EMPLOYMENT TRIBUNALS

Claimant: Mr W Johnson

Respondent: A1 Nursing and Homecare Agency Limited

HELD AT: Liverpool **ON:** 16 & 17 June 2016

BEFORE: Employment Judge Horne
Ms H D Price
Mr W K Partington

REPRESENTATION:

Claimant: Ms L Neville, Solicitor
Respondent: Mr D Flood, Counsel

JUDGMENT having been sent to the parties on 23 June 2016 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Complaints and issues

1. By a claim form presented on 3 February 2016, the claimant raised complaints of direct race discrimination, unfair dismissal and breach of contract.

2. The issues for determination were clarified at the start of the hearing and further refined during the course of the parties' helpful oral submissions.

Direct race discrimination

3. The claimant is of Nigerian ethnic origin. It was common ground that the respondent had dismissed him. The tribunal had to decide whether the dismissal was because of the claimant's ethnic origin. With the agreement of the parties, our focus was solely on the decision made by Mr McSorley.

Unfair dismissal

4. In the unfair dismissal complaint, the first issue is whether the claimant had the required qualifying period of continuous employment.

5. The period in question is two years ending with the effective date of termination (EDT). It was agreed that the EDT occurred on 2 October 2015, when the claimant's employment was terminated without notice.

6. On the respondent's case, the claimant's employment first started on 28 July 2012 and the last period of continuous employment began on 14 March 2015. On any view, therefore, the claimant was continuously employed for more than a month and would have been entitled under section 86 to one week's notice. Had that notice been duly given, the EDT would have been 9 October 2015. (On the claimant's case, the EDT would have occurred later, because the claimant would have been entitled to a longer period of statutory notice, but that entitlement presupposes a period of continuous employment of two or more years, so the issue over the qualifying period would not arise). The tribunal therefore has to decide whether or not the claimant was continuously employed from 10 October 2013 to 9 October 2015. The actual period in dispute in 10 October 2013 to 14 March 2015.

7. We have to decide whether the respondent has proved that:

   7.1. during that period there was at least one complete week where the claimant's relations with the respondent were not governed by a contract of employment; and

   7.2. in respect of that week, there was not a custom or arrangement by which the claimant's employment would be regarded as employment for any purpose.

8. If the claimant is entitled to bring a complaint of unfair dismissal, the respondent must prove the reason for dismissal and that it was a reason relating to the claimant's conduct. If the respondent discharges that burden, the tribunal must determine whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant.

9. One further issue arises if the dismissal is unfair. The tribunal must decide whether it is just and equitable to reduce any award of compensation on account of the claimant's contributory conduct.

Breach of contract

10. Two issues arise under the breach of contract claim:

    10.1. To what statutory period of notice was the claimant entitled? (The answer to this question depends on the period of continuous employment.)

    10.2. Did the claimant repudiate the contract by committing an act of gross misconduct entitling the respondent to terminate the claimant without notice?

Evidence

11. We heard evidence from Mr McSorley, Mrs Norman, Mrs McSorley, Mrs Bevan and Mrs Lowe as witnesses for the respondent. The claimant gave evidence on his own behalf, but called no witnesses.

12. We considered documents in an agreed bundle running to 305 pages. We did not read every page in the bundle, but we did read every page to which our attention was directed in the witness statements and orally during the hearing.

Facts

13. The respondent is an employment agency providing workers in the residential care and homecare sectors. At the time with which we are concerned, it had 9

management and administrative staff and approximately 670 agency workers on its books.

14. The respondent's managing director is Mr John McSorley. His mother, Mrs Helen Norman, founded the company and remains a director. Mrs Corina McSorley was the nurse manager. Management of agency care workers was delegated to care co-ordinators.

15. If an agency worker wished to work for the respondent, he or she was required to be registered. The registration process included, or at least was intended to include, mandatory training. One of the training modules was in moving and handling techniques. The module was split into two components: theory and practical.

16. Registered agency workers who were between assignments would remain "on the books". For the first two months or so following the end of an assignment, care coordinators would ring a worker who was on the books with a view to offering further assignments. If a worker did not take up an offer during that period, the care coordinator would tend to stop ringing them. A worker who went for 6 months or more without an assignment would be required to re-apply for registration. If they had not worked for the respondent for an entire financial year, their name would be taken off the books for the next financial year. The respondent would not issue a P45 certificate for an agency worker who was between assignments.

17. The claimant began working for the respondent on 28 July 2012 as an agency support worker. His induction included both theoretical and practical components of the moving and handling training. He was given an induction pack which included the respondent's disciplinary procedure. One of the stated principles of the procedure was, "At every stage in the procedure the employee will…be fully advised of the nature and detail of the alleged complaint".

18. Over the months that followed, the claimant worked on several different assignments at different residential care homes. Between assignments he would receive regular telephone calls from the respondent with offers of work. He would accept or reject those offers depending on his availability. If he declined, there would be no sanction, but he would be called again some time later with a further offer of assignment.

19. One of the establishments at which the claimant worked on assignment was known as Heathcotes. In the summer of 2013 the claimant stopped working for the respondent and took up employment with Heathcotes directly. From 14 June 2013 until 14 March 2015 the claimant did no work for the respondent.

20. At the end of each financial year in April 2013, 2014 and 2015, the respondent prepared P11 returns correctly recording the payments made to the claimant during the year just ended. The returns described the claimant as an employee and referred to a start date in 2012.

21. On 1 March 2015, the claimant signed a further application form for registration with the respondent. It is possible that the claimant understood that he was merely being given a training update. We accept the evidence of Mr McSorley that, as far as the respondent was concerned, he was applying for re-registration. The claimant was given refresher training in the theory component of the moving and handling module. The practical refresher

training was intended to be carried out by Mrs McSorley, but she was unable to deliver it, because of an injury to her back.

22. On 14 March 2015 the claimant started an assignment at Riverside Care Home and worked a regular shift pattern until 8 May 2015. The claimant's point of contact with the respondent was Mrs Rosemary Lowe, the care co-ordinator at the respondent's Blackburn office. Day-to-day management was undertaken by the Home Manager, Ms Gail Ainsworth.

23. The claimant's work brought him alongside a care assistant to whom we will refer as "Mr C". Mr C was employed directly by Riverside. Also working at Riverside was Ms Susan Reddin, the claimant's partner's mother.

24. On 8 May 2015 Ms Ainsworth telephoned Mrs Lowe to report an incident. It had occurred at Riverside Care Home the previous day. Involved in the incident were the claimant, Mr C and an elderly resident to whom we will refer as "Service User B". Ms Ainsworth sent Mrs Lowe a copy of an incident report written by Mr C. She informed Mrs Lowe that Service User B had woken with bruising to her arms. At some point, probably the day of the telephone conversation, Ms Ainsworth sent Mrs Lowe photographs of the bruising.

25. Mr C's incident report read (with our spelling and punctuation corrections):

> "We, me and the [claimant], were about to get [Service User B] up from the chair. I noticed another lady had her head leaning over, so I walked across the room, and gently moved her head up. When I turned round I saw [the claimant] pull [Service User B] by the hand. She was now not seated but not up, shouting, "You're hurting me," and I shouted, "Stop it, don't do that, let go!" He did as I said. But this whole thing was about 5 or 6 seconds in time. We then assisted her up properly, with [Service User B] saying, "You're a rough bugger."

26. Mrs Lowe spoke to the claimant and asked for his side of the story. He denied having done anything that could have caused bruising to Service User B. At Mrs Lowe's request, the claimant wrote a handwritten statement. Although dated 7 May 2015, we find it was actually written on 8 May 2015. The statement explained that the incident had happened when all of the service users had been taken to their bedrooms apart from Service User B. He continued (with our corrections and added emphasis):

> "…as we were about to take her in she held my hands. So as I was going to place it on her aid that she walks with, [Mr C] said I shouldn't, so I didn't. We then **lifted her together** and got her in bed. There wasn't any problems, only for [Mr C] to go behind my back and lie that I have pulled the lady up, when that wasn't the case. I am very disappointed that people can act in this manner. This is not a safeguarding issue because no-one was hurt and no-one's life was put in danger. This is just a way to jeopardise my name."

27. The same day, Mrs Lowe spoke to a member of Lancashire County Council's Safeguarding Team. Mrs Lowe gave details of the incident based on the information she had. She established that Riverside Care Home had already reported the matter.

28. Mrs Lowe decided that the claimant should be suspended whilst the County Council's investigation was ongoing. The claimant was informed of his suspension on 8 May 2015.

29. On 11 May 2015 Mrs Lowe sent a fax to Mr McSorley, which included Mr C's statement and monochrome copies of the photographs.

30. For the next couple of months very little happened. Mr McSorley believed that an investigation was being carried out by the County Council and that the respondent should not interfere. The claimant regularly telephoned Mrs Lowe to ask for an update, but was simply told that the matter was in the hands of Safeguarding. But for the first two months or so, nobody at the respondent thought to chase up the County Council for the progress of their investigation. When the respondent did make contact with the County Council, they were told that the investigation was still ongoing. They did not think to ask if it would be appropriate for the respondent to carry out its own investigation in parallel to the Safeguarding investigation.

31. Whilst suspended the claimant started looking for other work. Later in May 2015 the claimant obtained a conditional offer of employment from Cornerstone Children's Home. The home contacted the respondent and asked for a reference, supplying a template form for the purpose. Mrs Lowe completed the form. She stated that the claimant's employment commenced on 26 July 2012. In the field next to "Reason for leaving", Mrs Lowe wrote, "Suspended". His competence and trustworthiness were described by Mrs Lowe as "Poor". In answer to the question, "Would you re-employ the candidate?" Mrs Lowe replied, "No". Mrs Lowe's reasons for these negative entries on the reference were that there was an ongoing safeguarding investigation and, on the evidence available to date, the claimant appeared to have acted inappropriately. In our opinion these were not good reasons. The reference gave the impression that Mrs Lowe had reached a concluded – and very negative – view about the claimant's competence and trustworthiness. But the conduct that had led her to form that conclusion had not yet been investigated. The respondent needed to avoid giving a misleading reference and could not cover up a potential safeguarding issue. It would have been quite sufficient, however, for Mrs Lowe simply to have stated that the claimant was suspended pending and ongoing safeguarding investigation. Having noted our criticism, we should add that we believe Mrs Lowe when she tells us that she acted alone in completing the reference and did not tell Mr McSorley about it. We also believe Mr McSorley's evidence that he did not write or approve the reference.

32. The completed reference was sent to Cornerstone, who withdrew their job offer.

33. On 19 August 2015 Mrs Bevan started employment as a care co-ordinator in the Blackburn office. Approximately two weeks after she started, the claimant telephoned her and voiced his frustration. She took an active interest in the claimant's case and decided to escalate it to Mrs McSorley. She and Mr McSorley then decided – belatedly in our view – to commence a parallel investigation as best they could, based on the evidence available to them. At the time of making their decision, they had still not heard from the County Council; nor had they actively sought the County Council's approval. What triggered Mrs McSorley's decision to begin an investigation was the

intervention of Mrs Bevan. There is no reason why the respondent could not have taken that decision months earlier.

34. By an undated letter, the claimant was invited to an "informal disciplinary meeting" to discuss the allegation of "incorrect moving and handling". The claimant had no reason to believe that this allegation was any different from the allegation contained in Mr C's statement.

35. The meeting took place on 18 September 2015. Mrs McSorley chaired the meeting, assisted by Mrs Bevan who took notes. The claimant was accompanied by Ms Reddin.

36. During the meeting the claimant handed Mrs McSorley a further handwritten statement. It was largely consistent with his previous version written on 8 May 2015. There were some subtle differences. Instead of stating that he and Mr C had lifted Service User B together, he said that they "moved her together" and that the claimant had "assisted" Mr C to move her.

37. There is some dispute about what happened at the meeting. We find the most reliable source of evidence to be Mrs Bevan's oral account and the notes that she made at the time. The claimant stated that Mr C "kept repeatedly going outside for smoke breaks and had asked [the claimant] to quickly get all the clients in bed so he could go back outside for another smoke break". The claimant described how he had tried to assist Service User B to use her walking frame, but that Mr C had said, "No, let's lift B into the wheelchair". The claimant added, "as it was quicker".

38. Contrary to the claimant's evidence, we are satisfied that the claimant told Mrs McSorley that he and Mr C had lifted Service User B by placing their arms under each of her arms and then manually lifting her onto the wheelchair. The claimant acted out the manoeuvre with the role of Service User B being played by Mrs Bevan. In order to lift Mrs Bevan the claimant placed his arm under Mrs Bevan's shoulder. Both Mrs Bevan and Mrs McSorley thought the manoeuvre to be inappropriate, carrying an unacceptably high risk of injury.

39. The claimant went on to say that, following the move, there was no evidence of Service User B having been injured. He said that Mr C's account was motivated by a personal grievance against him, caused by Ms Reddin working there.

40. On 21 September 2015 the claimant signed the minutes as being accurate.

41. By letter dated 23 September 2015 the claimant was invited to a disciplinary meeting. The letter did not contain any statement of the allegation that he faced. Not surprisingly, therefore, the claimant continued to believe that he remained accused of the conduct outlined in Mr C's statement.

42. The disciplinary meeting took place on 2 October 2015. Present were Mr McSorley, Mrs Bevan, the claimant and Ms Reddin. At the start of the meeting the claimant was asked whether he agreed with the minutes of the investigation meeting. He replied that "some words had been slightly changed as to what was actually said." When pressed for examples, and given a copy of the minutes to consider, the claimant did not raise any particular inaccuracy.

43. The conversation moved on to the incident itself. At first, the claimant denied lifting Service User B at all. He demonstrated a position with minimal contact that did not involve bearing any of the service user's weight, but meant he was

close at hand in the event that the service user lost her balance. Mrs Bevan pointed out to the claimant that his demonstration was different from the manoeuvre that he had acted out at the previous meeting. The claimant then accepted that he had assisted Mr C to lift Service User B.

44. The conversation became heated. The claimant's frustration mounted because he could not understand why Mr McSorley kept on questioning him. In particular, he did not care for Mr McSorley expressing concern about the lifting manoeuvre that the claimant had admitted to having carried out. It was the claimant's belief that he was accused of the violent conduct that Mr C had alleged. The claimant believed it sufficient to rebut Mr C's version and he would be cleared. This confusion could have been easily avoided had Mr McSorley given some thought to formulating the allegation properly in writing before the disciplinary hearing.

45. At one point in the meeting, the claimant stated that he had not completed his recent moving and handling training. He went on to accept, however, that he knew that the lift done on Service User B was not correct. He added that it was the way Mr C lifted all the clients, so the claimant thought that he should do the same. Mr McSorley asked the claimant if in future he would ignore his training and would just work to how other employees worked. The claimant replied that he would not.

46. Mr McSorley set about making his decision. He was satisfied that the claimant had used a dangerous manoeuvre to lift Service User B. He did not, however, think that this manoeuvre by itself was serious enough to justify dismissal. His main reason for taking this view was that he knew that the claimant had not received the practical component of the moving and handling training. He was afraid that the respondent could not demonstrate that the claimant knew that the lifting manoeuvre he performed on Service User B was dangerous. Nevertheless, Mr McSorley decided that the claimant should be dismissed. His reason was that the claimant's conduct was seriously aggravated by two factors:

    46.1. First, that the claimant had carried out the manoeuvre for an improper reason, namely to enable Mr C to finish his work quickly and go for a cigarette break.

    46.2. The second reason was that the claimant had, in Mr McSorley's view, shown no insight. He had attempted to deny having carried out the lift at all and had then given answers that suggested that he might behave in the same manner in a similar situation in the future. Mr McSorley's impression of the claimant's answers had come during the part of the meeting where the claimant was showing his frustration.

47. When the meeting resumed, Mr McSorley told the claimant that he was being dismissed without notice for gross misconduct. The outcome was confirmed to the claimant by letter the same day, with a very brief explanation of the reason.

48. The claimant appealed against his dismissal by letter dated 23 October 2015. The appeal letter was written by his solicitors. It reiterated that the claimant had been told by Mr C to move Service User B using a wheelchair "as this would be quicker". It went on to state that the claimant "had no alternative other than to assist with the manual lifting of B into the wheelchair". According to the letter, the claimant had "supported" Mr C who had "instigated" the

manual handling. It requested copies of Mr C's original report and copies of photographs of the bruising.

49. Mr McSorley replied, agreeing to accommodate an appeal, but declining to "revisit an investigation of the facts", doubting that "an umpteenth version from your client will do much to improve his credibility."

50. On 26 October 2015, one of the respondent's white employees, Mr J, reported that he had made a mistake when administering medication. Mr J reported himself immediately following the incident. The Safeguarding Team was alerted. Mr McSorley investigated the matter and decided to take no further action. He was satisfied that Mr J had learned from his mistake and was impressed by his prompt action in reporting himself as soon as he discovered the possibility of an error.

51. Mrs Norman was appointed to hear the claimant's appeal. On 1 December 2015 the claimant attended an appeal meeting with Mrs Norman, Mrs Bevan and Mr McSorley. The claimant explained his grounds of appeal. In answer to a question from Mrs Norman, the claimant confirmed that he had received moving and handling training within the last 3 years. Mr McSorley gave an account of why he had decided to dismiss the claimant. When Mr McSorley referred to the comment from the claimant about having carried out the manoeuvre because it was quicker, the claimant denied saying that he had done it because it was easier. At one point Mr McSorley interrupted the claimant with a comment along the lines of, "Don't speak to my mother like that." Mr McSorley's remarks gave the claimant the impression that he was trying to run the meeting.

52. Part-way through the meeting, Mrs Bevan left the room to photocopy some documents for the claimant. Whilst she was gone, the claimant and Mr McSorley had a one-to-one conversation. Mrs Norman was in the room, but not involved in the conversation. Mr McSorley made a comment to the effect that the claimant was confusing the respondent's disciplinary process with the County Council's safeguarding investigation. He also accused the claimant of changing his story and went as far as to call him a liar.

53. This brings us to an important dispute of fact. It is alleged by the claimant that, during this one-to-one conversation, Mr McSorley told the claimant to go back to his own country. It would clearly have been unacceptable for Mr McSorley to say such a thing. The claimant is of Nigerian ethnic origin. He would rightly take those words to be offensive and racist. Our finding is that Mr McSorley did not make any comment of this kind. We have a number of reasons for coming to that view:

    53.1. First, Mrs Norman was present in the room, even if she was not actively involved in the conversation. We think it likely that, had the alleged remark been made, she would have noticed it, or at least witnessed some kind of reaction from the claimant. We accept Mrs Norman's evidence that she did not hear such a remark.

    53.2. Mr McSorley's evidence is straightforward: he simply denies that any such remark was made.

    53.3. We had difficulties in accepting the claimant's evidence about the alleged remark. In order to explain why, we must step outside the chronology to the presentation of the claim form on 3 February 2016. It was prepared by

the claimant's solicitors. It set out the claimant's basis for contending that the claimant's dismissal was because of race, but made no mention of the alleged remark. Had the comment been made, it is very likely that his solicitors would have referred to it in the claim form. We do not know, and have no business to enquire, what instructions the claimant gave his solicitors. But we find it hard to believe that the claimant could have heard that remark at the appeal meeting and not mentioned it to his solicitors as part of his instructions to them. It was clearly the most important piece of evidence that connected Mr McSorley's decision to the claimant's race. Any solicitor worth their salt would also have seized upon that remark as an act of harassment or, at the very least, as part of the basis for contending that Mr McSorley had discriminated against the claimant.

54. We return to the appeal meeting. Mrs Bevan re-entered the room. Mrs Norman then left for a short while to gather her thoughts about the outcome of the appeal.

55. Mrs Norman decided to let the dismissal stand. It was not easy for us to discern exactly what went through Mrs Norman's mind at the time she reached that decision. Prominent in her thinking was her view that the claimant had wrongly lifted Service User B and had failed to show the correct degree of remorse. It included the belief that the claimant had lifted Service User B sufficiently harshly to cause Service User B to refer to the claimant as a "rough bugger". That belief can only have come from reading Mr C's statement and taking it at face value. Her conclusion from the "rough bugger" remark led Mrs Norman directly to think of Service User B as a "poor lady" who had been mistreated by the claimant. Mrs Norman was also significantly influenced by beliefs that did not relate to the claimant's conduct, in particular, that the respondent was powerless to uphold the appeal until it had the outcome of the safeguarding investigation.

56. The meeting resumed and Mrs Norman gave the claimant the bad news. She attempted to soften it by stating that she would be happy to support [the claimant] if he needed to see her again at a later stage or if he required any further documents. In her evidence to us, Mrs Norman told us that she had given a more specific assurance to the claimant. As she recalls it, she told the claimant that, if the safeguarding investigation was concluded in the claimant's favour, she would re-hear the appeal and consider reinstating the claimant. Whilst not doubting the sincerity with which Mrs Norman gave that particular piece of evidence, we are unable to accept it. Had Mrs Norman given a specific undertaking such as that, we would have expected to see it in the minutes.

57. On 3 May 2016, Lucy Singleton of Lancashire County Council produced her long-awaited report into the safeguarding investigation. Her findings were inconclusive. Mr C's allegation was neither substantiated nor unsubstantiated. Though not strictly part of her remit, Ms Singleton observed in passing that she queried the decision to dismiss the claimant. Her view, recorded in the report, was that "extra training would have been an appropriate response".

58. Having found all other relevant facts, we turn to the factual dispute at the heart of the race discrimination complaint. We are quite satisfied that the claimant's ethnic origin was in no sense whatsoever a motivating factor, conscious or subconscious, behind the claimant's dismissal. Mr McSorley's decision was

based solely on his belief about what the claimant had done on 7 May 2015. Had we felt it necessary to go through the two-stage approach to the burden of proof, we would not have been able to find any facts from which we could have concluded that the dismissal was because of the claimant's race. Our rejection of the claimant's evidence about the alleged racist remark left the claimant with very little from which we could draw such an inference. Mr J's circumstances were materially different from those of the claimant and did not enable an effective comparison. In any case, as it happens, we felt able in this case to move straight to the second stage and make a positive finding of fact.

Additional facts relevant to breach of contract

59. The breach of contract claim requires us to make findings about what the claimant actually did with Service User B. This is the least pleasant part of our fact-finding exercise.

60. It weighs on our mind that care workers in general are dedicated professional people who undertake challenging work. Our starting point in trying to recreate the events of 7 May 2015 is that it would be unusual for a care worker in the claimant's position to choose to put his career at risk by physically abusing a service user. It takes convincing evidence to persuade us that this is what happened.

61. We have only heard the claimant's version of events. Mr C's version is untested and we are certainly not able to take his account at face value. Nevertheless, based on what the claimant wrote, and what we have found that he said and did during the investigation, we make the following findings:

61.1. The claimant started to assist Service User B to use her walking frame. Mr C expressed his view that it would be better and quicker to use the wheelchair.

61.2. The claimant knew that Mr C was a regular smoker and believed that the reason why Mr C wanted to move Service User B quickly was so that Mr C could have a cigarette break.

61.3. The claimant did not challenge Mr C or report him to the nurse in charge. In this regard, we have some sympathy for the claimant. His employment situation was more precarious than that of Mr C, making it harder for the claimant to challenge him.

61.4. The claimant and Mr C began to lift Service User B together with their arms under each of her arms. We find that the claimant did significantly more than just keep gentle contact with Service User B for balance. He was actively involved in the lift and bore her weight.

61.5. Together, as a result of the lift that they both performed, the claimant and Mr C caused the injuries to Service User B that are shown on the photographs.

61.6. At the beginning of the disciplinary meeting, the claimant attempted, at least to some extent, to minimise his actions by suggesting that he had just been present and assisted for balance rather than by actually lifting Service User B.

Relevant law

62. Section 86 of the Employment Rights Act 1996 ("ERA") reads, relevantly, as follows:

> (1) The notice required to be given by an employer to terminate the contract of employment of a person who has been contiuously employed for one month or more-
>
> (a) is not less than one week's notice if his period of continuous employment is less than two years…

63. The general right not to be unfairly dismissed is simply stated in section 94(1) of ERA. That right is limited by section 108(1), which states:

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

64. The effective date of termination (EDT) is defined in Section 97 of ERA. By section 97(2), where the contract of employment is terminated by the employer, and the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the EDT, for the purposes of section 108(1) the later date is the EDT. The material date, for these purposes, means the date on which the employment was terminated.

65. Section 210 of ERA, so far as relevant, reads:

> (1) References in any provision of this Act to a period of continuous employment are…to a period computed in accordance with this Chapter…
>
> …
>
> (4) Subject to sections 215 to 217, a week which does not count in computing the length of a period of continuous employment breaks continuity of employment.
>
> (5) A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous.

66. Section 211(1) provides that an employee's period of continuous employment begins when the employee starts work. It ends, for present purposes, with the EDT.

67. The relevant provisions of section 212 are:

> (1) Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.
>
> …
>
> (3) …any week (not within subsection (1)) during the whole or part of which an employee is… (c) absent from work in circumstances such that by arrangement or custom he is regarded as continuing in the employment of his employer for any purpose… counts in computing the employee's period of employment.

68. Numerous reported cases address the question of whether a worker's relations are or are not governed by a contract of employment. There was little dispute about the relevant legal principles and we set them out only briefly here.

69. The classic formulation of the test is contained in the judgment of McKenna J in *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions* [1968] 1 All ER 433. The tribunal should ask itself three questions:

69.1. Did the worker agree to provide his or her own work and skill in return for remuneration?

69.2. Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant?

69.3. Were the other provisions of the contract consistent with its being a contract of service?

70. Every contract of employment must have an "irreducible minimum of obligation", consisting of an obligation of the employer to provide work and a corresponding obligation of the worker to do the work that is provided: *Carmichael v. National Power plc* [1999] UKHL 47.

71. In the case of casual or sporadic workers, it is often relevant to examine the period between assignments. If there is no obligation on the employer to offer an assignment and no obligation on the worker to accept an assignment that is offered, there will be no contract of employment spanning the period between assignments. The lack of any mutual obligation may also point away from there being a contract of employment whilst on assignment. As authority for these propositions, we would cite *Stringfellow Restaurants Ltd v. Quashie* [2013] IRLR 99, CA.

72. Section 98 of ERA provides, so far as is relevant:

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

73. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

74. Where the reason for dismissal is the employee's misconduct, it is helpful to ask whether the employer had a genuine belief in misconduct, whether that belief was based on reasonable grounds, whether the employer carried out a reasonable investigation and whether the sanction of dismissal was within the range of reasonable responses: *British Home Stores Ltd v. Burchell* [1978] IRLR 379, *Iceland Frozen Foods Ltd v. Jones* [1983] ICR 17.

75. Where an employee has been dismissed by an organisation, section 98 is silent as to which individual within the organisation counts as the "employer", for the purpose of ascertaining the reason for dismissal and whether the employer acted reasonably or unreasonably. This question was settled by the majority of the Court of Appeal in the case of *Orr v. Milton Keynes Council* [2011] ICR 704. The tribunal should examine the reasoning of the person deputed by the employer to decide whether or not to terminate the employment.

76. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

77. The tribunal must consider the fairness of the whole procedure in the round, including the appeal: *Taylor v. OCS Ltd* [2006] IRLR 613.

78. There may be circumstances where a dismissal is unfair because the employer has treated two employees inconsistently for the same misconduct. However, for a dismissal to be unfair, the circumstances must be truly comparable: *Hadjiouannou v. Coral Casinos Ltd* [1981] IRLR 352. Where the employer consciously distinguishes between the two employees, the tribunal must not interfere unless the employer had no reasonable basis for distinguishing between them in that way.

79. *ACAS Code of Practice 1 – Disciplinary and Grievance Procedures* at paragraph 5 reads:

> 5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case.

80. In *A v. B* [2002] UKEAT 1167/01, Elias J observed:

> (70) In our opinion, the question whether an employer has carried out such investigations as is reasonable in all the circumstances necessarily involves a consideration of any delays. In certain circumstances a delay in the conduct of the investigation might of itself render an otherwise fair dismissal unfair.
>
> (71) This was the view of the Employment Appeal Tribunal in RSPCA v Cruden (1986) ICR 205, (1986) IRLR 83. In that case the Industrial Tribunal held the dismissal of an employee of the RSPCA was unfair simply because of the delay of some 7 months in initiating proceedings. The

> Tribunal considered there was no good reason for this delay. They found, nonetheless, that the employee had suffered no prejudice as a result of it. Even so, the Tribunal considered the decision to dismiss to be unfair and the employer's appeal to the Employment Appeal Tribunal was rejected.
>
> (72) Where the consequence of the delays is that the employee is or may be prejudiced, for example, because it has led to a failure to take statements which might otherwise have been taken, or because of the effect of delay on fading memories, this will provide additional and independent concerns about the investigative process which will support a challenge to the fairness of that process.

81. Section 13 of EqA provides

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

82. Race, including ethnic origin, is a protected characteristic.

83. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, updated to reflect the language of EqA.

84. Less favourable treatment is “because” of the protected characteristic if the characteristic significantly influenced the decision to treat the claimant less favourably. It does not have to be the sole or principal reason. Unless the treatment is inherently discriminatory, the tribunal must look at the motivation, conscious or subconscious, of the decision-maker: *Nagarajan v London Regional Transport* [1999] IRLR 572.

85. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

86. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in *Igen v. Wong,* but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage. Tribunals proceeding in this manner must be careful not to overlook the possibility of subconscious motivation: *Geller v. Yeshrun Hebrew Congregation* [2016] UKEAT 0190/15.

87. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where

the tribunal is in a position to make positive findings on the evidence one way or the other.

88. We now turn to the law relevant to the claim for damages for breach of contract. Gross misconduct has been defined in the case of *Neary v. Dean of Westminster* [1999] IRLR 288 as conduct which so undermines the relationship of trust and confidence that the employer can no longer be expected to keep the employee in employment.

Conclusions

Qualifying period of continuous employment

89. Our view is that, whilst on assignment, the claimant was employed by the respondent. This view is consistent with the concession that the respondent has made in relation to the period from 14 March 2015. There was a clear obligation on the claimant, once he accepted an assignment, to fulfil the assignment or to give 24 hours notice of cancellation. Under the contract the claimant was required to do the work personally. The respondent was obliged to pay him for any work done. Although day-to-day instructions were given by the client, the respondent retained sufficient control over the claimant's work to be compatible with employment. The other hallmarks of employment, such as annual leave and PAYE tax, were present.

90. This relationship can be contrasted with the period between assignments. The claimant was not obliged to accept work that was offered to him, and the respondent was not obliged to offer any work.

91. We have drawn that conclusion from a number of sources, one of which is the claimant's own oral evidence about what would happen between assignments. That understanding is consistent with the claimant's terms which he signed on two occasions in 2012 and in 2015. In particular the requirement to give notice was based on the express presumption that the claimant had accepted the work in the first place. That understanding was also consistent with the written handbook which the claimant was provided with when he first started in 2012, in particular the internal page 9 of the handbook. There was a clear statement in the handbook itself that once work was accepted notice had to be given re cover regular work whilst absent. Again there was no express obligation in any document that the respondent would offer work or that the claimant would accept it.

92. We think that the irreducible minimum of mutuality of obligation was not present whilst the claimant was absent from an assignment. There was a period of several months during the disputed period where the claimant was not doing any work on assignment. That was not governed by a contract of employment. Therefore unless the exception under section 212(4)(c) applies, continuity of employment was broken.

93. In our view the exception did not apply. There was no custom or arrangement that the period July 2013 to March 2015 would count as being under a contract of employment for any purpose.

94. It is arguable (and consistent with the respondent's concession) that there was such a custom from May 2015 onwards during the period of suspension. Otherwise, we might rhetorically ask ourselves, why call it a suspension? Why go through the procedure of dismissal? Why not simply decline to offer the

claimant any further assignments? Why not refer to it as taking the claimant off the books?

95. Again, this state of affairs can be contrasted with the period from July 2013 to March 2015. There is nothing to suggest that any arrangement of that kind existed during the earlier gap between assignments. There was no express agreement to treat the claimant as being employed between assignments for any purpose other than during the period of his suspension. Nor was there any implied arrangement. The requirement to re-register in particular was inconsistent with such an arrangement. It is certainly inconsistent with any arrangement to treat the claimant as being continuously employed for more than 6 months between assignments.

96. We have taken into account the statements in the tax documents and Mrs Lowe's reference that employment began in 2012. Frankly, we believe that the statements in those documents are mistaken. They are based on a misunderstanding of the legal position. They not inform our view as to whether the claimant was continuously employed, which has to be determined according to the detailed provisions of ERA.

Fairness

97. The claimant not having continuous employment during that two year period means that we cannot consider the claim of unfair dismissal. We have, however, gone on to consider the position that we might be wrong and therefore we should analyse the unfair dismissal claim on its merits.

98. The reason for dismissal, in our view, was a set of beliefs held by Mr McSorley (who took the original decision to dismiss) and Mrs Norman (who confirmed the decision on appeal).

99. Mr McSorley's beliefs were:

99.1. first, that the claimant had, with Mr C, moved Service User B using an incorrect moving and handling technique by lifting her underneath her shoulders;

99.2. second, that the claimant had chosen to move Service User B in that way because the claimant knew Mr C wanted to move Service User B quickly so Mr C could go for a cigarette break;

99.3. third, that the claimant had, in his answers to questions, demonstrated no insight into the seriousness of his actions.

100. This set of beliefs was a reason that related to the claimant's conduct.

101. Mrs Norman's decision was based on a set of of beliefs, most of which related to the claimant's conduct, but some of which were not. We have in mind, in particular, Mrs Norman's belief that she was powerless to overturn the dismissal whilst the safeguarding investigation was still in progress.

102. We now turn to whether the respondent acted reasonably in treating those beliefs as sufficient to dismiss the claimant.

103. We will deal first of all with whether or not Mr McSorley had reasonable grounds for his belief:

103.1. He had reasonable grounds for believing that the claimant had used an incorrect technique. The claimant admitted in his initial letter that he and Mr C

had lifted Service User B. It was reasonable for Mr McSorley to believe that at the investigation meeting the claimant had demonstrated the manoeuvre that he had used and that it had involved lifting Service User B under her shoulders. At the disciplinary meeting, whilst the claimant initially denied having lifted Service User B, under further questioning he did accept that he had "assisted" Mr C to lift her. Although he demonstrated a different technique at the disciplinary meeting than he had demonstrated in the investigation meeting, he nevertheless showed that he was in contact with Service User B during the lift. That was different from his initial position at the start of the disciplinary meeting. Mr McSorley was entitled to come to the view that the claimant had changed his story. It would have been better if Mr McSorley had asked the claimant directly whether the claimant had put his arms underneath Service User B's shoulders, but his failure to do so does not mean that he did not have reasonable grounds for believing that that is what the claimant had done.

103.2. Mr McSorley had reasonable grounds for believing that such a technique was liable to cause injury. That knowledge accords with the understanding of everybody concerned, including the claimant himself, that the shoulder lift was inappropriate and dangerous.

103.3. Mr McSorley had reasonable grounds for believing that the claimant had assisted in the manoeuvre to enable it to be completed quickly. The claimant was recorded in the investigation meeting minutes as having said that. He did not state in the disciplinary hearing that he had not said those words. We accept the minutes of the disciplinary meeting so far as they show the degree of challenge that the claimant made to the notes of the investigatory meeting. He went as far as saying that some of the wording was not correct, but he was unable to identify any particular respect in which the meaning was wrong, and he certainly did not challenge those aspects of the investigation notes with which he now fundamentally disagrees. We find that the claimant did say that Mr C lifted all the clients in that way so that he thought he should do the same.

103.4. Mr McSorley had reasonable grounds for believing that the claimant had lacked insight. He just about got over that hurdle in our view. The reason for us having our doubts is that there was a considerable degree of confusion in the disciplinary meeting for which the respondent has to accept some of the blame. Mr McSorley had reasonable grounds for believing that the claimant had changed his story. At the start of the disciplinary meeting the claimant came across as saying that he had done nothing wrong, in that he did not lift Service User B at all. It was reasonable for Mr Sorley to believe that this was different from what the claimant wrote in his letter and said at the investigation meeting. Later in the meeting, the claimant appeared to be saying that he realised that the manoeuvre that he had used was incorrect and that he had done it because that was what the home carer did and he did not feel able to challenge him. He also said that in future he would not ignore his training and would not just work to how other employees worked. This was not inconsistent with the claimant showing insight. However, the claimant's manner of answering questions was defensive and it made it hard for Mr McSorley to be confident that he had genuinely learnt from the experience.

104. The claimant has advanced a number of criticisms of the investigation carried out by the respondent. We will start with the criticisms which we thought lacked merit:

104.1. *The failure to provide the claimant with documents*. When ultimately it was established what documents the respondent had in its possession, it appeared to us that the documents shed little light on the actual decision making process of the respondent. The actual decision was the set of beliefs that Mr McSorley had; the documents were not particularly relevant to that set of beliefs. The claimant was in any event shown the photographs of bruising to Service User B during the disciplinary meeting. He was given a report from Mrs Lowe and he was given Mr C's original statement.

104.2. *Mr McSorley's presence at the appeal meeting*. There is nothing wrong, in our view, with Mr McSorley attending. That accords with our experience that it is common practice for a person who makes a disciplinary decision to attend an appeal meeting to explain why he or she reached the decision they did. It would have been better if Mr McSorley had not intervened during the meeting to ask the claimant to speak in a different manner to his mother, but we are satisfied that he did not prevent Mrs Norman from being able to take an independent decision.

104.3. *Predetermination based on the reference*. It was unfair to write the reference in the terms in which Mrs Lowe did because the investigation had not been concluded. The claimant had written the letter of 7 May 2015 but on that version alone, because there had been very little investigation, it was unfair to describe the claimant's competence as being poor and saying that the claimant would not be employed again. It would have been far preferable simply to state that there was an ongoing investigation. However, this shortcoming did not affect the fairness of the dismissal. As recorded in our findings of fact, we are satisfied that Mr McSorley did not know about the reference and kept an open mind when dealing with the claimant.

105. Now we deal with what we regard as some weightier criticisms:

105.1. The respondent took too long to begin its investigation. The claimant was suspended for a period of over four months before the respondent's investigation even began. For part of that time the respondent was waiting to hear from Lancashire County Council, but for the first two of those months the respondent did nothing to chase them. That initial period of inaction is likely to have contributed to the overall delay. This was not just an academic point; it had, in our view, a real impact on the fairness of the proceedings. The disciplinary allegation arose out of a brief moving and handling incident that had happened in May. He was asked during the course of an investigation interview about it for the first time in September. It is quite likely that his memory would have faded in that intervening period.

105.2. The respondent failed to give the claimant a clear statement of the concerns it was investigating. At the heart of the respondent's decision was the belief that the claimant was guilty of misconduct even on his own version of events. On that version, they believed the claimant's technique had been inappropriate, he had knowingly carried out the move for an improper reason and that he had failed to speak out. But that was never put to the claimant in writing. The claimant was left reasonably believing that the allegation of incorrect moving and handling was the allegation that Mr C had made in his

initial statement and that by rebutting that he could keep his job. Proper formulation of the disciplinary allegation may have avoided some of the confusion and anger that arose in the disciplinary meeting. The claimant was indignant that he was being repeatedly questioned about his own version, whereas he thought the purpose of being at the meeting was to rebut Mr C's version. We recognise that, during the disciplinary meeting itself, it was put squarely to the claimant that, based on what he had said, there was a risk he might ignore his own training in order to do a practice that others followed. By that stage, however, the meeting had become dysfunctional. It was harder for the claimant to explain his answer than it would have been had he had advance notice of the allegation.

105.3. Finally, we think that there were two fundamental flaws in the appeal. The first is that it was not made sufficiently clear to the claimant that a positive report from the safeguarding authority would lead to a re-opening of the appeal. We have considered Mrs Norman's evidence in this regard. It is inconsistent with the appeal minutes and there was no assurance given in writing to the claimant that the appeal would be re-opened if the safeguarding investigation was concluded without any finding of misconduct on the claimant's part.

105.4. Another problem with the appeal was that Mrs Norman took account of an allegation (the "rough bugger" remark) in Mr C's initial statement and drew the inference that the claimant had roughly handled Service User B. It was unfair for her to reach that conclusion. It depended on Mr C's version being correct. She could not fairly decide whether Mr C's version was correct or not, because the County Council's investigation into Mr C's allegation was still ongoing and the respondent had not attempted to carry out such an investigation for itself.

106. We have stepped back from the particular criticisms and looked at the entire procedure in the round. We have asked ourselves whether any reasonable employer, having regard to the size and administrative resources of the respondent, could have gone about reaching its decision in that way. In our view it could not. There were too many serious problems with it. We find that the dismissal was therefore unfair.

107. Had the procedure been reasonable, we would not have interfered with the decision purely on the ground of inconsistency of treatment. In contrasting his treatment to that of the nurse who made a medication error, the claimant is not comparing like with like. One particular difference between the circumstances of the two is that the nurse immediately made a report of the incident and admitted their mistake.

Direct race discrimination

108. Our finding of fact dispose of the race discrimination claim. The treatment of the claimant, namely his dismissal, was not because of race. It did not amount to direct discrimination and the complaint must therefore fail.

Breach of contract

109. In the light of our conclusions on the qualifying period, our view is that the claimant would have been entitled to one week's notice of termination.

110. We remind ourselves of our additional findings of fact relevant to the breach of contract claim.

111. The claimant's actions, in our view, so undermined the trust and confidence that the respondent could have in the claimant that it could no longer be expected to continue to employ the claimant. The claimant had repudiated his contract of employment. The respondent was entitled to accept that by dismissing the claimant without notice and therefore the claim for breach of contract fails.

Contributory fault reduction

112. All that we have left to determine, should we wish to do so, is the question of contributory fault for unfair dismissal. This issue presupposes, of course, that the claimant had a qualifying period of continuous employment, which we have found he did not have. Our finding that he claimant did in fact commit gross misconduct must mean that the claimant was substantially to blame for his dismissal. We have not come up with a precise percentage. We think it unnecessary to do so since we have no power to actually find that the dismissal was unfair, but we would find it very difficult to envisage circumstances in which we could find that the percentage was less than 70%.

Disposal

113. Our conclusions mean that we must dismiss the entire claim. All that remains is for us to thank both parties' representatives for the skilful and efficient way in which they conducted the hearing.

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Employment Judge Horne

20 July 2016

REASONS SENT TO THE PARTIES ON

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FOR THE SECRETARY OF THE TRIBUNALS

[AF]