



EMPLOYMENT TRIBUNALS

Claimant: MR G YANEV
Respondent: Sussex Partnership NHS Foundation Trust
Heard at: London South via CVP
On: 4 – 8 March 2024
Before: EJ Harley
Mrs Alford
Mrs Carter

Representation:

Claimant: Mr M Wing, representative
Respondent: Mr J Jupp (Counsel)

RESERVED JUDGMENT

1. **The Claimant was unfairly dismissed by the Respondent. His claim is well founded and succeeds.**
2. **The Claimant was not subject to Race Discrimination and this claim is dismissed.**
3. **The claim of Harassment fails.**
4. **The claim of Victimisation fails.**

REASONS

1. The Claimant, Mr Yanev, was employed by the Respondent, Sussex Partnership NHS Trust, as a Senior Support Worker from 15 June 2015 until 21 February 2022. An allegation was made that the Claimant assaulted a service user by violently pushing him the ground. The allegation originated from a colleague who sent an email outlining the assault to a senior manager after work hours. Despite being a frequent source of complaints, the service user had not complained of an assault himself, at the time of the alleged assault or at any point during that day. One day later it was alleged by a manager that the service user spontaneously confirmed this allegation to him. The Claimant had complained about his colleague some months before, and just over one month before this incident registered concerns about his colleague coaching the service user in the making of safeguarding

complaints. The Claimant denied the assault, and still asserts this to have been a false allegation, motivated by revenge on the part of his colleague. The allegation led to his suspension, being disciplined and ultimately dismissed for gross misconduct. The Claimant states that the investigation into the allegation and the motivation for making was not sufficient, was not in accordance with proper process and was therefore unfair. He alleges that a comparable hypothetical white worker would not have been dismissed for such allegations and that his dismissal was on the grounds of his nationality. Mr Yanev claims that he was harassed by the service user from December 2019. The service user subjected him to frequent racial and homophobic insults. He complained to management but says that this was not acted upon. He complains that the dismissal was an act of victimisation arising from complaints made to the Respondent about the service user's behaviour which were not acted upon.

The Respondent denies any racial element to the allegations and says that the Claimant was fairly dismissed for assaulting the service user. It denies that third party harassment can amount to harassment under the Equality Act 2010 and contends that the dismissal was by reason of the Claimant's conduct and not for any other reason.

Issues

2. The issues were agreed at a case management hearing on 4 August 2023 attended by both parties. The listing was confirmed and a hearing timetable agreed with the Claimant's case to be presented first. The issues (amended to reflect a change in approach by the Claimant regarding comparators) are as follows:

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

1.1 The Claimant is of Bulgarian nationality and compares himself to a hypothetical white British worker.

1.2 Did the Respondent do the following things:

1.2.1 Dismiss the Claimant?

1.3 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else would have been treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

1.4 If so, was it because of race/ nationality?

2. Unfair dismissal

2.1 What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.

2.2 If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

2.2.1 there were reasonable grounds for that belief;

2.2.2 at the time the belief was formed the Respondent had carried out a reasonable investigation;

2.2.3 the Respondent otherwise acted in a procedurally fair manner;

2.2.4 dismissal was within the range of reasonable responses.

3. Harassment related to s.26 (Equality Act 2010 section 26)

3.1 Did the Respondent do the following things:

Service user acts

3.1.1 Did the service user say to/call the Claimant the following: 'fudge packer; golliwog; white nigger; black nigger; wog; Muslim pig; 'Go back to your own country! You don't belong here; 'You can't speak proper English you should be deported immediately!'; 'Why's the colour of your skin so dark?'; 'You shouldn't be in this country'; 'You are a terrorist from ISIS'; 'You must go back to your own Muslim terrorist country and eat your halal there'; 'You're radical islamist sent to kill me and my family; 'You should be detained, arrested and hanged immediately'.

3.2 If so, was that unwanted conduct?

3.3 Did it relate to race and/or sexual orientation?

3.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

3.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Respondent – Failure to act

3.6. Did the Claimant report the incidents to the Respondent on the following dates: 26th July 2019; 1st August 2019; 6th August 2019; 7th April 2020; 11th February 2021; 14th May 2021; 3rd July 2021; 4th July 2021; 13th July 2021.

3.7. Did the Respondent fail to act upon those incidents?

3.8 If so was that unwanted conduct?

3.9 Did it relate to race and/or sexual orientation?

3.10 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

3.11 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. The Claimant says that the Respondent's failure to act sustained a proscribed environment for him up to the point of his dismissal.

4. Victimisation (Equality Act 2010 section 27)

4.1 Did the Claimant do a protected act as follows:

4.1.1 In or around January or February 2020 the Claimant complained verbally to Michelle Butler about discrimination from the service user.

4.1.2 On 5th February 2020 the Claimant complained to Nicky Freebody about the service user as recorded in his supervision record.

4.1.3 In May 2021 the Claimant complained about the service user to Robert Ward.

4.1.4 On or before 21st December 2021 the Claimant wrote an email to Vicky Baker complaining about the service user's behaviour.

4.2 Did the Respondent do the following things:

4.2.1 Dismiss the Claimant

3.3 By doing so, did it subject the Claimant to detriment?

4.4 If so, was it because the Claimant did a protected act?

4.5 Was it because the Respondent believed the Claimant had done, or might do, a protected act?

Procedure

3. The case was listed as a five-day hybrid hearing before an Employment Judge and two panel members, with all but one participants appearing in person. It emerged that by an Order of 10 January 2024 (not included in the bundle) the hearing had been changed to a fully remote hearing. The panel were not aware of this change until the morning of the hearing. This case had previously been listed as a three-day hearing set for September 2023 but was vacated and relisted at the request of both parties.
4. The panel offered to accommodate any necessary adjustments but none were required. The panel were supplied with portions of electronic bundles prepared by the Respondents which comprised 805 pages, together with seven separate electronic witness statements (for the Claimant and six Respondent witnesses). The Panel were required to assemble these themselves into a functioning bundle on Day 1. Additional documentation was supplied electronically by the Respondents during the hearing and these were copied to the Claimant. Mr Wing was introduced as the Claimant's new representative - the EJ clarified that Mr Wing was appearing at short notice in the capacity of a friend, he was not a qualified lawyer but that he had extensive experience of the employment tribunal from a previous role and had agreed to assist the Claimant in presenting his case when no other representative was found. The Tribunal expresses gratitude for his assistance in this matter, and indeed to Counsel for his professionalism and assistance during this case.
5. The list of issues was confirmed at the outset of the hearing excepting the issue of comparators, where the Claimant's representative confirmed that he would seeking to establish a hypothetical comparator for the purposes of establishing racial discrimination. Counsel confirmed that one witness Nicola Freebody would no longer be attending as she was now unavailable. When this was later queried Counsel indicated that he had been instructed that this was due to a pre-booked holiday, which was booked when the case was listed for Sept 2023. We were advised that this meant that neither she nor her husband Tony Freebody, (the Investigation Case Manager) were now unavailable. In fact, Mr Freebody had never been proffered as a witness in this case. Mrs Freebody however had provided a witness statement which was signed and dated 23/02/2024 and served on the Claimant and the Tribunal. A timetable was confirmed and the panel spent the morning session reading the papers. In the afternoon the Claimant's case was opened, his statement was adopted, and he was cross examined by Counsel.

6. At the outset of Day 2 the Tribunal confirmed that the panel would only consider and read documents from the bundles to which they had been explicitly referred or to which the panel themselves had referred during their review of the materials. Later on Day 2 we heard evidence from the Respondent's witness Andrew Cole. On Day 3 we heard evidence from Rachel Walker, Robert Ward, Viki Baker and Kim Allen. All witnesses were cross-examined by Mr Wing and faced questions from the EJ and panel members. On Day 4 the Panel then accepted submissions from the Respondent and Claimant, (Counsel for the Respondent having helpfully provided written submissions to the ET, Claimant that morning) and the panel rose to consider and discuss the case.
7. This case was challenging as, unusually in a case where the quality of and approach to the investigation had been in issue from the outset of the claim, no witness statements were supplied by either the Case Manager (Mr Freebody), or the Investigation Officer he was said to have appointed (Helen Lacy). No reason was given for the absence of this evidence, and neither were proffered as witnesses at any point. As a consequence, Ms Lacy did not formally produce her investigation report. We were therefore without assistance in understanding the process Ms Lacy followed investigating this allegation, or the process followed in producing the final report countersigned by Mr Freebody. We saw no evidence confirming these officers' appointment. We secured oral evidence on their appointment from Andrew Cole, but this was less satisfactory than documentary evidence on these points
8. Issues arose here with the provision of evidence during the hearing. Remote hearings are a welcome development, as they allow hearings to proceed without requiring all parties to physically travel to one place. They only work however if all participants observe and respect the rules of the Tribunal and act in good faith. Despite asking witnesses to switch off mobile phones, to ensure that no other programs were running on the devices they used to join the hearing, and confirming that they were alone, the proceedings were disrupted when on two occasions a witness's evidence was interrupted by incoming electronic messages. In the session before lunch on Day 3, during questioning Mr Ward's screen froze immediately after we heard an incoming message alert. Panel members had already noted and alerted the EJ to the fact that Mr Ward was consistently looking down to his right when offering answers – he sought to reassure us that this was simply him looking at the copy bundle he had on his desk, which he showed us. After lunch Mr Ward assured us that there were no other devices running, or other programmes running on his computer. During questioning, despite these assurances another message was received, interrupting evidence, which Mr Ward claimed was as a result of the messaging service Skype running on his computer without him knowing it was on. The Tribunal explained that witnesses were to provide their own evidence without prompting or interruption and that it was not in Mr Ward's or the Respondent's interest to do anything to undermine his credibility. The repeated interruptions to Mr Ward's evidence from electronic communications had precisely that effect.
9. This case largely centres on the disputed assault which was alleged to have taken place on 4/7/21 and actions taken by managers on 5/7/21 (and after) in consequence of this allegation being made (although there are important events in the case which precede those dates). It was unhelpful that the Respondent's witness statements (for those involved in receiving the allegation, the fact-finding and the launch of the investigation) made no reference to their involvement in those processes on these dates. This meant that the Tribunal had to waste time establishing what it could from within the knowledge of the witnesses who were produced, so as to understand what actions the Respondent took in response to this allegation. This was unfair on the Tribunal, the Claimant and indeed on the witnesses, who found themselves addressing points on which they had not prepared. Parties should always bear in mind the overriding objective when approaching litigation. The parties should work together with the Tribunal to ensure cases can be progressed in an efficient and fair manner, and this includes

avoiding wasting court time by preparing appropriate witness statements. The Presidential Guidance on Case Management is instructive:

13. Preparation of witness statements helps the Tribunal to identify the issues and to ensure that the case is completed in the time allowed. ...

16. The witness statement***should cover all the issues in the case.*** It should set out fully ***what the witness has to tell the Tribunal about their involvement in the matter...***

17. The statement should be as full as possible because the Tribunal might not allow the witness to add to it, ***unless there are exceptional circumstances and the additional evidence is obviously relevant.*** (our emphasis)

10. We have made the following findings of fact on the balance of probabilities and based on the evidence we heard, statements we were served with, and materials from the agreed bundle to which we have been referred or to which we have turned in own deliberations. Where we have reached a finding where there was conflicting evidence, it is because we preferred that party's evidence. Where we have not referred to a matter put before us it does not mean that we have not considered it, merely that it was not relevant to our conclusions, or that it pertained to an issue not captured in the issue list.

FACTS

11. The Claimant is Bulgarian. He commenced work in the care sector in 2012 and pursued this as a career, attaining a Diploma in Health and Social Care in 2014. In June 2015 he commenced employment with the Respondent (an NHS Trust) as a Support Worker and progressed to the Senior Support Worker role by 2021. At the point of his dismissal he had been in the Respondent's employment for 8 years. At the time of the disputed event he had an unblemished work record and he has consistently denied the accusation made against him in this matter.

12. The Claimant's original employment contract of 15 June 2015 included the provisions on its disciplinary policy and made explicit that employees could be subject to summary dismissal in the event of gross misconduct and provides as follows:

"This policy incorporates the principles of natural justice in that the employee will have the right to know the allegation being made against them; a fair and proper hearing; as well as the opportunity to respond to these allegations. ACAS guidance has been incorporated into this policy which also complies with the Employment Rights Act 1996 (as amended) and the Equality Act 2010. It is expected that all employees behave in a manner that promotes good relations with their colleagues and managers. ...All employees are expected to bring to the attention of their manager or a senior member of staff the actions of a person or persons which might jeopardise the health, safety or welfare of a patient/service user or member of staff or the reputation of the trust."

13. In addition the Respondent has what it calls a "Dignity at Work" policy. Its guiding principles include the following statement:

"We are committed to improving staff experience and wellbeing, making sure our staff feel valued, supported and cared for... support staff even in difficult or challenging circumstances, facilitating decisions being made with transparency and impartiality.... (the Trust) is committed to creating a work environment free of bullying and harassment for all employees, where everyone is treated with dignity and respect and protected from harassment, intimidation and other forms of bullying at work. The Trust has a zero-tolerance approach to bullying, harassment and victimisation and is committed to tackling this at all levels of the organisation."

14. The Claimant was employed within the Respondent's Partnership Domiciliary Care Agency (PDCA). The PDCA is a specialist support service for adults with complex needs, learning disabilities and behavioural difficulties to live in the community. The service users present with a range of challenging behaviours. The Claimant helpfully identified that the stated aims of the PDCA are:

“...to provide a safe, high quality individualised support service in the community for adults with learning disabilities who have complex and high risk emotional/ behavioural difficulties which place themselves or others at risk of harm”.

We were not supplied with a Job Description by the Respondent, but it was described in their Grounds of Resistance as involving providing support to service users with learning disabilities.

15. At the date of the alleged incident the Claimant was based at Mayfield Court. Service users are housed there in self-contained studio flats under tenancy agreements. They are subject to the terms of a tenancy agreement which includes sanctions for unacceptable behaviour. Support workers enable the residents to live with a degree of autonomy and each user has a behavioural support plan, a crisis plan (outlining strategies to use when incidents occur) and individual risk assessments. In addition all users have Positive Behaviour Support (PBS) and a care plan. Support workers are required to follow these plans to provide structure for the service users, which by maintaining a predictable routine helps reduce stress and reduce triggers for behavioural issues. It was accepted by all that this was emotionally demanding and frequently difficult work, caring for vulnerable service users among whom were individuals displaying particularly testing behavioural issues.

16. With the exception of the service user at the centre of this case ('ER'), all other Service Users at Mayfield Court are subject to Deprivation of Liberty Safeguards (DOLS). The effect of DOLS is to deprive a service user of their liberty where they lack capacity to consent to their care and treatment, so as to keep them safe from harm. Unlike the other residents ER has mental capacity and was not subject to DOLS. Although ER has diagnoses for Autism, ADHD, Learning Difficulties, and Dyspraxia and has mental health issues, he was free to leave Mayfield Court unsupervised at will, and was given money to spend when he left the unit. ER had been living in the general community, but his care plan collapsed in Dec 2019, and he was assessed and accepted as a resident at Mayfield House. The qualifying criteria for the service were not disclosed to the Tribunal.

17. During the hearing we learned that this is a 'niche' service within the Trust which accepts people who other providers will not accept, and owing to the level of support they offer they are "expensive". We heard that the more support and challenge a user presents, the greater the cost of their care, so the more difficult the service user is, the more expensive they are to house. It was volunteered that the service tends to be "tenacious" in holding onto service users who might otherwise be passed on to other providers.

18. From the start of his tenure at Mayfield ER insulted staff using racist and homophobic terms, used extreme profanity and was verbally aggressive. He was also physically aggressive. By 4 July 2021, ER had also made 7 allegations of assault and rape against staff, 6 of which were withdrawn after being made (the remainder was neither pursued nor withdrawn). ER repeatedly expressed an intention to get members of staff sacked, including the Claimant. We saw recorded accounts of him spitting at staff, punching staff (one on the jaw), sexual touching, and he repeatedly roamed the building naked. He tried to hug, kiss and otherwise harass staff. ER was at the time 30 years of age, 6' 7" in height and weighed approximately 20 stone. In the six months prior to this incident ER was involved in 15 incidents of verbal or physical abuse towards staff and 35 "ABC" forms (forms documenting monitored behaviour)

were completed in respect of ER. Three of these involved the Claimant and described racial abuse. There is a reference in the bundle to one incident from 2019 involving ER having been reported to the police, and a reference to ER having been interviewed by the police about allegations that same year.

19. The Claimant was one of numerous staff subjected to ER's abuse. It was not disputed by the Respondent that ER was repeatedly and consistently subjected the Claimant to vile racial abuse, telling him among other things that he was "a terrorist", a "white nigger", a "radical islamist sent to kill him and his family", that he "should return to his own Muslim country and eat your halal there", and that "he should be detained, arrested and hanged immediately". Among recorded reports were one made for an incident concerning the Claimant and ER on 06/08/2019, which led to an Incident Report and ABC form being completed, with follow up conversations with ER, and for 04/07/2021 (the incident in question) where the Claimant (and others) completed an incident form¹ and in the aftermath staff were offered a "defuse" session, where the support worker is given an opportunity to discuss an incident and share their feelings, confirm the facts of what happened and consider what might have been done differently.
20. The Claimant was described by the Respondents (including during the hearing) as an excellent worker, valued and regarded as an exemplar for new recruits. During his employment he trained in Positive Behaviour Support, Prevention and Managing Violence and Aggression, and attained a Care Certificate in Safeguarding Vulnerable Adults and Children. He was described as "boundaried", and that this was a good quality in this environment. He could be relied upon to follow protocols and rules, and that his professional approach – complying with rules, following and applying his training - acted as a calming influence on service users in what was often a chaotic and unpredictable working environment. This working environment created pressures for staff, generating tensions. It emerged that there were tensions at times between the Claimant and some co-workers, who did not share or follow the same boundaried approach. The Claimant in turn had made a number of complaints about colleagues' "unboundaried" behaviours - that they failed to follow protocols, care plans, or professional behaviours, causing issues with service users' care and behaviours.
21. The Claimant was initially managed by Nicola Freebody. Mrs Freebody has worked for PSCA for 28 years. She was then promoted passing his management to Robert Ward. Mrs Freebody remains in this management chain, now two levels above Mr Ward. Part of the management of Senior Support Workers involves their receiving regular supervision sessions with their manager. Supervision is regarded as an important element of the working pattern, providing support for workers performing an extremely demanding role, giving them an opportunity to raise issues, including issues arising with service users or colleagues. These sessions were supposed to occur every six weeks, but managers did not diarise them and their frequency dropped under Mr Ward. The discussions were supposed to be captured in writing by the manager and the record signed by both participants. We were only supplied with four records by the Respondent for the entire tenure of the Claimant's employment. As a result of the Respondent's failure to maintain a regular schedule, sessions became, for the Claimant, sessions by request. The Claimant requested sessions ad hoc as he required them, but not beyond the expected frequency for a support worker at his grade.

¹ Claimant's Incident Report completed on 7/7 and erroneously identified the date of incident as 03/07/2021.

22. Mrs Freebody did not attend the hearing, but we were supplied with her statement which the Tribunal had read in advance. As some materials she produced were referred to, we have considered her statement to a limited extent for context.
23. Mrs Freebody described the Claimant in her statement as “needing quite a lot of support” and volunteered that “he had a number of issues with other members of staff which were often raised in these individual supervision meetings”. It was therefore surprising that we were supplied with just one record from 5 Feb 2020 of Mrs Freebody recording the Claimant complaining of other colleagues’ behaviour. Mrs Freebody promised to look into this complaint but again there is no record of her having done so. In the session the Claimant complained of the effect of another colleague not following protocol which led to ER not following his routine. Later Mrs Freebody suggested she had no recollection of the Claimant raising specific issues regarding ER, but records that at the end of June 2021, she took the decision that the Claimant and ER would not work together, on the basis that ER had told her that he did not want to work with four members of staff including the Claimant. She emphasised that this change was at ER’s request. Mrs Freebody was at that point a Grade 5 Line Manager. We saw no record of this decision in the bundle, or of the conversation she had with ER. There is no indication that Mrs Freebody alerted the Claimant, either to ER’s antipathy towards him - which had risen to the point he refused to work with him - or that she had assured ER he would not have to work with the Claimant. The Claimant denied having been made aware of this significant change and in the absence of Mrs Freebody’s evidence to the contrary we must accept his account.
24. Mr Ward stated in his statement that “he recalled that the Claimant liked regular supervision sessions” and like his mentor Mrs Freebody, sought to state that he “had issues ...in relation to professional relationships with other staff members, which he would regularly bring up in supervision sessions”. While he recognised his abilities, the value of his work in creating a calm and regularised environment, and that he regarded their relationship as professional Mr Ward volunteered in evidence without prompting that he did not particularly like the Claimant, which was remarkably candid.
25. On 14 February 21 the Claimant made a complaint about a colleague Andrei Morosanu (the accuser of 4/7/21) to Kim Allen, another senior manager, copying in Mrs Freebody. The complaint concerned an incident when Andrei Morosanu (a Senior Support Worker peer) had repeatedly interrupted a supervised contact telephone call between a vulnerable service user and her family four times in order to attend to an administrative task. He described Mr Morosanu making unprofessional and sarcastic remarks in front of the service user’s family, to whom the Claimant was providing feedback on her progress, causing distress to the service user. Ms Allen responded on 15 Feb confirming that she would raise this with his (Mr Morosanu’s) manager and further confirmed that:

“...I am aware that there has been previous issues/ concerns raised between both of you and would like to find a way forward , to ensure a professional relationship between all staff members which would help to ensure the smooth running of all shifts”.

The Claimant replied and confirmed a previous occurrence where Mr Morosanu again interrupted another family contact session. He outlined that Mr Morosanu behaved in a high-handed manner when acting-up as a shift lead. Kim Allen approached Mr Morosanu to arrange a three-way conversation to explore any issues, but Mr Morosanu refused to participate. Mr Morosanu was therefore on notice from Feb 2021 that a complaint had been made about him by the Claimant.

26. The Claimant had a supervision session with Rob Ward on 28.05.21 where the Claimant related a new concern - that service users were being informed how to get staff sacked by

making safeguarding complaints. He reported that a service user warned him that another staff member was 'on GYs (Claimant's) case'. He informed Mr Ward that this was a repeat of a similar previous occurrence with another service user, involving the same member of staff. The note concluded: "RW will discuss the above with line manager and feed back to GY". Mr Ward's note did not name the service user or the colleague, but we established that Mr Ward was told by the Claimant that the service user was ER, and the staff member was Andrei Morosanu. Mr Ward's line manager at the time was Mrs Freebody. Mr Ward told us it was his practice to email such matters to his manager in order to capture issues in real time. No such email was supplied but we are satisfied that Mr Ward advised Mrs Freebody of this complaint on, or shortly after 28 May. No feedback was given to the Claimant on the outcome of this complaint, but we note Mrs Freebody volunteered that she acted to stop ER and the Claimant from working together from June. By this stage Mrs Freebody was sighted on two reports of complaints from the Claimant concerning Mr Morosanu (this one, and the report to Kim Allen from Feb 21 to which she was c.c.'ed).

27. An incident occurred on 4/7/21 at 10:03am involving service user ER and staff and was recorded as per the prescribed Incident Reporting process by Chris Salmon, a Band 4 Assistant Team Leader on duty that day. The references in Mr Salmon's report to Person 1 are to service user ER². Also named and relevant for these purposes are Christina (Chrissy) West (she like the Claimant was a senior Support Worker - person 3 in the narrative), the Claimant (Person 4), and Mr Salmon (person 5 in the following narrative):

Person 1 had been settled but became anxious and came to the office having seen person 2 enter the office. Person 1 demanded from person 5 that they provide a money top up and their meds refilled. Person 1 barged in and called person 2 a "fat bastard" and punched them lightly in the stomach. Person 3 told person 1 to return to the flat. Person 1 started shouting abuse at staff and demanding their money be topped up and their meds be topped up. When person 3 approached, person 1 grabbed them by the throat. Person 3 used friendly come along to escort person 1 back to the flat. Person 1 stayed in their doorway and spat at persons 2, 3, 4 and 5 hitting person 3 on the arm and threatening to kill person 3 and break their arms and legs. Persons 2, 3 4 and 5. returned to the office. Person 1 followed after and banged on the office door for approx. 10 Minutes, shouting abuse and threats at staff. Person 1 slammed their own door and the fire door persistently causing pieces to fall from the framework and other service users to become unsettled. At 10:20 person 1 returned to the office naked saying that they had broken their meds dispenser and passed it through the door to person 3. Person 3 told person 1 to return to their flat and not to come back out undressed. Person 1 saw person 5 behind person 3 and called them a "black terrorist", a "nigger", and to "go home". person 1 returned to their flat. Damage was done to meds dispenser and to frame of fire door in communal hallway. Possible damage to own door frame.³

This report was entered on 4/7/2021 at 10:31 and captures the incident time as 10.03. To note, the usual early shift pattern for Senior Support Workers was 7am to 2.30pm.

² The report in fact identifies ER as person 2, and a staff colleague as person 1, but it is clear that this was in error.

³ The first floor of Mayfield Court comprises a staff office, a toilet and three studio flats: 3, 4, 4A. Flats 3 and 4 are situated either side of the hall at the entrance to the floor. Flat 4 was ER's, Flat 3 was AW's flat – the Service User being attended to by Mr Morosanu on 4/7. Their doors are 55mm insulated fire doors and approximately 2.8 meters apart. The length of the floor is approximately 3.9 meters and at the end of the floor is Flat 4A, with the office and a toilet on either side.

28. On the evening of 4/7 an email was sent at 19:52 from Mr Morosanu to Mrs Freebody. It was sent from his private email to her work account. This was over five hours after the early shift had ended. It stated as follows:

Subject: Concern physical abuse // incident ER

Hi Nikki,

Today was a serious incident at Mayfield.

ER has been unsettled in the morning, shouting, slamming doors, verbally and maybe physically abusive with staff. The whole incident started earlier but around 10:15 am, ER tried to enter the AW flat, but the door was locked so he went to the office door and he slammed the door with his palms and tried to get inside but as well the door was locked. I was ready to intervene to help my colleagues in case they asked for help and I began to look through the AW's door sight. After a couple of seconds I saw ER heading, slowly walking to his flat, facing the entrance and almost entering the flat when I was shocked to see GY coming from running and pushing ER with both hands so hard that ER collapsed to the floor in the hallway just behind the front door. In my opinion this is physical abuse and is my duty to report.

Physical force should not have been used as ER was walking in the direction of his flat, almost entering his flat. I don't have the whole picture of what happened before but at that moment ER didn't attack anyone, it looks like GY has lost his temper and wanted to punish ER for his behavior (sic) hitting and pushing him. I saw CS after a couple of seconds, maybe he or CW who supported ER in the morning were around and they can give more information if they saw GY during this physical intervention. I could only see in front of ER's door, not in the direction of the office. Besides IR and ABC if were made, I'm pretty sure that ER has bruises or marks on the back close to the underarm area, as well as on the right shoulder blade. These marks can only be explained by the application of a very strong force and completely unnecessary. No form of physical intervention can explain by hitting and pushing with such force from the back. Of course, you can find more info directly from ER when he is able to speak calmly. Our job is to provide a good quality of life for our service users not to physically abuse them and intimidate them when they display challenging behavior (sic). I would like to ask you if you can save this info/e-mail in a safe place without being seen by Band 4, I need to tell you that I'm worried about GY's reaction if he found out that I expressed my concerns regarding this serious incident. Nobody knows I saw the incident because I was behind the AW's door and I did not talk with anyone. Maybe GY acted that way because he probably knew no one sees. I don't know if my worries are relevant but I'm just sending you what I saw.

Don't hesitate to contact me if you need more information.

Thank you,

Andrei

29. In reporting this incident in this manner Mr Morosanu failed to follow the proper procedure for reporting such an incident, which would either be to create an Incident Report as soon as possible after the incident, or, as a minimum, advise the Duty Manager at the end of the shift at 'handover'. Mrs Freebody helpfully described the Incident Reporting process for us in her statement. If issues arose on a shift with a service user:

“...the correct process was to complete an incident form. Even when a staff member had not opted to fill out an incident form, they are required to complete the handover notes at the end of the shift. If the notes are reviewed and something is included that suggests it would be appropriate to fill out an incident form, then the staff member will be asked to complete one.”

In the absence of any evidence on the points from Mrs Freebody, Mr Freebody or Ms Lacy the following events have been reconstructed using evidence from Mr Cole, Mr Ward and documents supplied.

30. Andrew Cole (General Manager for Learning Disability and Neurodevelopmental Services) received a telephone call from Mrs Freebody on the morning of 5/7 advising him of this allegation. We accepted Mr Coles account that he was not advised by Mrs Freebody of the identity of the person making the allegation, nor did she disclose the coaching allegation or the previous issues between these two colleagues to him. Mr Cole asked Mrs Freebody to conduct a ‘Fact Finding’ involving the service user. Mrs Freebody called Mr Ward at Mayfield House and asked him to approach ER to find out what happened and to relay that back. Mr Ward went to see ER. Mr Ward recorded in an email later that day that ER had said:

“...I needed to sack George as he is an Iraqi bully. ER then said that ‘George pushed me yesterday and I fell on the floor’.”

31. Mr Ward telephoned Mrs Freebody to relay this account. Mr Cole received a call from Mrs Freebody passing on what had occurred, and Mr Cole directed that an investigation should commence. Mr Cole confirmed in evidence that he appointed Tony Freebody (Service Manager, Mrs Freebody’s husband) as Case Manager, and he had directed both Mr and Mrs Freebody to a HR officer called Christine Sage for assistance. Mr Cole indicated that Mr Freebody appointed Helen Lacy (Deputy Service Manager) as Investigation Officer. While it is evident from the emails we were shown that Ms Lacy was involved from 5 July there is no reference to Mr Freebody being involved in any communications at this point of time. There is no evidential trail covering the appointment process. The first evidence we saw of Mr Freebody’s involvement in terms of the investigation (as opposed to his correspondence with the Claimant about his suspension and highlighting options for support) was his correspondence on the revisions to the report from November 2021. We note that this oral account contradicted Mr Cole’s statement of 27/2/24 which indicated he had no further involvement after ‘being made aware’ of the incident in early July. He did not disclose his interactions with Mrs Freebody on 5/7, or his role in having someone dispatched to secure confirmation from ER, or his role in appointing Mr Freebody. His statement describes Ms Lacy receiving ER’s statement from Mr Ward, as if this was a separate event, when in fact Mr Ward was confirming the account given to Mr Cole earlier, which triggered the investigation Ms Lacy later undertook (see 32.)

32. Mr Ward sent an email that morning to Helen Lacy capturing his account of an exchange with ER. This is dated 10:31 and is as follows.

“Good morning Helen,

With reference to what was discussed with Nikki earlier this morning;

Upon ER getting up this morning at 09.57, he was heard in the hallway calling for me (Rob Ward) to say good morning. As ER was naked he was asked by Alan Dyer to go back into his flat and put some clothes on, and I would say hello to him once he was dressed. I knocked and entered ER's flat at 10am and he immediately tried to hug me. ER was verbally asked not to hug, he stopped and we fist bumped instead.

ER then said that I needed to sack George as he is an Iraqi bully. ER then said that "George pushed me yesterday and I fell on the floor". I hadn't mentioned any staff members names or asked any questions about previous day's events at all, this was the second thing ER said to me after entering his flat and was completely un-prompted. ER was quite anxious this morning about his broken meds dispenser and shopping so was moving from subject to subject and said nothing else about GY. I was able to visually check ER's back and saw no apparent marks." (our emphasis)

33. This e-mail makes no mention of the initial command from Mrs Freebody to Mr Ward to speak to ER, disclosed by Mr Cole. Mr Ward's live evidence, following on from Mr Cole's evidence the day before, was - contrary to this account – that he went to see ER having been called by Mrs Freebody, she had instructed him to "go in" and speak with ER and to ask non leading questions to discover what had happened the day before. He confirmed that he was accustomed from training to ask non-leading questions, such as "How was your day yesterday?". We are satisfied that this was in fact what had occurred here, and that this was what prompted the statement from ER.
34. Mr Ward did not create an Incident Report to capture his receiving an allegation, nor did Mrs Freebody advise him to, nor did she register the incident herself, nor did she ask the Duty Manager to do so. Mr Ward did not check to see if a report had been created independently. He did not share the allegation that the service user had suffered an assault with the Duty manager. This failure to report this safeguarding incident was not remedied until 7 July when Mr Morosanu created an entry outlining the alleged assault on the system, 3 days after the alleged event.
35. At around lunchtime on 5/7 the Claimant was contacted by Helen Lacy to advise him that an allegation had been made. Miss Lacy initially refused to provide him with any details of the allegation but then confirmed the allegation concerned ER. The staff under management authority used WhatsApp for the purposes of arranging shifts and discussing administrative issues. The Claimant messaged Mr Ward to ask him if he knew who was raising allegations about him assaulting ER. Mr Ward, as his manager, expressly denied any knowledge of or of any involvement in this issue. This was untruthful.
36. On 7/7 Andrei Morosanu created an Incident Report for the alleged assault having previously expressed himself unwilling to do for fear of the Claimant or his managers discovering he had done so. There is no evidence to explain why his attitude changed, or if he was instructed or persuaded to do this. He summarised the allegation, as per his initial account. The report is subsequently marked as 'completed' by Ms Lacy (meaning it was closed for management purposes). All additional entries apart from Mr Morosanu's were entered on 20/8 between 14:53 and 14:54 and give details of the fact finding and included entries under 'Senior Management Comments or Actions'. These include the statement that the service user was 'pushed with such force as to leave red marks on the body', then 'red marks were observed on the service users body but no visible bruising'. No witness described or recorded marks apart from Mr Morosanu. The first-time red marks were mentioned was in the interview with Mr Morosanu (see below) chaired by Ms Lacy on 16/7. As all these additional details were added within two minutes on 20/8, and the only other person on the record was Ms Lacy, it must be concluded that these evidential entries referring to red marks were in fact made by Ms Lacy, the Investigating Officer.
37. Mr Freebody informed the Claimant on 7 July that as a result of the allegation the Claimant would be put on restricted duties, but not suspension. The Claimant had a supervision session with Mr Ward on 10.07.21. Mr Ward refused to discuss any specific aspects of the incident with the Claimant, including the identity of the complainant, citing confidentiality.

38. On 12.07.21 the Claimant called the police to report an incident involving ER racially abusing him while he was off duty with his children in town. On 01.08.21 the Claimant had a supervision session with Rob Ward to discuss this matter, but Mr Ward told him he would be unable to discuss this “due to the issue being around another Band 4. RW confirmed ...that RW would be unable to discuss”. He complained of the lack of support from management and RW records that rather than him arranging support it was left for “GY to contact Line Manager Monday due to RW’s inability to discuss”.
39. On 27.08.21 the Claimant was suspended on full pay. On 14.12.21 the Claimant wrote to Viki Baker (Associate Clinical Director) for support, outlining the history of the appeal, that the complainant had stated to colleagues he was taking revenge on him, describing the incident of 12/7, and raising doubts about the investigation – that having worked with Mr Freebody - he doubted Mr Freebody’s willingness “to consider the actual evidence, facts and details so the case will probably go on hearing”. Ms Baker immediately forwarded the email for advice to Andrew Cole, Jo Russell (HR Advisor) and Rachel Walker. They correspond on the topic and Mr Cole proposed a strategy which it appears was adopted without demur.

The Investigation

40. The Investigation was conducted by Investigating Officer (IO) Helen Lacy. Under the Disciplinary Policy the IO was required to determine the facts of a case and report back to the Case Manager (CM – Mr Freebody), to meet with the CM at the outset of the investigation to agree the terms of reference, to develop terms of reference and an investigation plan and get it signed off by the CM, to provide regular updates on progress to the CM and the Senior HR Advisor (SHR), and to escalate any additional allegations or concerns that emerged to the CM and SHR including any issues of delay. We saw no records of any interactions between the IO, CM or SHR regarding the conduct of the live investigation, apart from addressing queries regarding delay and rectifying the report in response to challenge from the Claimant’s representative during Oct/Nov 2021 (after the initial report was closed).
41. Ms Lacy records that “the initial fact-finding concluded on 5/7”. The initial fact finding amounted to what was done by Mrs Freebody (communicating the allegation to Mr Cole, and arranging for Mr Ward to question ER), and Mr Ward (questioning ER, sending Ms Lacy an email outlining account). No further fact-finding is recorded as having occurred at this point.
42. On 16 July Ms Lacy conducted a witness interview with Mr Morosanu, assisted by HR advisor Christine Sage and a note taker. The key points for our purposes were that Mr Morosanu remained inside his service users flat throughout the incident and after and he did not emerge to assist the service user or his colleagues, or to challenge the alleged assailant. The spy hole he looked through to see the events had no peephole/spy-glass lenses, so he had been looking through an unmagnified, unmoderated spyhole in the door. He described a completely naked ER coming in and out of his flat, and that ER was naked during the incident. He saw ER go to the office and heard him slamming the door with the palms of his hands. ER returned to his flat and he saw the Claimant running and then jumping to push ER with both hands, with force, from behind. ER fell into the floor of his flat. Mr Salmon approached immediately after the incident. ER got up and approached GY swearing at him, repeatedly asking why he pushed him. The naked ER was shouting and asking the Claimant this same question for 30 minutes. He described seeing two red marks on ER’s back – a large red mark close to the underarm, one on his shoulder blade. The marks were clearly visible on ER’s back. He confirmed he later reported the matter to Mrs Freebody. When asked why he failed to raise what you had seen immediately with the shift lead on the day? He stated he “was nervous reporting a serious incident”, “sometimes I feel I am not listened to so, I report to upper management. I did not inform the shift lead that I reported it to

management". "I'm very sure everyone heard ER shout about this incident. The marks were visible on his back. I thought CS was sure to have seen the marks on his back."

43. On 21 July the Claimant was interviewed by Miss Lacy, again assisted by Ms Sage and a minute taker. The Claimant was accompanied by John Ottley a union representative. The Claimant was informed of the allegation, but not the identity of the complainant. No specific details of the allegation outlined in the allegation email were disclosed or put. No mention was made of the email from the accuser. Having been given the bare details (the allegation being that he had pushed the service user over causing him to fall into his flat doorway) he was asked for his response, and to talk them through the shift. He explained he was working a service user in Flat 4A. They had completed the first part of their day, and he was due to take the service user to the shops. He observed ER behaving in a loud and aggressive manner in the communal hall. He went through a floor access door leading to the office and tried to calm ER. ER spat in his face and ran off round the corner towards his flat door. The Claimant went to show Mr Salmon the spit, wiped his face and walked to ER's flat. He found ER sitting on the ground, the door was ajar, and he was sitting with his back to the wall. The user abused him verbally. Mr Salmon and Ms West had approached. ER was wearing underwear, and trousers, which had fallen beneath his waist but above his knees. ER stood up, shouted abuse and went to push him, but Mr Salmon intervened, leading him into his flat. He had no physical contact with ER. He advised Ms Lacy that had he pushed the user from behind the user would have fallen forward on his front, not backwards, landing with his back to the wall. He complained that he was frequently racially abused by ER including in public, when arriving for work, and on one occasion in the community when he abused himself and his children. Ms Lacy confirmed that "PDCA is aware that his is frequently targeted by Service User ER, and this is being monitored."
44. On 28 July a witness interview was held with Chrissy West. She confirmed the general account of the earlier incident recorded by Mr Salmon, then reported hearing a bang and leaving the office. She said she "...saw ER on the floor of the hallway, struggling to get up." She did not see him fall, or a push. She related that "...by the way ER landed it looked like he fell backwards." She stated she "...heard ER asking 'why did you do that?'... ..ER was saying this to Senior Support Worker, GY (*the Claimant*)." She confirmed the Claimant was standing in the hall observing ER. She was "...pretty sure (ER) was dressed. He was definitely not naked". She is then reported as having said: "It looked like he had been pushed. His back was against the ~~door~~ WALL" (*her correction*).
45. On 28 July 21 a witness interview was held with Mr Salmon. He confirmed that his Incident Report of 4/7 was completed "before ER's fall". He described the earlier incident, he confirmed GY working with the other service user, and that he was concerned that ER calm down before proceeding with his service user. He reported ER "banging and shouting", he came out of the office, recalled ER getting up, shouting that "...a member of staff looked like an Iraqi terrorist and that some staff were too fat to work here". He confirmed he spoke to ER that day about his behaviour and events of the day.

CS: Yes, I did. ER persisted to talk to me about what had happened the day before (i.e. 3 July). I wanted to talk to him about that day (Sunday 4th July 2021). ER was preoccupied about the day before. He had said that he wanted Senior Support Worker MO dismissed.

HL: Did Service User ER raise anything about being pushed?

CS: No he didn't. I don't believe he did.

46. For reasons unknown Miss Lacy wrote to Robert Ward on 4 Nov, attaching his email of 5 July, asking him to confirm the following:

“This is the email you sent me the day after the incident. Can you just confirm ...Had Nikki already spoken to you about the allegation before you went into ER? Who did you contact after ER spoke to you and disclosed the allegation below? Did anyone else hear ER's statement? Alan maybe? Or were you on your own? How did ER appear when he said it and did he refer to it again during the day? Sorry for all the questions.” (*Alan Dyer, another Senior Support Worker, who was attending ER on 5/7)*

He responded:

I had spoken to Nikki regarding an accusation that had been made against GY that morning, as I was based at Mayfield court. I was asked to go and speak to ER by Nikki without asking any leading questions. As it happens I didn't need to even ask about it as it was the first thing ER said to me, as mentioned in my original email. ...I cannot recall if Alan was in the immediate vicinity when ER and I spoke unfortunately.. I contacted Nikki by phone immediately afterwards and relayed what ER had said to me regarding the accusation that was made. Nikki asked me to email you following our conversation.

ER asked me several times during the morning and early afternoon if GY would be working with anyone in the building that day. He then asked me several times if GY was working the night shift once the afternoon staff came in and were supporting their service users. ... I had no opinion on the matter at the time as I understood that I was simply fact finding, following instructions from my line manager and following correct procedure. I am aware that ER has a history of false accusations but at the same time he appeared (to me) to be anxious about seeing GY again.

47. The bundle included an email from Mrs Freebody to Miss Lacy from 16 Nov, forwarding Mr Morosanu's email of 4 July evening, outlining the accusation. The covering text simply states: "As requested". There is no context offered, or chain of correspondence contextualising Miss Lacy's request or Mrs Freebody's response. We must therefore conclude (in the absence to any reference to this document earlier in Ms Lacy's investigation) that this was because Ms Lacy did not have it before 16 November. This makes sense, as the details in the account were not put to any of the witnesses.

Investigation Report

48. The report was produced and issued in early October. We have not been supplied with the first version of the report. On 12 October the Claimant's representative contacted Mr Cole and the SHR to challenge omissions from the report including the lack of a floorplan, Incident Reports for the day in question, and for earlier incidents where ER made false accusations. He accused the investigating officer of withholding evidence and failing to pursue legitimate lines of enquiry. We saw no evidence of the internal approach taken to respond to these challenges by the IO, CM or SHR.
49. The process of producing the revised report including the hand-drawn floor plan, photos of the doors, and Incident Reports added approximately 7 weeks to the process. Ms Lacy produced her final report on 17 November 2021. We were not supplied with her version of that report, submitted to the CM (Mr Freebody). We were supplied with the version countersigned by Mr Freebody, on 21 November. We are therefore unable to confirm, in the absence of evidence from either of them, what changes if any occurred to the report, between 17 and 21 November. However, what is clear is that Mr Freebody presented the report having asserted that he had reviewed the report and its attachments and declared the report to be a reasonable investigation. Under the Disciplinary Policy the CM has overall

responsibility for the case, must ensure that all alternatives have been fully explored to ensure the matters is being dealt with in the most constructive way and in accordance with just culture principles, and ensures that the investigation proceeds in a prompt manner. The report was issued to Andrew Cole on 23 November (4 months and three weeks after the incident) and the final version was not sent to the Claimants representative until 30 November, losing one more weeks' time in the process, taking the period to almost 5 months).

50. While the report includes typed summaries of witness interviews produced by the Respondents we saw no handwritten interview notes, and no email exchanges or telephone records showing investigatory actions or efforts made by the investigator, aside from the exchange between Miss Lacy and Mr Ward dated 21/11/21, Mrs Freebody's email of 16/11/21, and emails involving Mr Freebody and Mr Cole updating the October report in response to the representative's points. The report stated all witnesses were interviewed. There is no explanation or rationale offered as to why ER was not interviewed, nor is an explanation is offered for the failure to interview Mr Ward. Neither is listed in the box marked "persons not interviewed".

It states:

Verbal comments made by ER on Monday 5th July 2021 to Rob Ward, assistant team leader, stating that GY had pushed him the previous day and he had fallen on the floor. Rob then submitted this in an email.

This account omits the first two clauses of ER's statement: (You have to sack George. He is an Iraqi bully.).

51. Ms Lacy then produces documents she has referred to including her typed interview notes and summarises key points from the interviews. She states that:
- a. Mr Morosanu heard ER shouting accusations at GY, (omitting he alleged this to have lasted 30 minutes).
 - b. She states that the Claimant indicated ER had his trousers round his knees "causing him to trip and fall". There was no mention of the Claimant suggesting ER tripped in either the interview note she produced or the version the Claimant produced, or of him offering any explanation for ER's being found on the floor. He simply confirmed he had not seen a fall. This reference to tripping is introduced first here.
 - c. She states that Chrissy West saw ER on the floor *shouting* at GY saying: "you'll get sacked for that, you can't do that". In fact the notes, signed by Ms West who corrected other pieces of text, clearly record her as saying she heard: "...ER *asking* 'Why did you do that?'"

52. Ms Lacy goes on to create a grid, in order to examine discrepancies in the accounts, including the omission at a. and the false quote at c. above.

Among these captured are:

- Clothing (only Mr Morosanu says ER was "completely naked" at the time of the incident and throughout, the others say he was clothed at the relevant time).
- Marks: Mr Morosanu says ER had red marks on his skin. She does not capture that both Mr Salmon and Mr Ward state that they saw no marks on his skin (Mr Salmon at the scene, Mr Ward the next day, having examined him for marks).

- Shouting: Mr Morosanu is quoted stating ER was shouting after the incident (again omitting his reference to 30 mins). Mr Salmon (duty manager) reported he in fact settled down and went quietly to his flat, and she again misstates Ms West's account: she is said to have described ER shouting "you shouldn't do that, you'll be sacked for that" rather than asking "why did you do that".

49. Ms Lacy goes on to state that

"On 28th May 2021 he (the Claimant) raised a concern about a service user making allegations. This refers to the incident form completed on 9th May in which a member of staff reported an allegation that ER had made against GY and one other member of staff. This was looked into fully and objectively. On speaking to the service user as part of the fact finding, he said that the allegation wasn't true."

This refers to the account in the Supervision Record of 28/5 made by Mr Ward. In fact, that typed account, which Mr Ward confirms is correct, while arising from service users allegations clearly refers to and concerns an allegation being raised *against a colleague*.

"He is of the opinion that service users are being informed about what would happen to staff in a safeguarding situation and he was told by the service user that another staff member was 'on GY's case' ... George is concerned as this appears to be a repeat of a similar occurrence with another service user, with the same member of staff involved."

The Supervision Record, despite being referred to in the report by Ms Lacy, was not included in the investigation report bundle.

50. Ms Lacy proceeds to say the following:

Although ER made initial comments to RW on 5th July 2021 he has not spoken about it since and when asked says he cannot remember but has not said it was untrue.

There is no evidence as to who spoke to him, or when, or in what context. The report in fact confirms that ER had not been interviewed at any point. (The significance of him not remembering the assault is never developed. There is no suggestion that ER has memory loss, or any form of memory impairment).

RW followed the correct procedure upon receiving this allegation from ER by reporting back to the Deputy Team Leader and documenting what ER said as soon as possible. This was then sent to the Deputy Service Manager.

This appeared to be an attempt to address the Safeguarding failure here. Mr Ward was not in fact volunteering a safeguarding report - he was following an order to fact-find and providing information confirming a report she had already received. Having done this however at that point a Safeguarding report, given no such report had by that stage been recorded, should have been completed. Mr Ward was a Grade 4 Team Leader, Mrs Freebody was at this point a Grade 5 Line Manager. Neither of them followed safeguarding processes as they both failed to record this allegation (which by now, taking these communications at face value amounted to two separate reports of an assault). There is no evidence that the DSM (Ms Lacy fails to make clear that this was herself) did anything about this either. Further:

The difference with this allegation to others made by ER is that he has not retracted it and that it has been witnessed by another member of staff.

We will return to this point. Ms Lacy then notes that Incident Forms were not completed by the Claimant and Mr Morosanu until 3 days after the incident. She notes the following:

RW has also reported that ER asked numerous times during the day on the 5th July whether GY would be working with anyone in the building that day or on a night as he appeared anxious about seeing GY again.

The report omits that this evidence was supplied by Mr Ward in November, four months after the event, rather than being contemporaneous to the event in question. Also, despite asking Mr Ward had Mr Dyer heard the exchange with ER, or if ER had mentioned the incident again (which Mr Dyer would have been best placed to answer, as his allocated Support Worker that day), Mr Dyer was not interviewed. The Report was adopted by Mr Freebody on 21 November. He stated that he reviewed the report and all appendices. He cites as support for the allegation the (false) statement that another witness heard him shouting "you shouldn't do that, you'll be sacked for doing that"; the partial quote "George pushed me yesterday and I fell on the floor"; and ends with the assertion that unlike previous allegations, the service user has not retracted this allegation.

Disciplinary process

51. The Claimant was invited to disciplinary hearing for 17/2/22, over seven months after the alleged assault, by way of a letter dated 20 January 22. The letter was supplied in the bundle. It outlines that Mr Cole would chair, accompanied by Jo Russell (HR), while Mr Freebody would present their case. It confirmed that dismissal was one potential outcome, that he could be accompanied by his rep and was provided with a copy of the disciplinary report, It confirms that notes of the hearing will be taken but in place of a name leaves the entry for the name as "XXX". More importantly, with regards to witnesses the letter reads:

"The Case Manager will/will not be calling any witnesses to the hearing, (sic.)"

There is no indication that this was ever rectified or that the identity of the witnesses being called was communicated to the Claimant or his rep in advance of the hearing. The hearing took place and included evidence from Mr Morosanu and Mr Salmon. The Claimant supplied a submission in advance of the hearing which included supervision notes and photographs of the view visible through the spyhole in the door for Flat 4.

53. Mr Cole confirms that he was supplied with the investigation report and appendices in advance, the Claimant's submission and attachments and that he had reviewed them. He specifically cited the matrix containing the inconsistencies and incorporating erroneous information. Mr Cole does not identify the errors despite having reviewed the supporting papers. In his account of his deliberations he states that he was 'aware that he had two accounts which supported the allegation that the Claimant had pushed the service user'. His initial statement, dated 27/2/24 records that:

'The Claimant had said that the service user had tripped, he did not expand on this at all and put forward very little information to support this'.

He sought and was permitted to revise the first part of the sentence during the hearing, after the Claimant had been cross examined, so that the sentence now read:

'Although the Claimant had said he had not witnessed how the service user went to the floor, he did not expand on this at all and put forward very little information to support this'.

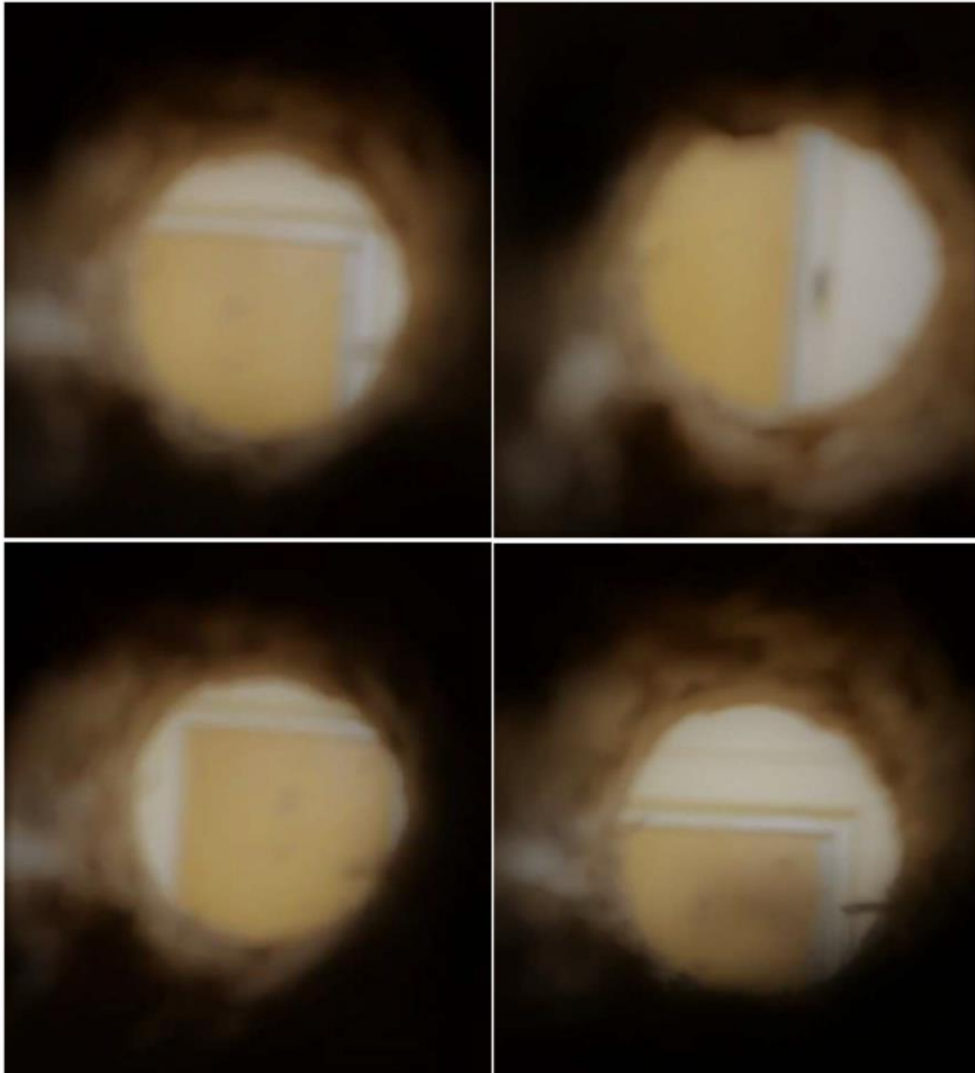


Illustration 1. View through spyhole, Flat 4, from Claimant's submission to Disciplinary Panel.

54. The hearing took place, with the Claimant being accompanied, assisted and represented by his union representative John Ottley. After adjourning to consider the evidence provided he decided that the assault had occurred and that the Claimant would be dismissed for Gross Misconduct, he would be dismissed with effect from 17 Feb 2022, would receive no pay in lieu of notice and would be reported to DBS. The letter issued on 22 Feb 2022.

Appeal Process

55. On 25.02.22 the Claimant indicated appeal against decision, and an appeal hearing was held on 11.04.22, chaired by Rachel Walker, who was Mr Cole's senior manager (two levels above him). The appeal was not a rehearing, or a review, but rather an adversarial process where management who conducted the disciplinary process could attend, and both he and the Claimant could raise and address issues with the disciplinary hearing/process.
56. It emerged that Mr Cole regularly reported issues of concern to Ms Walker, as his senior manager. In fact, he reported and sighted her on strategic issues pertaining to the strategic handling of this case – specifically arising from the police complaint made by this Claimant in respect of this service user, arising from an attack made on him and his children by the service user in Eastbourne on 12/7/2021. This process was particularly focused on separating the racial abuse "incidents" from the assault allegation. Ms Walker, two grades

above Mr Cole, was copied in on a series of emails arising from this, and she herself asked at one point if this was “the case that came to us through freedom to speak up?” The exchange discussed and planned the strategic approach to the incidents of racial abuse, in the context of the hearing. Ms Walker confirmed that she had received these emails and could not say that she was not sighted on other exchanges because she had not conducted a conflict check. Indeed she confirmed it was not her practice to check for conflicts before agreeing to chair appeals.

57. Ms Walker upheld the dismissal and sent an undated letter to that effect issued at some point after the hearing of 11 April 2021. As a consequence of the outcome a report was made to the Disclosure and Barring Service (DBS). On 12/04/2023 DBS dismissed the Respondent’s findings, finding that on their analysis the case of assault was not proven, on the balance of probabilities. ***The Tribunal, while noting this finding, have not been influenced by it in their consideration of the evidence and issues before it, in terms of considering the different claims before us.***

Turning to the legal issues the Tribunal will consider direct discrimination first, because if it is established that there was a discriminatory element at play here it will affect the other aspects of the case before us.

Direct discrimination

58. S13(1) Equality Act 2010 precludes direct discrimination:

“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.”

Under s4 of the Equality Act 2010, a protected characteristic for a Claimant includes race, which includes: (a) colour; (b) nationality; and (c) ethnic or national origin. The Claimant’s treatment must be less favourable than a comparator. The examination of less favourable treatment because of the protected characteristic involves the search for a comparator and a causal link. When assessing an appropriate comparator:

“...there must be no material difference between the circumstances relating to each case.”⁴ and the treatment must be because of the protected characteristic.

S136 Equality Act 2010 requires the Claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

59. The cases of ***Barton v Investec Henderson Crosthwaite Securities Ltd*** [2003] ICR 1205 and ***Igen Ltd v Wong*** [2005] EWCA Civ 142, [2005] ICR 931 provide a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence, this can be distilled into a 2-stage approach:

- a. Has the Claimant proved facts from which, in the absence of an adequate explanation, the tribunal could conclude that the Respondent had committed unlawful discrimination?
- b. If the Claimant satisfies (a), but not otherwise, has the Respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

⁴ s23(1) Equality Act 2010

60. The Court of Appeal in the case of *Igen* emphasised the importance of *could* in (a). The Claimant is nevertheless required to produce evidence from which the Tribunal could conclude that discrimination has occurred. The Tribunal must establish that there is prime facie evidence of a link between less favourable treatment and, say, the difference of race and that these are not merely two unrelated factors: (*University of Huddersfield v Wolff* [2004] IRLR 534). It is usually essential to have concrete evidence of less favourable treatment. It is essential that the Employment Tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: (*Anya v University of Oxford* [2001] EWCA Civ 405, [2001] ICR 847). The burden is therefore on the Claimant to prove, on a balance of probabilities, a prima facie case of discrimination. In *Madarassy v Nomura International plc* [2007] EWCA Civ 33 the Court of Appeal held at paragraph 56:

“The court in *Igen* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the Respondent could have committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination. It was confirmed that the Claimant must establish more than a difference in status (e.g., race or sex) and a difference in treatment before a Tribunal will be in a position where it could conclude that an act of discrimination had been committed.”

61. Even if the Tribunal believes that the Respondent’s conduct requires explanation before the burden of proof can shift there must be something to suggest that the treatment was ***due to the Claimant’s race***. It is not sufficient to shift the burden onto the Respondent to say that the conduct is simply unfair or unreasonable if it is unconnected to a protected characteristic. *B and C v A* [2010] IRLR 400 EAT, para 22, and *St Christopher’s Fellowship v Walters-Ellis* [2010] EWCA Civ 921 at paragraph 44:

“The Respondent’s bad treatment of the Claimant fully justified findings of constructive unfair dismissal, but it could not, in all the circumstances, lead to a finding, in the absence of an adequate explanation, of an act of discrimination.”

62. We note *Nagarajan v London Regional Transport* [2000] 1 AC 501, where Lord Nicholls stated at 512-513:

“Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds, even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how to legislation applies in such cases: discrimination requires that racial grounds were a cause, the aggravating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided. So far as possible. If racial grounds or protected acts has a significant influence on the outcome, discrimination is made out.

The Tribunal notes that while a different decision maker in two cases may, in some cases, amount to a material difference (where they were operating different policies at different

times, or operating at different levels) it is not a given that this will amount to a material difference, as the employer is responsible for the decisions made by both decision makers⁵

Direct Race Discrimination: Conclusions

63. There is no issue but that the Claimant is Bulgarian, and that he was summarily dismissed by the Respondent. The Tribunal accepts the summary dismissal of the Claimant by the Respondent constitutes unfavourable treatment.
64. The Claimant invites the Tribunal to consider that he was treated more harshly than the Respondent would have treated a hypothetical white British colleague in exactly the same circumstances, and that the dismissal he suffered was because of his Bulgarian nationality.
65. In order to succeed the Claimant must be able to establish that he was subjected to unfavourable treatment *because of his nationality*. This is the crucial question we are asked to consider in every direct discrimination case: *What was the reason for his treatment?* In this case, was he charged with gross misconduct and dismissed because he is Bulgarian? Or was it wholly for other reasons?⁶ Without this element present, the question of the comparator, hypothetical or otherwise, becomes academic.
66. The Claimant in his ET1 and statement suggested his unfavourable treatment was because of his nationality and that this led to his dismissal. In cross examination however the Claimant openly confirmed that he did not think, and indeed was not accusing either Andrew Cole or Rachel Walker of conscious or unconscious racial discrimination based on his nationality in reaching the decisions they reached. Rather he considered that his complaint was that the Respondent generally tolerated racist behaviour. He offered no nefarious reason as to why the Disciplinary Officer, or Appeal Officer acted as they did. This was to his considerable credit and reflected his principled approach. It was not put to either Mr Cole or Ms Walker on his behalf that they had a conscious or unconscious racial motivation.
67. It was put for the Respondent that it was not possible for the Claimant to establish that he was treated, or not defended from this treatment, by the Respondent because of his nationality. Other staff were abused for their own characteristics. White English staff were also subject to abuse (race, homophobic abuse), and the Claimant had accepted when it was put to him that the Respondent's management did nothing about this either. All staff were equally exposed to and were equally 'not protected' by the Respondent from third party abuse or harassment. They had all suffered from the same inadequate management. While this is an unattractive argument, it is an effective one from a legal perspective.
68. In order to prove direct discrimination based on race or nationality, there must be an element of those characteristics at play in the mind of the decision maker. It does not need to be the overriding motivation, but it must be present. There was no evidence in the papers, or in oral evidence which could allow the panel to construe a motivation based on race or nationality, or connected to race or nationality, on behalf of the decision makers here. There was no suggestion made to the decision makers that other parties had influenced their decisions or the process or that they did so for reasons of race. While he may believe that he was treated differently to a hypothetical white staff member by the Respondent, he has accepted that he

⁵ Olalekan v Serco Ltd. UKEAT/0189/18/RN at para 31

⁶ Shamoon v. Chief Constable of the Royal Ulster Constabulary (Northern Ireland)⁶

was in fact treated no differently to actual white staff colleagues with protected or perceived protected characteristics in similar situations. In any event, even if he established a difference in treatment, without there being a link to a protected characteristic, that difference alone cannot constitute direct discrimination.

69. The Tribunal considers that the Claimant failed to establish that his treatment was something that arose from his nationality, or proven facts from which the tribunal could conclude that the Respondent had committed unlawful discrimination. It is our view that the decision makers here found themselves considering the Claimant's dismissal not because of his nationality, but because of the allegation of misconduct. There was no discrimination here arising from his nationality and no basis to consider that they acted as they did because of his nationality.

Harassment: Law

70. Harassment is defined in s.26 of the Equality Act 2010 as follows:

26 Harassment

- (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 and intimidating, hostile, degrading, humiliating or offensive environment for B"

An employer will only be liable for offending acts or omissions of employees or agents pursuant to s109 of the Equality Act 2010 which provides:

109 Liability of employers and principals

- (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
- (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
- (3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

This provision extends liability for acts of discrimination from employees to agents, where the agent discriminates in the course of carrying out the functions he is authorised to do by their principle : *Unite the Union v Nailard*⁷. Nailard confirms that agency encompasses situations where individuals are authorised or empowered to represent the principal in its dealings with others, or to "stand in their shoes".

71. Turning to the issues: it was not disputed that the service user repeatedly used racist language and slurs when addressing the Claimant. This was disgusting and demeaning language and has no place in society, let alone a workplace. This was without doubt unwanted conduct, it related to the Claimants nationality and his perceived race and arose from the service user's perception of the Claimants heritage. In respect of the complaints pursued the Tribunal was satisfied that reports were made by or in respect of the Claimant of incidents on 6/8/2019 and 4/7/2021⁸. The incident of 12/7/2021 was not cited in the issues

⁷ [2019] ICR 28, at [18]

⁸ Incidents on 26/7/2019, 01/08/2019, 07/04/2020, 11/02/2021, 14/05/2021 were not made by the Claimant and concerned other staff. 03/07/2021 report refers to events of 04/07/2021, there was no incident for which evidence was presented dated 13/07/2021.

before us. The other reports cited in the list of issues referred to reports not made by the Claimant or concerning other staff. The Tribunal is satisfied that it these had the intention of violating the Claimants dignity and creating an intimidating hostile, degrading, humiliating or offensive environment for the plaintiff.

72. In respect of the allegation that there was a failure to act, the Respondent has asserted that they acted in response of those complaints. It pursued several strategies and interventions to capture incidents and to change ER's behaviour (including the filling out of ABC forms, which they admit was not done consistently, daily worry sessions, a rewards system, Easy Read Document, behaviour support plan and TAP meetings). There was also a support framework for staff which included, diffuse sessions, supervisions, and access to free counselling. The Respondent therefore asserts that there was no failure to act in respect of these distressing acts.
73. While we acknowledge that actions were taken, it is clear that these did not effect change with this service user. It is a matter of concern that NHS staff, on minimum wage contracts, are required to withstand the types of verbal and physical abuse we have had described to us, but equally it has to be appreciated that even with capacity, it is in the nature of this work that service users display at times very challenging and distressing behaviours, which is an aspect of the work. While ER is different from the usual category of service user these staff deal with, it was not suggested that he represented a unique or unprecedented challenge in this context. It is not possible in our view to say that the Respondent has *failed to act* in respect of these or other incidents brought to our attention. It is evident that their actions failed to effect change, but nonetheless actions were taken. As a consequence we must find there was no failure to act in respect of these incidents, and we therefore must find that there can be no race related unwanted acts.
74. We are aware that a failure to act on repeated acts of harassment by third parties may constitute unwanted conduct if the failure to act is related to race⁹. In order to succeed a Claimant has to establish that any failure to act was materially influenced by the fact that he was not white British. The Respondent's defence is that because the service user has abused white British employees using racist and homophobic abuse, the Claimant is not being singled out.
75. It was explicitly put at the close of the case that the Claimant had accepted in his evidence that everyone was treated the same. He did not allege that his nationality or race was the reason for the lack of effective action in respect of issues he experienced. He could not succeed as the management response has been equally ineffective for all staff affected by this ongoing behaviour. Again, unattractive as that argument is, the Tribunal must accept the Respondent's argument that the Claimant was not treated less favourably because of his race or nationality. He was not treated less favourably; the staff were all underserved by their management.

Victimisation: Law

76. Victimisation is defined for the purposed of the Equality Act 2010 as follows:

S. 27 Equality Act 2010:

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because-
- (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.

⁹ Bessong v Pennine Care NHS Foundation Trust [2020] IRLR 4.

Protected acts as defined by subsection 2 include “making an allegation (whether or not express) that A or another person has contravened this Act”. If it can be established that an employee performed or was about to perform a protected act and the employer subjected the employee to a detriment, the question then becomes one of causation. In other words it focuses on the word because. We must ask ourselves why did the employer act as it did? Was it because of the protected act? Or was it entirely because of other things?¹⁰ The Tribunal having considered the alleged protected acts, were satisfied that for the purposes of victimisation these comprised a complaint to Mrs Freebody from 5 February 2020 regarding colleagues’ behaviour, a complaint to Mr Ward from 28 May 2021 regarding the service user ER, and the complaint to Viki Baker regarding the service user from 21 December 2021. The detriment to the Claimant here was his dismissal, which is not disputed. So we return to the question of causation, or the word ‘because’.

77. It was put for the Respondent that no case was put on victimisation to Mr Cole, that he was not accused of having been influenced by any complaints. There was no challenge to his evidence that the only protected act he knew of was the complaint of December 2021 regarding the incident in Eastbourne following the Claimant’s suspension. It was not put to Mr Cole that those to whom the complaints had been made had influenced his approach or the investigation.
78. Whether or not the case was put, and irrespective of what they were aware of in terms of earlier protected acts the Panel were not persuaded on the evidence presented that Mr Cole or Ms Russell acted as they did because of protected acts. There is no evidence to suggest that the decision makers’ actions derived from anything other than the misconduct allegation and their view that the Claimant’s misconduct had been proven.

Unfair Dismissal : Law

79. The Respondent’s case is that this was dismissal for conduct (gross misconduct). That is a potentially fair reason under s 98(2)(b) Employment Rights Act 1996 (‘ERA’). Section 98 of the Employment Rights Act 1996 (ERA) provides as follows:

98. (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
- (a) The reason (or if more than one, the principal reason) for the dismissal, and
 - (b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it – ...
- (b) Relates to the conduct of the employee, ...

If the Respondent establishes that reason, a determination of the fairness of the dismissal under s98(4) ERA is required....

98. (4) In any other case 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.

¹⁰ (Chief Constable of West Yorkshire Police v. Khan [2001] ICR 1065

80. It is for the Respondent to show that it had a fair reason to dismiss the Claimant. In a conduct case, for the dismissal to be considered substantively fair the Tribunal must consider three questions (the *Burchell* test)¹¹ - whether the Respondent's decision makers had a reasonable and honest, or genuine, belief in the Claimant's misconduct; whether there were reasonable grounds for such a belief; and whether the Respondent had carried out a reasonable investigation into the circumstances of the alleged misconduct. The burden of proof is neutral in relation to the fairness of the dismissal once the Respondent has established that the reason is a potentially fair reason for dismissal. The Tribunal must determine whether the process followed and the decision to dismiss falls within the range of reasonable responses to the misconduct identified¹². This test of band of reasonable responses also applies to the belief grounds and investigation referred to.
81. The factors that may inform the standard of reasonableness of investigation vary with the circumstances. An employee being caught in the act or admitting the misconduct requires less in the way of investigation than a case based on inference.¹³ In other cases, a relevant factor may be the likely sanction. An allegation likely to lead to dismissal will typically require more by way of investigation than one likely to lead to a first warning. Similarly, the greater the impact and consequences the decision will have on an individual being able to work in their chosen field in the future, the more that will be expected of the investigation.¹⁴
82. The Tribunal must not substitute its own view regarding the investigation into misconduct or regarding the decision to dismiss.¹⁵ This means that we must decide not whether we would have investigated things differently, but whether the investigation was within the range of investigations that a reasonable employer would have carried out. The test as to whether the employer acted reasonably in section 98(4) ERA 1996 is objective.¹⁶ The Tribunal must assess the reasonableness of the employer and only consider facts known to the employer at the time of the investigation and at the point of the decision to dismiss.¹⁷
83. With regard to serious cases, where dismissal is likely, guidance on the reasonableness of these investigations is offered in paras 58 – 63 of *A v B*¹⁸, where Elias J said at para 60:
*"Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of **the most careful investigation**, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but **a careful and conscientious investigation of the facts is necessary and the investigator***

¹¹ British Home Stores Limited v Burchell [1978] IRLR 380

¹² British Leyland v Swift [1981] IRLR 91; Whitbread v Hall [2001] IRLR 275

¹³ Gravett v ILEA [1988] IRLR 497

¹⁴ A v B [2003] IRLR 405 EAT, Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721 CA

¹⁵ Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82, London Ambulance Services NHS Trust v Small [2009] EWCA Civ 220

¹⁶ Iceland Frozen Foods Ltd v Jones [1982] IRLR 439

¹⁷ W Devis and Sons Ltd v Atkins [1977] IRLR 31; West Midlands Co-Operative Society Ltd v Tipton [1986] IRLR 112

¹⁸ See footnote 10 above.

charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him. (our emphasis)

84. It is particularly important to test the evidence of an accuser where the consequences will be severe for the employee¹⁹. The Tribunal also notes ***Sneddon v Carr-Gomm Scotland Ltd [2012] IRLR 820***, at para 15, where the Court of Session described the approach to deciding whether the sufficiency of an investigation into misconduct is adequate. This is particularly pertinent in relation to this case, in terms of the analysis that must be undertaken of what was done here: -

“...the tribunal necessarily has to examine and consider the nature and extent of the investigations carried out by the employer and the content and reliability of what those investigations reveal before it can reach a view on whether a reasonable employer would have regarded the investigatory process as sufficient in matters such as extent and reliability or as calling for further steps. That decision is essentially one for the assessment of the tribunal, as a specialist, first instance tribunal.” (our emphasis).

85. This point is echoed in ***Tykocki v Royal Bournemouth and Christchurch Hospitals***²⁰ a case where the credibility of a witness, in that case a patient, was brought into question by the Claimant in that case. The EAT made clear that the ET is required:

“...to properly (take) into account all relevant circumstances, including the degree of investigation required into the broader question of credit, given the gravity of the charges made against the Claimant.”²¹

86. Should there be shortcomings in the Investigation or the Disciplinary processes, the overall process can still be considered fair where there is a sufficiently thorough and reasonably conducted appeal process in the context of sufficient evidence of gross misconduct.²²

87. Finally, on the question of sanction, there is always an area of discretion within which a Respondent may decide on a range of disciplinary sanctions all of which might be considered reasonable. It is not for the Tribunal to ask whether a lesser sanction would have been reasonable but whether the dismissal was reasonable.²³

Unfair Dismissal: Discussion and Conclusions

88. The first question to be determined here is what was the reason for the dismissal? The reason given by the Respondent for the dismissal was gross misconduct. Counsel for the Respondent put it to the Claimant under cross examination that assaulting a service user would constitute gross misconduct. While he denied the assault, he accepted that an assault would be gross misconduct. The Tribunal accepts that based on the contemporaneous evidence supplied, considering what was known at each stage and the evidence that emerged at the ET hearing that, on the balance of probabilities, the Respondent dismissed the Claimant for what they considered to be gross misconduct. As is established in law, a reason for dismissal which is related to conduct is a potentially fair reason under section 98(2)(b) of the ERA 1996.

¹⁹ Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721, CA, [2010] EWCA Civ 522

²⁰ UKEAT/0081/16/JOJ

²¹ Para 17 of Tykocki – see footnote 17 above.

²² Taylor v OCS Group Limited [2006] ICR 1602

²³ Boys & Girls Welfare Society v McDonald [1996] IRLR 129

89. Next: did the Respondent (specifically the decision makers) reasonably and honestly believe, based on reasonable grounds, and after an appropriate investigation that the Claimant in fact committed the misconduct? The Claimant challenges the basis for the Respondent's belief that he was guilty of gross misconduct – and the disciplinary investigation which underpinned it. He offered us striking evidence as to why the original complainant wanted to target him.
90. The decision makers were presented with evidence assembled by the investigator Ms Lacy in a report and the report was countersigned and endorsed by Mr Freebody, who went on to present the management case at the Disciplinary proceedings. They were also supplied with a detailed submission from the Claimant.
91. It was clear from the outset of this investigation that a finding of gross misconduct here would lead to dismissal. That being the case the investigation had to be 'most careful and conscientious' and had to look at exculpatory as well as damning evidence (**per. A v B²⁴**). The Claimant suggests that during the process further investigations should have been undertaken – that witnesses who should have been interviewed were not, and that Mr Morosanu's evidence should have been approached with caution, and his motives investigated. There will always be scope for investigations to be more detailed, but it is not the role of the Tribunal to impose an idealized approach on employers. In order to determine whether the actions taken here were reasonable or not, we have had to carefully examine what was done here to form a view as to whether the approach taken was reasonable.

The Investigation

92. The Investigation and its accompanying report troubled the Panel on a number of fronts.
93. Firstly, there was no adequate explanation as to why it took so long to produce an Investigatory report on a relatively straightforward allegation. The interviews (of 4 witnesses) were concluded by 28 July. The first version of the report was not issued until October, and a final version was not issued until 30 November, almost five months on from the incident. Despite that passage of time, the October report contained no floor plan, no photographs, nor were there details sufficient to satisfy themselves or the Disciplinary board as to the viewing range a person viewing that scene would have had from the spyhole. No site visit had been conducted. We were told the delay to the report had been caused by additional requests from the Claimant and his representative. It is difficult to see how the Disciplinary panel could have properly considered the case without their intervention.
94. Failing to undertake a site visit to survey the scene meant that the investigation had not tested Mr Morosanu's account, from a spatial perspective before the report was initially closed. No alarm bells rang when Mr Morosanu reported at interview having witnessed the detailed events he described through a spy hole which had had its spy lenses removed. The potential significance of this was not recognised. Instead, witnesses at interview were invited to create their own diagrams of the floor plan. Given the allegation – the key witness viewing the scene through a spyhole, with no lens, and the Claimants vehement denial - it should have been clear that this was going to be a matter of dispute, which would require evidence to enable the Disciplinary panel to consider the view of the scene. A reasonable investigator would have satisfied themselves of the veracity of the account by confirming what could be seen from that vantage point at an early stage and would have taken considerably less than 5 months to finalise their investigation.

²⁴ See footnote 10 above.

95. The finalised report (issued in November), while containing photos of the scene, and a floorplan (though none of the view through the spyhole), makes no reference to this key aspect of this case – what could be seen through the spyhole. No mention is made by either Ms Lacy or Mr Freebody of the witness having observed this event through an unmoderated spyhole, which we heard was 16mm wide, through a door 55mm deep. There is no expectation that a professional scale drawing had to be created (there was not), but it would be expected that an amateur representation remaining broadly true to scale could be produced and that it did not include misleading details – the version produced suggesting a wide and expanding field of vision from the spyhole which would only have been valid for a functioning spyhole with lenses. The photos produced (by the Claimant) of the hole showed a much narrower, linear view.
96. The report signed off by Ms Lacy and endorsed by Mr Freebody includes a litany of misstatements, the most troubling being that regarding Ms West's evidence. She is repeatedly misquoted in a manner which changes her evidence. "Saying" becomes "shouting". A sentence which is open to interpretation "why did you do that?" morphs into "you'll get sacked for that, you can't do that". This statement is repeated by Mr Freebody as one of three key facts he draws on to support advancing the case to a Disciplinary hearing. The Claimant is then attributed with having said the service user "tripped", the implication being that he was explaining a fall which in fact he explicitly stated he had not witnessed. There was no basis for this in the summary interview notes presented by Ms Lacy (and we were not supplied with the note taker's handwritten notes).
97. The report references the supervision report of 28/5, which the investigator had accessed. She omits the key information that an unnamed colleague was priming a service user to make safeguarding complaints against the Claimant. We know that Mr Ward knew the identities of both people. If Ms Lacy accessed this in the system without reference to Mr Ward she could have simply called or emailed him to clarify who these individuals were. In addition, the record describes Mr Ward promising to raise this with his manager, which we were satisfied he did. It would have been a simple matter to ask Mrs Freebody, who Ms Lacy was in contact with on this matter from day 1 of this affair. It betrays a remarkable incuriosity for the investigator, a senior manager, not to check to see whether this familiar scenario linked to this affair. There is no evidence that she examined this question. It is the duty of the investigator to look at evidence which points towards and away from the accused person. This duty was not met here.
98. The next concern was the failure to interview the service user, to confirm what - if anything - he had to say about the matter being alleged as part of the fact finding. It was regarded from the outset by Mr Cole and Mrs Freebody as important that ER should be asked to confirm what had occurred. This was different from other allegations concerning ER - he had made those allegations himself. This allegation had originated from a staff member, in unusual circumstances. ER was a person with capacity, who had previously faced interviews by managers and indeed the police about serious allegations, so he was someone who could withstand a frank conversation. In addition, he was someone known to have made multiple false complaints about mistreatment of the most serious kind in the past. Any allegation being made here should therefore have been approached with caution and its credibility tested. Given the gravity of the accusation and the implications here for the accused of a finding of guilt, it was the Panel's view that, in these circumstances, applying the guidance in **A v B**, a careful and conscientious approach was required. Relying on a second-hand account of a conversation with a known liar in circumstances where the accused person was facing dismissal was unnecessary, given ER's capacity, and the amount of time the investigation had at its disposal. Ms Lacy should have spoken formally to ER early in the process. ER had shown himself capable from earlier incidents, of discussing matters 4 or 5

days after they were said to have occurred. He had no recorded memory issues. This would have been possible and should have been done.

99. Much was made by the Respondents at all points of the suggestion that ER had not withdrawn the allegation. He was not (according to the report) formally interviewed by the investigation, so it is unclear how they envisaged a withdrawal could have occurred. It was suggested the process followed here was no different to the processes followed previously with other complaints from ER. That was demonstrably not correct, even on a cursory review of the Incident Reports included with the investigation report. On each of the previous occasions when ER made a serious allegation - they centred on him stating that members of staff had raped him - one of two things happened. In some situations he made the allegation about someone in front of them or in his vicinity and when challenged by a member of staff in situ, he immediately withdrew it (this happened twice – both with Mr Ward on 7/4/2020 and 12/12/2020). There is no indication he was challenged by Mr Ward here. On other occasions he made the allegation and did not withdraw it, but it was recorded in an Incident Report and when he was subsequently approached and spoken to by the Service Manager - Mr Freebody - days later (on each occasion accompanied by a witness from the leadership team) the allegation was withdrawn. This happened twice. On 26/7/19 he complained he'd been raped by staff members, but when approached on 1/8/19 (6 days later) he withdrew the complaint. On 1/8/19 he made another rape allegation – he was then spoken to on 5/8/19 (4 days later), again by Mr Freebody and again the allegation was withdrawn.
100. It is therefore evident that ER had a propensity to lie, and he did not automatically withdraw complaints. On the evidence supplied he would withdraw them if he was challenged (this did not occur here, Mr Ward at no point expressed scepticism about the statement he made), or if he was subsequently interviewed to substantiate the claim. The issue here was that no attempt was made here to ask ER to substantiate the claim he was alleged to be making. This was in part because neither Mr Morosanu, Mr Ward nor Mrs Freebody ensured an Incident Report was completed until the investigation was already underway. The fact that Mr Freebody was clearly aware of the previous pattern, having himself taken pains to check previous serious allegations with ER, but made no reference to difference in approach here is noteworthy. It was therefore reasonable to expect the investigator to interview and test the allegation made by the service user, given his history, and if she did not it was for the case manager who had specific experience of dealing with the service user, to ensure that this occurred. It was unreasonable to present this as a situation where the service user had not withdrawn a positive allegation, particularly in the light of other facts.
101. One reason the same process was not followed here was because the allegation was not reported to the Duty Manager or in an Incident Report as per procedure on 4/7. The original allegation was made by Mr Morosanu, and Mr Morosanu did not follow the proper process of recording what was (according to his account) a serious assault and safeguarding issue. Had he done so and discussed it with the duty manager before his shift ended on 4/7, an opportunity would have arisen to capture the allegation contemporaneously, and (as had been done each time before when ER made an allegation) to speak to the service user and ask him to confirm what, if anything, had gone on. If the allegation was not withdrawn, there would likely have been a management follow up to check details, and immediate action could have been taken to protect him, check him for injuries, and action be taken against the assailant. Neither Mrs Freebody nor Mr Ward rectified this on 5/7 – had they done so, a Duty Manager would at that point have been expected to follow this up with the service user then or shortly after. Mr Morosanu claimed he did not do this immediately because he was worried about the Claimant's reaction, that the managers did not listen to him, and that he wanted his report to be hidden from management. This changed later to the suggestion that he thought the managers must have seen and reported this incident (but he did not check –

again, failing in his safeguarding responsibilities, and general duty of care to the service user). Given the failure to properly record the allegation on 4/7, or the exchange with Mr Ward on 5/7, meaning there was no follow-up, a failure to withdraw is unsurprising.

102. ER's account comes via Mr Ward. Mr Ward approached ER without a witness, under instruction from senior managers. He justified this on the basis that he wanted to protect confidentiality, so it would not have been appropriate to bring another staff member in with him. This was an unsatisfactory explanation. The service user had previously made outlandish accusations about many staff members, so it was unlikely that hearing another one would have shocked a colleague or led to them assume it was true. This would have been of less significance if ER had been interviewed later by way of follow up, as had been on every other occasion when he had not withdrawn an allegation, but given the investigation did not do this, and Mr Ward's account became central, it becomes more problematic. We were encouraged to take the view that it was not unreasonable for the Investigation to simply rely on Mr Ward's account of the service users comments. The service users' comments were taken as corroborating the allegation made by Mr Morosanu and were regarded as particularly important as they were supposedly spontaneous and independent of the allegation. We now know that in fact the comments were gathered in response to and as a direct consequence of Mr Morosanu's allegation – Mrs Freebody dispatched Mr Ward to question ER on Mr Cole's instructions. As such the comments were not serendipitous and independent of the allegation. Mr Ward made no reference to his actions on 5/7 in his witness statement, and he failed to mention this mission in his email to Ms Lacy on 5/7. Mrs Freebody's statement was silent as to her role. The impression Mr Ward gave to Ms Lacy was of an unsolicited remark. This caused us concern - Ms Lacy was investigating this matter, so why did Mr Ward omit the important information that he had gone to see ER on Mrs Freebody's instructions, rather than saying this visit was at ER's request?
103. While we cannot impute knowledge about this to Ms Lacy at the point she was initially compiling her report, it is important to note that Ms Lacy appears to have realised that Mr Ward's original account did not tell the full story. We do not know what prompted it, but she questioned Mr Ward in an email of 4/11 (before the final version of the report closed) asking him to confirm the account in his email, asking him if he had spoken with Nicola Freebody before speaking to ER, whereupon he admitted that this was in fact a commissioned approach. It is therefore perplexing as to why, given she now knew Mr Ward's original email was not candid, and she now had two different accounts from this key witness, that she did not satisfy herself as to the exact sequence of events by speaking directly with Mr Ward. This was important as Mr Ward was, for reasons neither she nor Mr Freebody has explained, acting as ER's voice in this process. Ms Lacy had uncovered a concerning aspect of Mr Ward's account. This warranted examination if Mr Ward was to be relied on. It was also strange that having established that Mr Dyer was another potential witness, who might not only confirm Mr Ward's account of ER's attitude on 5/7 but might relay comments made (he being the Senior Support Worker allocated to ER that day), that she did not seek him out, if only to rule out the apparent concerns she had about Mr Ward's account.
104. We learn from the report that ER was in fact 'spoken to', but no information given as to when, or by whom. Mr Cole suggested in evidence this was by Ms Lacy. We are told however in Ms Lacy's report that ER was not on the interview list, but then reports that ER "...cannot remember but did not say it was untrue". This takes us back to the question of how someone might be expected to withdraw a complaint they don't recall making? Was it the complaint he did not recall? Or the attack? There is no indication that it was put to him that he had been said to have made an allegation which was being investigated. In fact, the picture which emerged of ER in evidence was of someone who forcefully and strategically approached situations to his advantage. It is odd that someone with his history of complaints,

who allegedly suffered a violent and aggressive act would not have complained vociferously and at length about this incident, had it occurred in the manner alleged, at the time. It is equally strange that he is then said not to recall this incident, or the complaint, having apparently complained about it. Another important piece of evidence which was not weighed as significant was Mr Salmon's evidence. As duty manager he was looking after ER on 4/7 and spoke with ER at length after the events of 10 -10:30am on 4/7. He related that the service user did not mention or complain of a violent attack but was wholly preoccupied with the events of the day before and his attempts to secure the dismissal of a different member of BME staff who had displeased him. It seems likely and realistic that if the alleged provocation had occurred, that he would have mentioned it then. It is noteworthy that this important evidence was given no prominence in Ms Lacy's analysis.

105. A further concerning aspect concerns the absence of the original allegation email from the investigation until it was supplied by Mrs Freebody on 16 November. It is remarkable that the investigator did not secure this vital document before interviewing the main witness, Mr Morosanu, or the Claimant. Having the email would have enabled her to understand the allegation. These basic details were not before Ms Lacy or in her contemplation when interviewing the witnesses, and so she could not put the accusation to the Claimant. It is a basic requirement that an investigator, in considering if there is a case to be answered, should be familiar with the detail of an allegation at the outset of the investigation. Having done that she could then check his verbal account at interview against his original complaint. It would also have enabled her to identify any new facts disclosed in interview (in the interview he mentioned seeing red marks, he mentions that the spyhole lenses are missing). Most importantly, it would have enabled her to put the specifics of the allegation to the Claimant. It is another basic requirement of an investigation that allegations are put to the accused person so that they have an opportunity to respond to them. This did not happen at this stage. Specific allegations, around the Claimant running and jumping at the service user, leaving visible marks on the service user, that the service user stood naked shouting at him for thirty minutes – none of these were disclosed or put to the Claimant in interview. In fact, rather than putting the allegations to him and inviting his response, the basic allegation (that he had pushed the service user) was put and the Claimant was called upon to explain events which he denied having seen.
106. There is no record of the investigator or case manager having given any consideration to the potential contradiction between a 6' 7" man having been pushed at speed and with force from behind and said by the witness to have landed on the floor of his flat, being found seconds after his descent sitting with legs splayed open sitting face forward against a wall. There is no consideration or discussion of injuries, or the lack thereof, or the contradiction between the allegation that he had visible red marks when both Mr Salmon and Mr Ward both examined him shirtless and reported no injuries or marks to be seen.
107. Having considered this investigation report, we were not satisfied that this was sufficient to its purpose. It was not conducted or produced with care or diligence, or indeed in a timely manner. Sight seems to have been lost of the staff member facing a career ending accusation, and the cloud of suspicion left hanging over him over this period of time. It is shocking that an investigation report should have contained the errors, misstatements, and misrepresentations we have seen. Not to have flagged the May 21 Supervision Report for Mr Cole was extraordinary, given it predicted this scenario. The errors in the report should have been immediately apparent to Mr Freebody who claimed to have reviewed the accompanying documentation. Instead he repeated one of the false quotes taken from the matrix in support of his conclusion and gave significance to the failure to withdraw an allegation here in comparison to previous scenarios, which was not a fair representation of the facts. This investigation did not highlight or pursue exculpatory evidence. In the form in which he

submitted it to the disciplinary team, under Mr Freebody's signature, it was a flawed, incomplete and misleading document.

108. Before moving on, a general concern for the panel was the systemic failure by senior management (Mr Cole, Mrs Freebody, Ms Lacy, Mr Freebody) to ensure that safeguarding action be taken to protect a service user from what was purportedly a serious and violent assault. If this assault was as described by Mr Morosanu, (bearing in mind they dismissed the Claimant on the basis that they believed his account), this would have constituted a serious criminal assault. It is perplexing that despite the seriousness with which Mr Freebody in particular characterises this allegation, that he did not report the assault to the police. The Respondent's Disciplinary policy²⁵ contemplates reporting criminal offences to the police:

Criminal offences and police involvement

Where a criminal offence is alleged, the Case Manager will check with the police to obtain their advice on whether it is safe to proceed with an internal investigation, or parts of the internal investigation, in regard to the police's own collection of evidence.

Nor was any approach made to the relevant safeguarding team, nor is there any indication that this was considered. This is also flagged by the policy as the Case Manager's responsibility

The Sussex Partnership Safeguarding Team should be consulted in cases of allegations regarding the abuse or neglect of children or adults. In consultation with the relevant manager and the safeguarding team, the Case Manager should consider whether the trust should raise a safeguarding alert or concern by contacting:...

- the appropriate Local Authority's Adult Social Care department in relation to safeguarding adults. The local authority may have a designated role i.e. in East Sussex there is a LADO for adults, and in Brighton there is a lead role in relation to persons in a position of trust (PIPOT).*

It is difficult to reconcile the non-compliance with safeguarding procedures here with the suggestion that the Respondent believed a serious assault took place. We were assured that the reporting of safeguarding incidents have improved since this time. We hope that is correct.

Disciplinary Process

109. It is established law that a good disciplinary and appeals process can rectify and overcome the problems presented by a poor or ineffective investigation. That principle would be tested in a case with an investigation as poor as the one we found here. However, the approach taken by Mr Cole did not identify or address issues in the investigation. Nor did he ensure basic fairness in the running of the proceedings. He failed to ensure the Claimant had prior notice of whether he was calling witnesses, or who they were. It was put during the case for the Respondent that the Claimant had failed through his representative to put particular points to Mr Morosanu. That criticism is difficult to sustain where a non-professional representative has not been told whether there will be witnesses or their identity until the start of the disciplinary hearing. It was Mr Coles' responsibility to ensure the hearing was fair, and he failed in this basic requirement.
110. During the disciplinary hearing, when Mr Morosanu was being questioned by the Claimant's representative on a key aspect of the case (what he said he could see through the peephole),

²⁵ Policy TP/WF/208, Disciplinary Policy & Procedure, 2021, page 7, 8

he was interrupted by Jo Russell (HR), who complained about the tone he was adopting in pressing the witness on his account. Given the Claimant's career was in jeopardy, and he was accusing Mr Morosanu of fabrication, it was entirely appropriate to press him on these points. This was not a management meeting, but an adversarial hearing, which was potentially going to lead to their employee losing his livelihood and potentially his career. The stakes could not have been higher. Shortly afterwards Mr Cole cut off the line of questioning entirely, without reference to the Claimant's representative. Given what we have seen, this was a misjudgement. These were central issues of fact in the case, and went to Mr Morosanu's credibility, so this approach was unfair to the Claimant, and indeed, these were questions the Decision maker should have been focused on himself. The Claimant was denied the opportunity to press and challenge the witness in the manner he wished on all the points relevant to the determination of whether this allegation was credible or not.

111. In terms of the analysis Mr Cole described adopting in assessing the evidence, Mr Cole took issue in his statement with the fact that the Claimant failed to account for the service user being on the floor – either through tripping as per his original statement (which was not at any point the Claimant's account), or (having accepted during the hearing that he denied having seen him fall) through some other means. It is evident even from his amended statement that Mr Cole started from the premise that it was for the Claimant to provide an exculpatory explanation for 'the fall' and his failure to account for it was suspicious. He complains that the Claimant "focussed...on trying to cast doubt on the management case, rather than trying to explain what had actually happened". Firstly, casting doubt is exactly the business of defence. Secondly, it was for management to establish what had 'actually happened' – this was their case. The Claimant denied pushing ER or seeing him fall. This was not, it appears, given any serious consideration. Were there circumstances in which ER could have gone to the floor without an external intervention? From what was described it appears that was a possibility. If the Claimant's position had been given serious consideration, even as a counterpoint, to test Mr Morosanu's premise, that may have opened the door to the possibility to a more critical approach being taken to testing Mr Morosanu's account, both in terms of what it alleged and what potentially lay behind it.
112. Mr Cole cited two witnesses whose evidence he believed supported the allegation, Mr Morosanu and ER. ER's' evidence amounted to the second-hand statement attributed to him that the Claimant pushed him, and as we saw this was never tested or developed. That failure in itself is not fatal, as a compelling statement from a reliable witness would suffice to establish the event had occurred, in circumstances where there was no corroborating evidence (for example, where the victim could not or would not offer evidence). Mr Cole considered that Mr Morosanu's account was reliable as it remained consistent under questioning. This does not reflect the evidence. Mr Morosanu initially described seeing the Claimant running then jumping, in order to push with force, which later became walking quickly and pushing with force. The spyhole view we were shown means that we can only see part of the top half of the door and a narrow piece of wall. Accepting for now his account of seeing one person pushing another's back, from behind, pushing them face first towards the door, with this narrow view, from this vantage point, what might we expect to see? One might first see the service user walk into the view, then we'd see the assailant in the view behind them but in front of us, one would see the assailant's back while they pushed the service user, then (if the service user falls) either we see the assailant standing, or if he moves from view nothing (presuming the service user is on the floor, unless he lands on his knees, which was not the account given). Mr Morosanu described seeing the assault leaving marks on the body, which later were described as red marks on his body (which no one else saw); he outlines that the service user was completely naked throughout the incident, until the disciplinary hearing when under questioning he suggests he might have been wearing trousers (whereas the witnesses saw him clothed from the waist down). He stated he saw

him lying on the floor, which it was accepted was not possible from that vantage point. It would have been possible to see the service users head and shoulders if he was sitting against the door, but one could not see the floor. The description of seeing someone approaching at a run, then jumping, pushing, leaving red marks and so forth is simply not sustainable, considering the view on offer.

113. Most importantly Mr Cole, was asked in evidence about the significance of Mr Morosanu not reporting the incident to the Duty Manager or creating an Incident Report, as per the regulations. He gave as rationale in evidence that he accepted Mr Morosanu's account that he left his shift that day, thinking that the report had already been made by the manager, and it was: "...only later he realised he (Mr Salmon) hadn't and felt he had to report it". In fact, Mr Morosanu's original note makes it abundantly clear that he deliberately did not inform the manager at the time or at the end of the shift, he believed no one knew he had observed the incident, and he explicitly wanted his report kept hidden from his immediate managers. This was significant, as it went to his motivation for making the complaint in the way he did, in secret, and with the expressed hope that he would not be identified. Mr Morosanu had not only failed to follow proper protocol, failing to make a safeguarding report, but failed to step in to assist a service user he said he considered to be in danger, a victim he says he believed to have suffered a violent assault. He did not check or raise concerns for this service users physical wellbeing, even at the end of the shift, contrary to guidance and his responsibilities as a caregiver. He stated that he was concerned he would not be listened to – this seems unlikely: it would have been incumbent on Mr Salmon to record the allegation and would have prompted him to approach ER to ask him what had happened in real time. If the manager did not want to listen to him he could simply have created his own Incident Report, as he did on 7/7. This was after all a core part of their responsibilities. This failure was a red flag, and should have prompted Mr Cole to ask further questions, particularly in the light of the allegations that the Claimant had brought to his attention regarding the level of animosity Mr Morosanu carried towards him. Mr Morosanu's behaviour was inconsistent - he claimed to be afraid of the Claimant or of others learning he made a complaint – but on 7/7 created an Incident Report accusing the Claimant of the assault, without any apparent hesitation.
114. Mr Cole considered that "he (Mr Morosanu) did not know he had been the only eyewitness to the incident" and stated that for Mr Morosanu to have fabricated the account, he "would have needed to make up something that corroborated with what other people present would have seen". Mr Morosanu worked the full shift, so would have heard at 'handover' what others had reported. He would have immediately known if the others had reported, or missed, a violent assault. Mr Morosanu made significant statements in respect of what he saw, giving details which were either wrong or were not supported by other independent witnesses. He stated that the service user was 'completely naked' throughout the morning. Mention was made of ER being naked in Mr Salmon's account - he was naked earlier - but was not at the relevant moment, according to those present in the hall. There is a discernible difference between someone 6' 7" being completely naked and someone who is not. Mr Morosanu was adamant when first interviewed that ER was completely naked throughout (i.e. that he had seen this). He changed his account during the disciplinary interview in the face of challenge accepting that ER may well have been wearing trousers. Mr Cole later characterised this change of position, in his submission to the appeal, as "evidence of an honest witness position" rather than a concerning inconsistency and another red flag. If a witness is wrong on such a fundamental aspect of their visual account, how could the rest of their account of what they say they saw at a particular moment in time be accepted without question? In his decision letter Mr Cole cites Mr Morosanu as saying the service user said, "why did GY push me". In fact, the other attendees denied hearing this. Mr Morosanu claimed in his first account that this question was repeatedly shouted by the service user over a

period of 30 minutes. No one present accepted this account. These contradictions were not resolved by Mr Cole.

115. Mr Cole elided over the issue of the disparity between Mr Morosanu's account of marks, (which then became red marks in his interview) being visible on the service user, and the accounts of the Duty Manager on 4/7 and Mr Ward on 5/7 that there were none. The marks were mentioned in support of the idea of a violent push, which no one else witnessed. It was subsequently put that an absence of marks does not discredit the evidence given, and that a lack of marks did not disprove an assault. The presence of marks formed a key part of the complaint made by Mr Morosanu, and the presence of these helped establish his claim that this assault took place, and the seriousness of this incident. A failure to find these marks at the time by two experienced professional care workers undermines the credibility of that claim, simply as a matter of logic. These were key elements of what Mr Morosanu said he saw, just as he claimed to see the service user completely naked. These were not mere details, but signifiers of whether that witness was there, seeing what he said he saw, at that specific moment in time, when there were no other witnesses. They go to the question of whether Mr Morosanu's account was true, as opposed to a constructed complaint which fitted in with the general melee unfolding that morning. In his submission to the appeal Mr Cole stated he "...was not presented with any evidence to suggest that this witness could have had access to the detailed sequence of events presented, had he not actually witnessed the events described". The fact that significant details in Mr Morosanu's account were either wrong or contradicted was not recognised. The credibility of a witness's account in these circumstances is crucial. Instead of critically assessing Mr Morosanu's account, it appears to have been accepted uncritically, and any inconsistencies were either not registered, or were explained away, even in the face of his own previous inconsistent evidence. The Claimant however was expected to explain his role in an assault he denied committing, and in respect of a fall he said he did not witness.

116. Mr Cole cited Ms West in support of his thesis. In his account of 22/2/24 he correctly quotes Ms West as having heard "why did you do that?", rather than what was quoted in the matrix in the investigation report. When however he was asked to explain his interpretation of her statement (as quoted) that "(ER) looked like he was pushed", he immediately indicated that he recognised that as a nonsensical comment and discounted it. This was interesting, as this specific sentence is cited by the appeal officer as a supporting rationale for her decision, which, given how the Respondent's appeal process works, can only have been supplied to her in the management bundle supplied by Mr Cole. Setting that aside, given his disavowal of this statement, the only aspect of Ms West's account which he could have relied upon was the reference to a question "why did you do that?" (a comment open to interpretation). ER was at that point sitting with his back to the wall. Ms West did not witness a push or a fall, nor did she hear an accusation of a push. She did however say elsewhere that it **looked like he had been pushed backwards** (because he was facing forwards when she saw him, seconds after hearing a loud bang). The fundamental problem of reconciling an allegation that someone has been pushed, with force, in the back, so hard as to create marks in their back, and falling face forwards, but somehow landing backwards, in a sitting position with legs splayed open is never explained or grappled with by Mr Cole. He has selected elements of Ms West's evidence, while ignoring parts which did not fit the account. We were repeatedly told that it did not follow that a fall forward (caused by the victim being taken by surprise) would necessarily cause injuries. It would appear to be a remarkable turn of events when a 20 stone man, falling forward face-first, having been pushed by surprise and with force, falling forward into a door/doorframe/wall should emerge without so much as a bruise. It seemed similarly unlikely that the victim of such an attack, who had taken every possible opportunity to complain about staff, and particularly this member of staff, would ignore this opportunity to complain immediately, or when approached by the duty manager. This failure

to capitalise on an actual assault was not a turn of events the tribunal found reconcilable with the other evidence presented.

117. Mr Cole characterised this as a situation where two witnesses supported the accusation versus only one who did not (the Claimant). Mr Cole did not give any weight or seemingly any attention to the evidence of Mr Salmon, the Duty Manager, who appeared on the scene immediately after the incident was said to have occurred and he spoke with ER that day (4/7) and confirmed that ER did not raise or mention an assault. Mr Cole does not say that he either took it into account or discounted it. Mr Salmon indicated that there was no accusation from ER immediately after finding ER on the floor, and indicated that ER got up, went to attack the Claimant and that he steered him to his flat, where he went quietly. This directly contradicts the quite different account from Mr Morosanu of a naked ER shouting at the Claimant for thirty minutes. Mr Salmon confirmed that ER was focused on events of the day before and securing the dismissal of a BME member of staff. On his previous pattern of behaviour, had ER been attacked, he would have been expected to raise an allegation with Mr Salmon. He did not. Therefore, aside from Mr Morosanu's account in his email to Mrs Freebody after 7 pm, there is no supporting evidence from the scene or witnesses from 4/7 for ER having been pushed, or having complained of being pushed, or bearing marks or injuries either between 10am and 10:30am, or at any point throughout Mr Salmon's shift.
118. Mr Cole considered the fact that there was no retraction of the service user's allegation as being highly significant. As outlined the allegation was not recorded in the normal manner as would have generated a follow up conversation in the manner of the previous allegations. ER was therefore not challenged to substantiate or detail this allegation or given any actual opportunity to withdraw it. The statement he was quoted as having made was taken as 'the beginning and the end' of the fact-finding on this point. This differentiated it from all the other examples before Mr Cole. He characterised what occurred here as consistent with the previous six occasions, but it was not. Even in the absence of this having been flagged by the investigation report, a cursory reading of the previous reports in his pack reveals this. He mentioned ER's propensity for fabrication in evidence, when discounting the idea that the Claimant should have taken ER's warning seriously (regarding Mr Morosanu grooming him to make safeguarding reports). Applying that logic it does not seem to have occurred to him that ER could equally have fabricated the accusation regarding 4/7 with prompting. In fact, the failure to mention the assault immediately or at all during that day, but only mentioning it after an approach the following day, was itself highly suspect. Mr Cole sought to explain this by reference to ER's ADHD. We heard no expert evidence to endorse this as a plausible explanation.
119. Mr Cole indicated that there was no evidence of ER fabricating a story for a discriminatory motive. This was not correct. ER's story here was "he pushed me". This was not a complex story. Previous stories he had fabricated to implicate staff included variations on "he raped me" or "they raped me". ER was established to be a racist, homophobic man who repeatedly tried to get members of staff sacked. His 'story' should have been approached with scepticism given his history and the time lag between the event and his unrecorded 'allegation'.
120. Mr Cole characterised ER's statement as unprompted – but was silent in his statement as to his role in securing the allegation from ER on 5/7. He describes this statement as information given by Mr Ward to Ms Lacy on 5/7. We now know he himself instructed Mrs Freebody to confirm what had happened and it was this statement, relayed to Mr Cole on 5/7, which he took as the trigger for the investigation. This was, to his personal knowledge, not a freestanding statement supporting the allegation – it arose directly from the investigation of Mr Morosanu's allegation. Mr Cole took care not to mention Mrs Freebody in this context, in

his statement, simply that he was made aware of an allegation by “the PDCA Service Manager” and he had no further involvement. The PDCA manager was, of course, Mrs Freebody. Mr Cole appointed the Case Manager. Mr Cole considered it reasonable to rely on Mr Ward's account without hearing it first-hand. This was despite Ms Lacy having included in the report the exchange from November where she uncovered the inconsistency in Mr Ward's account. Mr Cole claimed to have considered the appendices but makes no reference to this.

121. In terms of the possibility of fabrication by Mr Morosanu, Mr Cole states that there was no evidence to support this. In fact, in his submission to the Disciplinary Meeting the Claimant alleged that Mr Morosanu had a number of confrontations with him at work, and that their antipathy was known to management. He reported issues in the working relationship which had been reported in supervision and to his line manager, and that Mr Morosanu had refused mediation. The submission also included two supervision notes, one of which was the May 2021 supervision and also explicitly outlined the allegation that service users were being coached in making safeguarding complaints. It stated:

“In the second supervision and the most recent from May 2021 where s/u was taught by a staff member of how to “remove/eliminate” staff members that he doesn't like via making allegations against them and they will not be working with him anymore and they will get the sack. I have raised the above on my supervisions as I was one of the staff members for whom the allegations have been made. I have been told by RW that the allegations were looked at by management and it would not be considerate as serious.”

122. We have already considered the supervision report. While it contains hearsay (it is reporting a conversation that occurred with someone not present - ER), its significance was less in what it reported, but rather that it confirmed that an allegation of collusion was made by the Claimant to his manager 37 days in advance of this incident. Mr Cole does not appear to have read or cited the passage from the Claimant's submission on this point, or read the supervision note - if he had he would have been expected to address it and check the detail of the complaint made to Mr Ward. Mr Ward knew the staff member in question was Mr Morosanu. As noted, the May supervision record was read by Ms Lacy, as it is referenced in the report, but was not attached to the report, submitted by Mr Freebody. This information should have been before Mr Cole earlier. Mr Cole cannot be blamed for the supervision record having been mischaracterised and omitted from the report (though he might have been expected to notice its omission, given the reference), but this was rectified by the Claimant. Mr Cole's assertion in his statement that there was no evidence before him “regarding collusion” was therefore wrong. During the disciplinary hearing Mr Morosanu himself acknowledged their relationship was at best ‘professional’ and that ‘it didn't matter’ if they did not like one another. Mr Cole acknowledged this suggested poor relations. This acknowledgment, combined with the Claimant having identified supporting evidence of existing complaints, should have raised concerns regarding a motive for making a false complaint. The supervision report, the complaints to managers and in supervision, Mr Morosanu's refusal of mediation were all red flags. These would have warranted following up in a reasonable investigation of an allegation of this seriousness

123. Despite the issues around the antipathy between the parties being recorded at the end of the hearing, there is no suggestion that these issues were ever followed up by Mr Cole. It would have been a simple matter for Mr Cole to speak to Mr Ward or indeed Mrs Freebody to clarify the position on the May 21 supervision. A call to Kim Allen would have unearthed the detail of the previous complaints and Mr Morosanu's refusal to participate in mediation (another red flag). All these managers were subordinate to and reported directly to Mr Cole

or to managers he oversaw. It is extraordinary that in a case of this serious nature, with a staff member's career on the line, that the Decision maker, having been alerted by both parties to their antipathy, and by one to the existence of pre-existing evidence of complaints, failed to pursue and check these issues. The credibility and motivation of the original witness, and of the service user were crucial here. Under the Respondent's policy it was explicitly part of Mr Cole's role as Chair to make sure all relevant evidence was considered, and to consider whether further investigation was required if new matters arose. This was also part of Mr Freebody's responsibilities as CM – and in fact he had noted the antipathy between the colleagues as an issue which had arisen at the end of the hearing in the formal record. The SHR Jo Russell was present at the hearing and indeed participated in the later 'deliberations' during which Mr Cole reached his decision. For reasons unknown, neither Mr Cole nor Mr Freebody pursued these potentially exculpatory leads, and there is no record of Ms Russell having recognised that there was an issue with them not doing so, or of her advising them accordingly. A reasonable decision maker would have followed this up. A reasonably run process involving senior managers, cognisant of the policies and their responsibilities, would have understood the importance of following this up and ensured it was done.

124. It was revealed in Mr Cole's statement that he considered the Claimant's clear work record, lack of warnings and consistent denial of the accusation in relation to sanction. He does not mention having factored his record in his consideration as to whether this alleged incident had in fact happened, as described. Would a staff member with a reputation for being boundaried, with experience and training in handling aggressive situations and conflict, act in this manner on this day, with potential witnesses and managers in situ? Was it a coincidence that the source of this complaint happened to be the person who he had made three previous complaints about? Both are certainly possible but warranted consideration in this context. Mr Cole considered the remarks Mr Ward made months later that 'ER was concerned about whether the Claimant was working that day' as being important. It appears he assumed that this concern was because ER was physically afraid of the Claimant. Was there not another possibility? Could it have been that he was worried about facing someone about whom he had made a false accusation? This other potential explanation was not mentioned as having been considered by Mr Cole.
125. It is evident by this point that this was not an even-handed process. Simply by considering the information actually assembled before him (ignoring for now the un-investigated aspects) the Decision maker made errors. He failed to appreciate the significance of key evidence (Mr Salmon); he ascribed weight to evidence which was not persuasive, while ignoring unhelpful elements of that same evidence (Ms West); he treated as spontaneous information which in fact derived from a direct approach he himself had ordered (Mr Ward on ER). He failed to recognise or consider the internal inconsistencies in Mr Morosanu's evidence, the significant contradictions between Mr Morosanu's evidence and those of the other witnesses, or the inconsistent handling of ER's 'allegation' here with the previous complaints he made. He did not weigh or properly consider the significance of Mr Morosanu's behaviour in response to the assault or the significance of his failure to follow protocol. He had not weighed the fact that ER himself had previously made multiple false allegations against staff, with a view to having them fired, and it appears he failed to read, consider or follow up the Claimant's prescient and very specific complaint about ER having been groomed to make a complaint by Mr Morosanu. He did not recognise, consider or follow up evidence supplied which confirmed pre-existing complaints about and the shared antipathy with Mr Morosanu. No consideration appears to have been given to the fact that Mr Morosanu had access to this service user on 4/7 and was in a position, if he had so wished, to encourage ER – who he knew shared his antipathy to the Claimant - to make a complaint. In terms of evidence, which was not before him, he had not sought for ER to be interviewed on either the allegation or the previous 'grooming' allegation

concerning Mr Morosanu. Nor was Mr Ward's account tested in the manner it should have been.

126. Was this Disciplinary process reasonable and fair, for an employer of this type in this industry bearing in mind the resources available? The answer is no. The Disciplinary process did not rectify the shortcomings in the investigation. The Chair did not ensure that the process leading to the hearing was fair or that the hearing was fair. The analysis he applied to the evidence before him was poor. He accepted the management case at face value, excused all contradictions in Mr Morosanu's evidence and gave no quarter to the Claimant. His failure to investigate or follow up the allegations he was supplied with by the Claimant is inexplicable, particularly in the face of the errors in Mr Morosanu's evidence. This was particularly troubling given Mr Morosanu's recorded attitude in the hearing. Mr Cole is a senior manager and he could have checked, or have checked, elements of the accounts he was given by speaking to his subordinates. There was a failure to engage with exculpatory evidence, or evidence which pointed towards Mr Morosanu's ulterior motives here. No reasonable employer would in good conscience ignore and fail to follow up the issues and evidence brought to its attention in the context of such a serious charge, with such profound implications for the employee. Mr Cole did not fulfil his duties as Chair to ensure that all relevant evidence before him was considered, that all relevant evidence was before him, or to ensure that further investigation of key information was undertaken. Given that not only his employee's job was at stake, but his ability to pursue this career was in jeopardy, this was unreasonable.

Appeal

127. The Appeal process here was unusual. The law recognises that a full re-hearing is not necessary for an appeal to be valid, but it should consider the fairness of the proceedings below. Rather than a full rehearing by an independent decision maker, or a review by an independent decision maker, the Respondent has adopted a system whereby the Claimant is called upon to present their case, then the previous decision maker is permitted to respond and present the management case, defending their decision. The Chair is required only to attend to the points raised by the parties. This is problematic. One obvious issue here is that if an issue is not raised by the Claimant, there is no scope here for any deficiency to be found or examined by the appeal board. The process exposes appellants, who have rejected the disciplinary process finding, face the person whose decision they have challenged. There is something troubling about an appellant facing the person who conducted the disciplinary process, who has the benefit of appearing to defend their decision before one of their supervising senior managers.

128. ACAS requires an appeal to be "dealt with impartially and wherever possible by a manager who has not previously been involved in the case." The Chair here was not independent of the case – she had previously been involved in this matter, having been sighted on various emails discussing strategic handling of questions around this case. Ms Walker did not accept this could be a conflict when it was put to her during the hearing, and yet was unable to confirm her exposure to the case was limited to the emails disclosed as she did not check for conflict before accepting this role. A conflict check would be the first thing a putative Chair undertakes to ensure they can provide fair and impartial view - the failure to conduct one was an error. From what we saw she should have been aware of the potential conflict, she should have checked, and having done so should have seriously considered recusing herself upon realising the potential conflict here.

129. Setting that to one side, the appeal itself followed the adversarial model the Respondent provides for. Ms Walker confirmed in her statement that she made it clear that this was not a

re-hearing and that it was for the Claimant to outline why the decision was 'perverse or disproportionate'. There is no mention anywhere in the Respondent's Disciplinary guidance of this phrase, and it is unclear where Ms Walker took it from. It is not clear if this was imposed by Ms Walker, or by her SHR Jo Russell, or indeed is an unpublished Respondent imposed requirement, but the fact that the test to be applied is not transparent, or is left to appeal Chairs' discretion, is unacceptable. Seeking to overturn the decision only on the basis that it was 'perverse' is a high bar to meet, and difficult to see how it would be possible to overturn a decision on the basis of mere unfairness, or error, using that metric. Bearing in mind that the misconduct charge was established only on the balance of probabilities, it appears onerous that in order to overturn that you need to meet a radically different level of proof. Ms Walker sought in evidence to persuade us that she adopted a more free-ranging, inquisitive approach, but this was contradicted by the clear and brisk approach she had articulated to the parties and by what her witness statement conveyed.

130. Ms Walker considered that the lack of documentation immediately following 'the incident' created a complication. Again, as with Mr Cole, this decision maker started from the presupposition that 'the incident' as alleged had occurred. There was documentation in respect of the incidents from 10:03, from the Duty Manager who denied there having been any suggestion of such an assault. Mr Salmon had in fact recorded that no complaint was raised by ER during his shift, despite their discussion of the events of the day.
131. Ms Walker stated that she saw evidence that the panel had "fully considered whether Mr Morosanu might have fabricated evidence... no evidence had been presented to support the Claimants assertion that he had made up his account". The previous panel had simply rejected that assertion in the face of Mr Morosanu's comments and had ignored and failed to follow up the issues raised on that front. She has accepted their reassurance at face value and failed to engage with the allegation raised at the hearing and the appeal that Mr Morosanu's motivation, and indeed his changing account, created concerns about his credibility.
132. Most interesting was that Ms Walker explicitly cited that she and the panel were satisfied that Mr Morosanu's account was in keeping with the service users behaviour following the incident, and noted with approval that it was supported by Ms. Wests assertion that "it looked as though the service user had been pushed". In fact Ms Walker repeated this in her statement from 16/2/24, still suggesting this was persuasive.
133. Ms Walker repeated the position that an absence of marks did not mean an assault had not taken place. That is correct as a general statement – however the absence of marks undermines the account Mr Morosanu gave, of a violent unprovoked assault at speed, with force, sending a 6'7", 20 stone man face-first onto a door/wall. Ms Walker did not resile from this position when invited to consider the question by the Tribunal. Again, any contradictions or inherent implausibility were simply absorbed and ignored.
134. The approach taken by Ms Walker here was passive. In her statement she repeated with unqualified approval assertions made in the management team submission. Among her reflections were that "...Mr Morosanu maintained a consistent account of what he witnessed...": he did not - his account changed in respect of significant details. "He did not attempt to describe events he was unable to see": he had done exactly that in his original email, describing events at the office door. It was also evident from Mr Walkers account that the error strewn 'matrix' from the Investigation Report had made its way to the appeal panel and had passed through a third level of senior staff who had all claimed to carefully consider the accompanying material which the report had in fact misrepresented. There was an absence of analysis here. This was not an appeal which was going to detect let alone remedy

deficiencies below. The appeal process was not, from our perspective, ACAS compliant in form or effect. This was a rubber-stamping exercise.

Conclusion

135. This overall process here did not meet ACAS requirements under their “Code of Practice on disciplinary and grievance procedures”. The process of appointing the Case Manager and Investigation Officer was opaque, their methods and approach remain unknown and the investigatory process was slow and incomplete. We have been offered no rationale for their approach, no explanation for their errors, or the omissions and misstatements in their work. The Investigation was poor, and the report produced was flawed and misleading. While the Disciplinary process met the basic formal requirements (minuted meetings, held with proper notice, opportunity to be accompanied and so on) it missed others (not providing the Claimant with notice of witnesses for example). Mr Cole was not independent of the process (given his involvement at the outset) and while this might not in itself had been a fatal flaw, he was not candid about his role in securing ER’s ‘allegation’ statement when reaching his view. Setting that aside his approach to the Disciplinary proceedings was not thorough, he did not properly weigh evidence before him, and he failed to follow up on evidence that would have cast light on the main witness’ credibility which required further consideration in a case of this type. The analysis applied to the evidence he was presented with lacked rigour. The structurally flawed appeal process which followed was headed by another compromised manager and Ms Walker’s appeal uncritically repeated Mr Cole’s findings. The process here as it played out was deficient at all points, and despite the involvement here of Senior Managers and HR resource, the Respondent failed to detect, rectify or challenge the issues during the Disciplinary Hearing or Appeal caused by the Investigation.
136. We are not satisfied that it was reasonable to rely on this flawed investigation. The initial investigation and subsequent processes did not provide reasonable grounds on which to sustain a genuine belief that the Claimant was guilty of misconduct. The disciplinary process was not fair, it lay beyond the range of reasonable responses an employer in this industry, with these resources and facing these circumstances would contemplate. There was a failure to properly assess the assembled evidence, to collect other evidence, which was reasonably necessary in these circumstances, or to consider or seek out other relevant evidence which the Claimant had signposted. None of the three elements of the Burchell Test are satisfied here.
137. As there were no reasonable grounds to believe misconduct occurred here, this dismissal was unfair and cannot be justified. A hearing will now be listed to consider remedy and associated issues.

Employment Judge **Harley**

Date: 11 April 2024