely justified.

25 Self-evidently, the claimant could not in the immediate future continue in her employment with the respondent as a Clinical Psychologist. Mr Humphries considered the following options: -

(a) The permanent redeployment of the claimant to a role which did not require HCPC registration - the claimant made clear that she had no interest in such redeployment.
(b) The temporary redeployment of the claimant into such a role until such time as her HCPC registration was restored.

    (i) We accept Mr Humphries evidence that no suitable temporary roles were vacant.
    (ii) He considered the temporary redeployment of the claimant into a vacant permanent role: but decided against this is a satisfactory outcome because it would present an obstacle to the respondent in substantively recruiting to such a role and it would leave the claimant’s role vacant for an indeterminate period.
    (iii) Mr Humphries was, in our judgement justifiably, concerned that the claimant’s approach to the HCPC process had been so blasé that

there could be no confidence that, after the six-month suspension period, the claimant's registration would necessarily be restored. Accordingly the unsatisfactory position identified at (ii) above might prevail for an extended period.

(c) Mr Humphries confirmed that he did not consider the straightforward suspension of the claimant from employment pending the possible restoration of her HCPC registration. But, had he done so, he would have decided against such an option on the basis that it would have left the claimant's substantive role vacant with an obstacle to its being filled for what might have become an extended period. This would have had an adverse effect on the respondent's ability to provide a satisfactory service.

26 Having considered these various options, and discuss the situation with his colleagues, Mr Humphries concluded that the most appropriate outcome was the claimant's dismissal from her employment. The claimant was dismissed with immediate effect: she was paid 12 weeks salary in lieu of notice but was not required to work her notice. The claimant was advised of this decision by letter dated 17 May 2018, and was notified of her right to appeal.

27 The claimant's appeal was heard by a Mr Masikane supported by Mrs Griffiths. The claimant attended; supported by a colleague, Ms Rebecca Holloway. Mr Humphries presented the management case supported by Ms Carr-Smith. Again, the claimant's attitude was to deny any responsibility for what happened; to be highly critical of HCPC who she described as unprofessional. She was unable to provide any evidence to demonstrate that HCPC had made an administrative error; nor did she inspire confidence in Mr Masikane that she intended to adopt a purposeful approach in securing the lifting of her suspension. In the circumstances, Mr Masikane dismissed the claimant's appeal and upheld the decision to dismiss her. The appeal hearing took place on 22 June 2018; and Mr Masikane wrote to the claimant with the outcome on 28 June 2018.

28 At no stage during the dismissal meeting or the appeal did the claimant raise any suggestion that she was being treated unfavourably because of her race. The claimant did not adduce any evidence before the tribunal to support the proposition race was a factor. She relied on a hypothetical comparator and apparently based her claim on a remark said to have been made by an unidentified trade union representative - that the claimant "*would not be being treated like this if you were a demure white woman*". The claimant also asserted that were "*others in the trust who have had their licenses suspended but remained in the employment of the trust*". The claimant accepted that she had no detail of those cases or of their individual circumstances.

29 Mrs Griffiths was able to give precise evidence regarding to employees whose registration had been suspended by the appropriate professional body - in these cases the Nursing and Midwifery Council: -

(a) A white female Nurse whose professional registration was suspended for 18 months was suspended by the respondent and then dismissed; an appeal against dismissal was raised but not upheld.
(b) A white male Nurse was suspended by the NMC; he was dismissed by the respondent; but by the time his internal appeal was held, the NMC had removed the suspension and imposed conditions to practice; his appeal against dismissal was therefore allowed.

30 Whilst the dismissal and appeal processes were ongoing, the claimant was involved in extensive correspondence with HCPC. She continued her assertions that she ought never to have been suspended from practice and that this had been caused by an administrative error on the part of her Case Manager. We have read this correspondence: there is nothing to support the claimant's continued assertions; nothing to support the suggestion that she had made proper arrangements to attend the Review Hearing remotely; and nothing to suggest that there was an error in the Committee's findings that the claimant had failed to comply with the CPO. (Indeed, in evidence before us, the claimant acknowledged that she had failed to comply in at least one respect.)

31 The claimant was able to secure an early Hearing to review her suspension from practice. The Review Hearing took place in London on 9 August 2018. On this occasion, the claimant attended in person. It appears that at this Hearing the claimant did everything she had failed to do at the Hearing in March 2018. She present; and she ensured that all relevant documentation had been submitted in advance. The Committee concluded that the claimant had learnt from her experience: she no longer presented a risk; and her fitness to practice was therefore no longer impaired. The Suspension Order imposed on 21 March 2018 was revoked with no further sanction imposed. We have had the opportunity to read the full determination made on 9 August 2018: there is nothing there to suggest that the Committee concluded that the suspension of 21 March 2018 was anything other than correctly applied. It is of no direct relevance to this case, but the evidence before us is that, in January 2020, the HCPC made a further CPO in respect of the claimant.

The Law

32 **The Employment Rights Act 1996 (ERA)**

Section 94 : The right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98: General Fairness

(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.

(4) ……where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

Section 108: Qualifying period of employment

(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.

Section 230: Employees, workers etc

(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

33 **The Equality Act 2010 (EqA)**

Section 9: Race

(1) Race includes—

(a) colour;
(b) nationality;
(c) ethnic or national origins.

Section 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.

Section 39: Employees and applicants

(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

Section 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.

34 **Decided Cases**

James v Greenwich London Borough Council **[2008] EWCA Civ 35 (CA)**

The question whether an "agency worker" is an employee of an end user must be decided in accordance with common law principles of implied contract and, in some very extreme cases, by exposing sham arrangements. Just as it is wrong to regard all "agency workers" as self-employed temporary workers outside the protection of the 1996 Act, the recent authorities do not entitle all "agency workers" to argue successfully that they should all be treated as employees in disguise. As illustrated in the authorities there is a wide spectrum of factual situations. Labels are not a substitute for legal analysis of the evidence. In many cases agency workers will fall outside the scope of the protection of the 1996 Act because neither the workers nor the end users were in any kind of express contractual relationship with each other and it is not necessary to imply one in order to explain the work undertaken by the worker for the end user.

British Homes Stores v Burchell **[1978] IRLR 379 (EAT)**

In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an employment tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief. Second, it must

be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

Iceland Frozen Foods v Jones **[1982] IRLR 439 (EAT)**
Post Office –v- Foley & HSBC Bank plc –v- Madden **[2000] IRLR 827 (CA)**

It is not for the tribunal to substitute its own view but to consider whether the respondent's decision came within a range of reasonable responses by a reasonable employer acting reasonably.

Sainsbury's Supermarkets Limited –v- Hitt **[2003] IRLR 23 (CA)**

The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed

Ladele –v- London Borough of Islington **[2010] IRLR 211 (CA)**

There can be no question of direct discrimination where everyone is treated the same.

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**

If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence.

Bahl –v- The Law Society & Others **[2004] IRLR 799 (CA)**
Eagle Place Services Limited –v- Rudd **[2010] IRLR 486 (CA)**

Mere proof that an employer has behaved unreasonably or unfairly would not, by itself, trigger the transfer of the burden of proof, let alone prove discrimination. However, It may be difficult for the employer to explain blatantly unreasonable treatment of a worker, and it might be inferred from the absence of an adequate explanation that discrimination occurred.

Rihal –v- London Borough of Ealing **[2004] IRLR 642 (CA)**
Anya –v- University of Oxford **[2001] IRLR 377 (CA)**
Shamoon –v- Chief Constable of the RUC **[2003] IRLR 285 (HL)**
R –v-Governing Body of JFS **[2010] IRLR 186 (SC)**
Alam v London Probation Trust **UKEAT/0199/14/L (EAT)**

In a case involving a number of potentially related incidents the tribunal should not take a fragmented approach to individual complaints, but any inferences should be drawn on all relevant primary findings to assess the full picture. Any inference of discrimination must be founded on those primary findings. Where there is no actual comparator a better approach to determining whether there has been less favourable treatment on prescribed grounds is often not to dwell in isolation on the hypothetical comparator but to ask the crucial question "why did the treatment occur?" In deciding whether action complained of was taken on grounds of race a distinction is to be drawn between action which is inherently racially discriminatory and that which is not; to establish that the action was taken on racial grounds in the former case motive or intention of the perpetrator is not relevant - in the latter it is relevant.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

Laing –v- Manchester City Council **[2006] IRLR 748**

In reaching its conclusion as to whether or not the claimant has established facts from which the tribunal *could* conclude that there had been unlawful discrimination the tribunal is entitled to take into account evidence adduced by the respondent. A tribunal should have regard to all facts at the first stage to see what proper inferences can be drawn.

35 **The ACAS Code**

Although not strictly applying to this case, we considered the ACAS Code as a guide to the expectations of an employer when conducting a process leading to potential dismissal.

The Claimant's Case

Employment Status

36 The claimant's case is that, during the period that she was employed by Pulse but working for the respondent, she was an employee of the respondent. Accordingly, it is her case that her employment with the respondent commenced not later than October 2015; and that by the time of her dismissal in May 2018, she had completed the requisite two years' service. The claimant was unclear as to whether it was her case that earlier placements with Pulse also created contracts of employment with the end user, or whether such contracts would be implied had she for example done some weekend working for another Trust whilst employed by Pulse and working for the respondent.

Unfair Dismissal

37 The claimant acknowledges that, whilst her HCPC registration was suspended, she could not undertake duties as a Clinical Psychologist. Essentially, it is her case that the respondent acted outside the range of reasonable responses in deciding to dismiss her. At the very worst, she submits that she should have been suspended until such time as the registration was restored. In making this submission, the claimant's case is that the respondent failed to properly investigate the situation: had it done so, she submits it would have been come clear that the suspension of her registration was an error and would be soon rectified.

Race Discrimination

38 Essentially, it is the claimant's case that the respondent behaved quite unreasonably in dismissing her without conducting further investigations. She

suggests that this conduct is sufficient to imply that she was treated as she was on racial grounds. And that, the burden of proof accordingly shifts to the respondent; and that, the respondent has not discharged the burden to disprove that discrimination occurred.

The Respondent's Case

Employment Status

39 The respondent's case is that there was clearly no express contract direct between the claimant and the respondent. The claimant had a contract of employment with Pulse; and the respondent had a contract with Pulse for the provision of the claimant's services. The arrangements were clear and transparent: there is no requirement to give efficacy to the arrangements by implying a contract of employment between the claimant and the respondent. To do so would be absurd, as it would be to conclude that the claimant was employed by two distinct employers at the same time for the same work.

40 Accordingly, the respondent's case is that the claimant's employment commenced on 1 November 2016 when she secured her substantive post - bringing with it the expected trappings of employment (an induction process; a written contract of employment; disciplinary and grievance policies; holiday pay; and access to the pension scheme). She was therefore employed by the respondent for approximately 19 months prior to her dismissal; and was not time-served to bring an unfair dismissal claim.

Unfair Dismissal

41 In any event, even if the claimant was time served, it is the respondent's case that the dismissal was fair. The suspension of the claimants registration prevented her carrying out the duties of a Clinical Psychologist for which she was employed. To dismiss her in these circumstances was clearly for a substantial reason pursuant to Section 98(1) ERA.

42 The respondent could not be confident as how long the suspension would be in place. Its conclusions were that the claimant was not taking the situation seriously; and, on this basis, it was unlikely that the suspension would continue for an extended period. The claimant set her face against permanent redeployment into a non-clinical or administrative role; and, for the reasons set out at Paragraph 25(b) & (c) above, temporary redeployment or suspension from work were not appropriate. Accordingly, it is the respondent's case that the decision to dismiss the claimant was within the range of reasonable responses.

Race Discrimination

43 The respondent submits that the claim for race discrimination is totally without merit. There was nothing unreasonable in the respondent's conduct: nothing that would justify an inference of racial motivation. The claimant is relying on a comment made by an unidentified trade union representative; and adduced no evidence to support the assertion. The respondent had produced evidence as to its treatment of white employees in comparable situations: a white female Nurse had been dismissed when her registration was suspended; a white male Nurse had been also been dismissed – but, by the time of his appeal, his registration had been restored and his employment was therefore restored on appeal. This was not the position for the claimant.

Discussion & Conclusions

Employment Status

44 In the period from October 2015 to November 2016 it is clear that the claimant had a contract with Pulse. This might have been a Contract of Service (an employee) or it may have been a Contract for Services (a worker). The claimant was uniquely in a position to produce relevant documentation at the Hearing: but she failed to do so claiming that she did not feel this it would be relevant. In any event, we know that Pulse paid the claimant's wages; holiday pay; probably sick pay if she had required time off sick; and pulse deducted tax and national insurance contributions and accounted for the same to HMRC.

45 During the same period, there was clearly a contractual relationship between Pulse and the respondent. Pulse invoiced the respondent for the claimant services: the amount of the invoice was calculated by reference to the claimant's time-sheet; and the invoices were paid by the respondent to Pulse. There were no circumstances in which the respondent made any payment to the claimant. Unsurprisingly, the claimant had a Clinical Supervisor from within the respondent Trust: but there is no evidence of the respondent exercising any wider managerial function in respect of her.

46 The claimant's position with the respondent was transformed on 1 November 2016 when she secured her substantive position. She went through an induction procedure; the respondent now paid her wages; holiday and sick pay; she was given a written contract of employment; and informed of the respondents disciplinary and grievance policies; she now had access to the NHS pension scheme.

47 In our judgement, it is clear that before 1 November 2016, the claimant was not an employee of the respondent: she may or may not have been an

employee of Pulse. This is the conclusion we reach on the basis of the contemporaneous documentation available to us; and there is no need for us to imply anything further in order to make the arrangement sensible. We find that, after 1 November 2016, the claimant was an employee of the respondent. But, this means that at the time of her dismissal in May 2018, pursuant to Section 108(1) ERA, the claimant did not have the requisite time-service to bring a claim for unfair dismissal.

48 Accordingly, the claimant's claim for unfair dismissal is dismissed for want of jurisdiction.

Unfair Dismissal

49 Having heard all of the evidence, for the sake of completeness, we have nevertheless gone on to consider the claimant's dismissal as if she had been time-served.

50 The claimant was dismissed because, at the time of her dismissal, she was unable legally to perform their duties as a Clinical Psychologist as her HCPC registration had been suspended. Although the suspension was expressed to be for a period of six months, it was far from certain that the claimant's registration would be restored after that period; there was to be a Review Hearing at which it was clearly a possibility that the suspension would be extended. In our judgement, in these circumstances, the respondent clearly dismissed the claimant for a substantial reason pursuant to Section 98(1) ERA; the dismissal was potentially fair.

51 This was not a case of misconduct within the claimant's employment; and the respondent acknowledged this from the outset stating that the process by which the claimant's situation would be considered would follow the principles of its disciplinary procedure. We nevertheless found that the principles set out in the case of ***Burchell*** were useful in considering the respondent's approach. Accordingly, the claimant was invited to a meeting; she was afforded the right of representation; and the respondent listened to, and took full account of, her explanation for having been suspended. In our judgement, the respondent was rightly concerned as to the claimant's attitude towards the suspension and her failure to recognise any fault on her own part or the seriousness of her situation. Mr Humphries concluded that the claimant's response was blasé; and, because of this, he had no confidence that the suspension was likely to be lifted at an early date. In our judgement, the respondent carried out a perfectly adequate investigation into the situation and reached reasonable conclusions.

52 What the respondent did not do was to attempt to gainsay the findings of HCPC. In this respect, in our judgement, the respondent acted entirely correctly.

It would have been quite wrong; and quite outside the respondent's jurisdiction; and outside Mr Humphries' knowledge or experience to attempt such exercise.

53 The respondent had no obligation to create a suitable situation for the claimant - temporary or otherwise. And to effectively suspend her from her substantive role, either generally, or into a re-deployed non-clinical role would have left the respondent with the claimant's position unfilled for an unspecified period. This was clearly undesirable from the point of view of service users.

54 In our judgement, in the circumstances, the respondent's decision to terminate the claimant's employment was clearly within a range of reasonable responses available. The position might have been different if, during the dismissal and appeal process, the claimant's attitude had been such that the respondent could have confidence that any temporary arrangements would have been for a short period only.

55 We also find that the respondent followed a conspicuously fair procedure compliant with its own disciplinary policy and the ACAS Code.

56 In these circumstances, in our judgement, even if the claimant had been time-served, we would have found that she had been fairly dismissed. Her claim for unfair dismissal would be found not to have been well-founded; and would in any event have been dismissed on its merits.

Race Discrimination

57 We find that the claim for race discrimination is entirely without foundation. The respondent's conduct towards the claimant was, in our judgement, entirely reasonable. There is nothing in it from which we could properly infer any racial motivation. The claimant's hypothetical comparator must be a white Clinical Psychologist in an identical position to her - namely having lost her HCPC registration with no expectation that it would soon be restored. In our judgement, there is no basis at all to conclude that such an employee would have been treated differently to the claimant.

58 Although the claimant relied principally on hypothetical comparators, she did assert that there were others whose registration had been suspended but had remained in the respondent's employment. We accept Mrs Griffiths's evidence that she properly investigated this assertion: she provided details of a white female nurse who was dismissed when her registration had been suspended by NMC; and of a white male nurse who was similarly dismissed but reinstated when his registration had been restored to him prior to his dismissal appeal hearing. The details of these potential comparators clearly shows that other

employees in comparable situations have been treated in exactly the same way as the claimant.

59 Accordingly, the claimant has not established before us any facts from which we could properly infer race discrimination. There is no shift of the burden of proof to the respondent. And the claim for race discrimination is accordingly dismissed.

60 For these reasons the claims are dismissed in their entirety.

Employment Judge Gaskell
23 April 2021