Case Number: 2301031/2014

EMPLOYMENT TRIBUNALS

Claimant: **CRW**

Respondent: **London Borough of Wandsworth**

Heard at: London South
On: 9, 10, 13, 14, & 15 February 2017
In chambers 31 May 2017

Before: Employment Judge Freer
Members: Ms B C Leverton
Mr O Husbands

Representation
Claimant: In person
Respondent: Miss C Maclaren, Counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that the Claimant's claims of ordinary unfair dismissal, unfair dismissal by reason of having made a protected disclosure and direct race discrimination are unsuccessful.

REASONS

1. By a claim presented to the employment tribunals on 19 December 2013 the Claimant claimed ordinary unfair dismissal, unfair dismissal by reason of making a protected disclosure and direct race discrimination.

2. The Respondent resists the claims.

3. The Claimant gave evidence on her own behalf and the witness statement of DM, Deputy Manager was not contested by the Respondent.

4. The Respondent gave evidence through Ms Marie Morgan, Change Adviser Wandsworth Council; Mr Mike Benaim, Assistant Director for Specialist Children's Services at Wandsworth; Ms Catherine Parsons, Acting Head of Human Resources; UM, Manager of the Unit; and Ms Carol Payne, Head of Special Needs Children with Disabilities.

5. The Tribunal was presented with a bundle of documents comprising 361 pages and additional documents during the course of the hearing as agreed by the Tribunal.

6. There remains in place a 'restricted reporting order' to preserve the privacy of the service users and staff given the sensitive nature of the allegations involved in this matter.

7. As a consequence the staff of the residential unit ("the Unit") have been allocated their job title initials by way of identification. The cross-references to documents in the bundle should assist the parties as to the identity of individuals if it is not obvious to them.

8. As Tribunal decisions are now published on the internet and given the sensitive nature of this case, the reasons are not as full as they might ordinarily be. Documents are often referred to by cross-reference to pages in the Tribunal bundle without the content being set out in the reasons. The parties will be aware of the content of those documents sufficient to know why they have won or lost as the case may be.

9. Employment Judge Freer apologises to the parties for the delay in promulgating this judgment and reasons, which has been due to lack of judicial resources.

The Issues

10. The issues to be determined were agreed between the parties at the outset of the hearing and were committed to writing by Counsel for the Respondent and are referred to in the conclusions below.

A brief statement of the relevant law

Unfair dismissal

11. The legal provisions relating to unfair dismissal are contained in Part X of the Employment Rights Act 1996.

12. Section 98 provides that, where dismissal is not controversial, the Respondent must show that the reason for dismissal is one of a number of permissible reasons. The Respondent in this case relies upon a reason relating to the Claimant's conduct.

13. If there is a permissible reason for dismissal, the Employment Tribunal will consider whether or not the dismissal was fair in all the circumstances in accordance with the provisions in section 98(4):

> "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"

14. The standard of fairness is achieved by applying the range of reasonable responses test. This test applies to procedural as well substantive aspects of the decision to dismiss. A Tribunal must adopt an objective standard and must not substitute its own view for that of a reasonable employer. (**Iceland Frozen Foods –v- Jones** [1982] IRLR 439, EAT as confirmed in **Post Office –v- Foley** [2000] IRLR 234, CA; and **Sainsbury's Supermarkets Ltd –v- Hitt** [2003] IRLR 23, CA).

15. It is established law that the guidelines contained in **British Home Stores Ltd –v- Burchell** [1980] ICR 303 apply to conduct dismissals, such as in the instant case. An employer must (i) establish the fact of its belief in the employee's misconduct, that the employer did believe it. There must also (ii) be reasonable grounds to sustain that belief, (iii) after a reasonable investigation. A conclusion reached by the employer on a balance of probabilities is enough. Point (i) goes to the employer's reason for dismissal (where the burden of proof is on the Respondent) and points (ii) and (iii) go to the general test of fairness at section 98(4) (where there is a neutral burden of proof).

16. It is also established law that the **Burchell** guidelines are not necessarily determinative of the issues posed by section 98(4) and also that the guidelines can be supplemented by the additional criteria that dismissal as a sanction must also be within the range of reasonable responses (also a neutral burden of proof) (see **Boys and Girls Welfare Society –v- McDonald** [1997] ICR 693, EAT).

17. The Court of Appeal in **Taylor –v- OCS Group Ltd** [2006] IRLR 613 emphasised that tribunals should consider procedural issues together with the reason for the dismissal. The two impact upon each other. The tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason as a sufficient reason to dismiss.

18. This decision was echoed in **A –v- B** [2003] IRLR 405, EAT and the Court of Appeal in **Salford Royal NHS Foundation Trust –v- Roldan** [2010] ICR 1457 with regard to assessing reasonableness of the process and the decision to dismiss with the seriousness of the alleged conduct.

Protected disclosure

19. Section 103A of the Employment Rights Act 1996 provides that an employee will be regarded as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

20. Part IVA of the Employment Rights Act 1996 contains provisions relating to protected disclosures.

21. Section 43A states that a protected disclosure means a 'qualifying disclosure' as defined by section 43B which is made by a worker in accordance with any of sections 43C to 43H.

22. Sections 43B provides that a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more prescribed circumstances.

23. It is irrelevant whether or not the information is correct, provided the worker reasonably believes it to be true (**Darnton –v- University of Surrey** [2003] IRLR 133, EAT and also see **Korashi –v- Abertawe Bro Morannwg University** [2010] IRLR 4, EAT on reasonable belief).

24. Allegations are not enough, the disclosure must convey facts (**Cavendish Munro Professional Risks Management Ltd –v- Geduld** [2010] IRLR 38, EAT).

25. By virtue of section 43L(3), a disclosure of information shall have effect where the person receiving it is already aware of it.

26. Sections 43C to 43H provide the circumstances when a qualifying disclosure may be made sufficient to make it a protected disclosure.

27. Before statutory amendments took effect on 25 June 2013, a qualified disclosure to an employer had to be made 'in good faith'. In this respect the Court of Appeal in **Babula –v- Waltham Forest College** [2007] IRLR 346 stated that an employment tribunal has to make three key findings: (i) whether or not the employee believes that the information they are disclosing meets the

criteria set out in one or more of the subsections in s43B(1)(a)-(f); (ii) to decide objectively whether or not that belief is reasonable; and (iii) whether or not the disclosure is in good faith (also see **Street –v- Derbyshire Unemployed Workers' Centre** [2005] ICR 97, CA)

28. From 25 June 2013, statutory amendments created an additional element to a "qualifying disclosure" that any disclosure of information, in the reasonable belief of the worker, is made "in the public interest". The requirement for a qualifying disclosure to be made "in good faith" was removed

29. In **Chesterton Global Ltd –v- Nurmohamed** [2015] IRLR 614 the EAT held the following with regard to what can be considered to be in the public interest:

> "The objective of the protected disclosure provisions is to protect employees from unfair treatment for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace (see *ALM Medical Services Ltd v Bladon*). It is clear from the parliamentary materials to which reference can be made pursuant to *Pepper (Inspector of Taxes) v Hart* [1993] IRLR 33 that the sole purpose of the amendment to s.43B(1) of the 1996 Act by s.17 of the 2013 Act was to reverse the effect of *Parkins v Sodexho Ltd.* The words 'in the public interest' were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications. As the Minister observed: 'the clause in no way takes away rights from those who seek to blow the whistle on matters of genuine public interest'.
>
> In the present case the protected disclosures made by the respondent concerned manipulation of the accounts by the first appellant's management which potentially adversely affected the bonuses of 100 senior managers. Whilst recognising that the person the respondent was most concerned about was himself, the tribunal was satisfied that he did have the other office managers in mind. . . All this led the tribunal to conclude that a section of the public would be affected and the public interest test was satisfied".

30. In **Kuzel –v- Roche Products Ltd** [2008] ICR 799, the Court of Appeal, confirmed the following in respect of the burden of proof on dismissal:

> ". . . the burden of proof issue must be kept in proper perspective. As was observed in *Maund*, when laying down the general approach to the burden of proof in the case of rival reasons for unfair dismissal, only a small number of cases will in practice turn on the burden of proof. . .
>
> I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of

> proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.
>
> Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.
>
> The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it *must* have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.
>
> As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason".

31. As confirmed in **Serco Ltd –v- Dahou** [2015] IRLR 30:

> "If a tribunal rejects the employer's purported reason for dismissal, it may conclude that this gives credence to the reason advanced by the employee, and it may find that the reason was the one asserted by the employee. However, it is not obliged to do so. The identification of the reason will depend on the findings of fact and inferences drawn from those facts. Depending on those findings, it remains open to it to conclude that the real reason was not one advanced by either side".

Direct discrimination

32. Section 13 of the Equality Act 2010 ("the 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".

33. On comparison between the Claimant and the case of the appropriate comparator, real or hypothetical, there must be no material difference between the circumstances relating to each case (section 23).

34. The decision on **O'Neill –v- Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School** [1997[ICR 33 confirmed that he Tribunal may assess what out of the whole complex facts was the "effective and predominant cause" of the "real and effective cause" of the treatment complained of? Or adopting **Shamoon** (below), what was the reason why the Claimant received the treatment and whether it was on the proscribed ground or for some other reason.

35. The burden of proof reversal provisions in the EqA are contained in section 136:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision".

36. Guidance is provided in the case of **Igen Ltd –v- Wong** [2005] IRLR, CA. In essence, the Claimant must, on a balance of probabilities, prove facts from which a Tribunal could conclude, in the absence of an explanation by the Respondent, that the Respondent has committed an act of unlawful discrimination. The Tribunal when considering this matter will raise proper inferences from its primary findings of fact. The Tribunal can take into account evidence from the Respondent on the primary findings of fact at this stage (see **Laing –v- Manchester City Council** [2006] IRLR 748, EAT and **Madarassy –v- Nomura International plc** [2007] IRLR 246, CA). If the Claimant does establish a *prima facie* case, then the burden of proof moves to the Respondent and the Respondent must prove on a balance of probabilities that the Claimant's treatment was in 'no sense whatsoever' on racial grounds.

37. The term 'no sense whatsoever' is equated to 'an influence that is more than trivial' (see **Nagarajan –v- London Regional Transport** [1999] IRLR 573, HL; and **Igen Ltd –v- Wong**, as above).

38. The Court of Appeal in **Madarassy** above, held that the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g. sex or race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

39. Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating on why the Claimant was treated as they were, and postponing the less-favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? (*per* Lord Nicholls in **Shamoon –v- Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285, HL).

40. The Supreme Court in **Hewage –v- Grampian Health Board** [2012] UKSC has confirmed:

> "The points made by the Court of Appeal about the effect of the statute in these two cases [Igen and Madarassy] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role 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."

41. Some main principles applicable in cases of direct discrimination have helpfully been summarised by the EAT in **Law Society v Bahl** (as approved by the Court of Appeal [2004] IRLR 799) and have been taken into account by the Tribunal in the instant case.

42. A tribunal may not make findings of direct discrimination save in respect of matters found in the originating application. A tribunal should not extend the range of complaints of its own motion (**Chapman v Simon** [1994] IRLR 124, CA, per Peter Gibson LJ at para 42).

Facts and associated conclusions

43. The Claimant commenced work as a Residential Worker for the Respondent on 26 June 2010 and worked in a residential unit ("the Unit") that provides residential care for severely disabled children.

44. This case involves alleged incidents within the Unit separately involving the Claimant and another worker, SRW, each reporting a number of incidents against the other.

45. On 7 December 2012 there was a supervision meeting with the Claimant. The notes record that the Claimant's lack of sensitivity around clients and staff was discussed.

46. Two incidents are alleged to have occurred in early January 2013 over which there is a dispute of fact.

47. One incident occurred on 11 January 2013 when a worker, RW, tripped and fell at work whilst organising service users onto a bus.

48. The second incident relates to an allegation of SRW locking a door to a toilet/bathroom when attending to a service user. The Claimant in evidence at the Tribunal hearing also placed this event on 11 January 2013 at the same time that the service users were being organised to board the bus.

49. The Claimant alleges that a service user was missing and the Claimant searched the building with another member of staff and found him "locked in a toilet in the Unit with SRW who was unable to provide a satisfactory explanation or reason as to why this child, an able child, who did not require any toilet assistance, was locked in the toilet with him, contrary to the organisation's safeguarding policies".

50. With regard to the incident with RW it was alleged by the Claimant that SRW stepped over RW after she had fallen and that this was an act of race discrimination against RW.

51. However, a witness statement relating to that matter was taken from RW on 25 October 2013, which states: "The bus had arrived. I had walked [a service user] to the bus but forgotten his bag. On the way back into the unit I tripped and fell. A lady from the bus and (the housekeeper) came to help me. The other bus had arrived. I could see SRW going back and forth and I said "Sort out my girls for me". He stepped over me. Someone suggested he did this maliciously. Afterwards SRW came to me to see if I was all right. He said "you have to go home" and suggested going to hospital. I said I would see about going to hospital when I got home. He was very attentive, he asked [the Claimant] to extend her shift so she could take me home. He was really busy getting the girls on the bus. I was aware of him being there . . . In the car on the way home, [the Claimant] said that SRW was out of order to walk over me. I didn't see it like that. He needed to see to the children. I was ostracised for this and that's what I told [UM]".

52. That account makes no reference to the Claimant stating her view that the event amounted to race discrimination and states that SRW was getting the girls on the bus, which is inconsistent with the Claimant 's account of events that SRW and a service user were missing and in the Unit when the rest of the children were on the bus.

53. RW's statement recounts the Claimant saying that SRW was "out of order" stepping over her, but there is no mention of the Claimant stating that she found SRW in a locked toilet in the Unit and on the Claimant's evidence at that stage the Claimant considered SRW to be, in her words, a paedophile.

54. This incident involving RW was raised by the Claimant with UM, Unit Manager, the following day on 12 January 2013.

55. On 16 January 2013, SRW had a supervision with UM. UM recounts that SRW asserted that the Claimant "had it in for him". UM tried to discuss with SRW, as she had done before, that there were less confrontational ways of allocating

work and giving guidance to staff. That exchange is not recorded in the supervision notes (page 64A) but the Tribunal accepts that it was said.

56. On 17 January 2013 there was a meeting between UM, and the Deputy Manager, DM, and the Claimant. The Claimant was given no prior knowledge of this meeting. The meeting notes are at pages 334 to 335 of the bundle.

57. UM wrote the notes of the meeting and states in her witness statement that: "DM and myself met the Claimant on 17 January as there were some concerns that had been raised. We needed to discuss various issues with the Claimant which she was likely to receive defensively and it was far more appropriate for two of us to be present. I made notes of the meeting afterwards. They were not on the standard supervision form because there was not sufficient space on it. While we were discussing right and wrong ways for the Claimant to criticise other staff, the Claimant gave an example that it would be correct for her to criticise a worker who was in the bathroom with the young person who did not need support. She did not give any information about a particular incident or the staff member involved and the discussion proceeded as I have recorded in the notes". The notes state: "The Claimant is also reported to:- criticise staff on a regular basis; The Claimant felt that she will challenge staff if behaviour is "iffy". She gave an example of someone being in the bathroom with a young person that did not need support. She says she will continue to criticise at these times which management agree is acceptable. There are other times that would not be acceptable. Staff should not be constantly challenged unless there are concerns, at which stage, the Claimant should be talking to management, not staff".

58. DM was present and recalled that they met with the Claimant because of concerns over her attitude. He does not recall the conversation as detailed by UM or any further detailed conversation about SRW and the locked door as argued by the Claimant.

59. The Claimant argues that she told UM and DM of SRW and details of the allegation.

60. The Claimant kept a hand-written diary, parts of which were produced and referred to in evidence. The Claimant's diary entry for 17 January 2013 is at page 352 of the bundle. It states: "Called into meeting with UM and DM re-complaints by other members of staff". There is no mention of any complaint made by the Claimant regarding SRW as alleged by the Claimant.

61. The Tribunal observed that there is a reference on 11 January 2013 to: "[RW] accident at work. [SRW] in toilet with [service user]". However, that diary entry was not referred to by either party in evidence.

62. UM stated that the general example was provided by the Claimant at the meeting on 17 January 2013 as recorded and it was when the Claimant raised the matter the following day on 18 January 2013 that detail was provided.

63. UM argued that on the 18 January 2013 the Claimant spoke to her as she was passing UM's office on her way out at the end of the shift and whispered that SRW had locked himself in the toilet with one of the boys. The Claimant did not give a specific date and just said "the other week". UM said that the Claimant left the room after she made the comment. When UM called after the Claimant to come back and explain what she meant, the Claimant replied that she couldn't because she was in a hurry.

64. UM considered that the way that the Claimant raised the matter was in contrast to the complaint the Claimant had made the previous week about SRW's behaviour with RW, which the Claimant described as completely unacceptable and demanded that UM did something about it.

65. There is no corroborative evidence of the alleged conversation on 18 January 2013, but the Tribunal concludes in all the circumstances that there does not appear to be any benefit to UM to falsify her evidence and move her account of that conversation by a day from 17 January to 18 January.

66. UM spoke to SRW the next time that he was on duty on 31 January 2013. There is a note of that conversation at page 288 of the bundle.

67. It is clear, therefore, that UM received information from the Claimant at some time before that date regarding the allegation of SRW having locked a bathroom door when supporting a service user. UM raised the matter with SRW who had agreed that he had locked the door while supporting the client in the bathroom. SRW recalled having done so because several times people just walked into the bathroom which did not respect the person's privacy. UM pointed out that the door should not be locked, but something should be said about the workers' lack of respect. SRW agreed that his behaviour had been wrong and agreed that it would not happen again. UM took SRW on his word and did not take the matter any further. There was no contact with HR, Ms Payne, or the Local Authority Designated Officer ("LADO") and no feedback to the Claimant.

68. The Claimant's evidence was that on 11 February 2013 she tried to raise the matter again with UM, but even on the Claimant's own evidence she simply said "Can I have a word?" to which UM said that she was busy. This was not pursued further by the Claimant.

69. The Claimant wrote an undated statement of the events which is at page 254 of the bundle. It is notable that this statement places the "stepping over incident" as occurring on 17 January 2013, which is inconsistent with both her evidence to the Tribunal and her own diary entry which placed the matter on 11 January 2013. The statement continues by stating that it was on 21 January 2013 when the Claimant informed UM and DM of the incident, whereas her evidence to the Tribunal was that this conversation took place on 17 January 2013.

70. In May 2013 UM informed Ms Carol Payne, Head of Special Needs and Children with Disabilities of complaints SRW had made against the Claimant

and an investigation was commenced (see below). The investigation report is at pages 231 to 241 of the Tribunal bundle.

71. At page 259 of the bundle is a telephone witness interview with an Agency Residential Worker ("ARW"). That interview was undertaken on 14 October 2013 and records: "Before posing any of the questions ARW reported that The Claimant had contacted her in July 2013. ARW is currently on maternity leave and The Claimant called her on her mobile to ask if she remembered RW falling over in January. ARW said that she did remember RW falling. She slipped in the entranceway to the building. ARW said that she did not remember any instance with [the service user] or a locked bathroom. She said that if she had found such a thing she would have said something at the time".

72. The Tribunal was referred to a file note by UM at page 150 of the bundle which details a discussion on 17 February 2013 between herself and the Claimant with DM taking notes. It records a number of issues that were brought up for discussion with regard to the Claimant's lack of awareness of children's emotional well-being, such as use of inappropriate topics and language in front of the children; speaking in a patronising way; challenging staff in front of the children; and criticising staff or management on a regular basis. The note itself was recorded on 24 September 2013. There is no reference in DM's witness statement to a conversation on that date and there is no other corroborative material. However, overall the Tribunal considers the meeting appears to be of little or limited relevance.

73. On 17 May 2013 two incidents were reported by SRW regarding conduct by the Claimant. These related to an incident where the Claimant was alleged to have left a service user unattended in a bath and having fed a service user toast contrary to their care plan.

74. SRW raised the matter with UM. UM met with the Claimant on 21 May 2013 and the notes of that meeting are at 74 to 75 of the bundle. The Claimant was not aware of what the discussion was to be about. The Tribunal will not set out the content of the note, but has considered it in full and finds on balance that it is an accurate account of the conversation.

75. UM spoke with the Respondent's HR because she was concerned about the Claimant's responses. The Respondent's HR recommended that UM obtained a statement from SRW. SRW prepared a statement and supplied it on 30 May 2013 which is at page 76 of the bundle.

76. UM consulted Ms Payne and HR and was instructed to conduct an investigation.

77. By a separate decision the Claimant was suspended pending investigation into the allegations. The decision was made by Mr Benaim and was communicated to the Claimant in a letter dated 04 June 2013 (page 78 of the bundle). The allegations were: "You left a severely disabled child unattended and laying in a bath with the side down; You failed to comply with the same child's care plan by feeding her toast when instructions were that her food must be pureed or finely

mashed; You took another disabled child out on her own on a number of occasions despite a requirement that two members of staff must be present to take her out". The letter confirmed that these allegations were potentially major offences of gross misconduct and that the Claimant was suspended from duty.

78. UM informed the Claimant verbally at a meeting on the same day.

79. The Tribunal accepts the evidence of UM that she had no part in the decision to suspend the Claimant, was requested to conduct a formal meeting with an HR advisor and the Claimant in order to inform her of the suspension, and to also conduct a disciplinary investigation.

80. The Tribunal concludes that Mr Benaim made the decision to suspend the Claimant together with Ms Payne and HR. Mr Benaim told UM to convey the decision to the Claimant.

81. However UM did suggest to Ms Payne that she was not the appropriate person to conduct this investigation because there had been so many issues over the years with the Claimant. It was also confirmed in Ms Payne's evidence that UM told her that she felt uncomfortable about undertaking the investigation as she had taken the Claimant to task several times in the past over various issues and behaviour.

82. However, Ms Payne was satisfied that UM would conduct a fair and thorough investigation of the particular incidents without being influenced by previous events. Ms Payne considered that UM and the Claimant had a satisfactory working relationship and there was no reason why UM should be disqualified from the investigation and that it would be unfair to ask one of the deputy managers to undertake the investigation as they did not have the necessary experience.

83. The Claimant was invited to a disciplinary investigatory interview to be conducted by UM. That letter is at pages 80 to 81 of the bundle. The allegations remain described as potentially amounting to major offences of gross misconduct.

84. An investigation interview took place on 13 June 2013 by UM with SRW with Ms Mary Morgan in attendance as senior HR advisor. The notes are at pages 82 to 84 of the bundle with the amended notes at 85 to 87 in the bundle.

85. The Claimant was interviewed as part of the investigation process on 19 June 2013 and was accompanied by TU, Staff Side Secretary. Notes of that meeting are at pages 88 to 92 of the bundle and the Claimant's amended notes are at pages 96 to 99.

86. By a note written on 4 July 2013 SRW submitted an additional statement (see page 94).

87. By letter dated 10 July 2013 the Claimant was informed that she was required to attend at a second interview (see page 103).

88. By letter dated 11 July 2013 the Claimant complained to Ms Goodwin, HR Business Partner, that she was at a disadvantage because UM and SRW had been good friends and work colleagues for 20 years, together with a range of other complaints (see page 105 of the bundle).

89. Ms Goodwin responded in a letter dated 11 July 2013 in which it was confirmed that UM's role was to investigate the allegations against the Claimant and that she would not make any decisions regarding the Claimant's future with the Council. (See page 106).

90. By a letter dated 14 July 2013 the Claimant lodged a formal grievance with Ms Goodwin itemising five matters of concern (see pages 107 to 108 of the bundle).

91. Ms Goodwin replied to the Claimant's grievance on 18 July 2013 and states: "In line with the Council's Procedures for Settling Employee Grievances (enclosed), because your complaint is relating to a matter being dealt with under the Employee's Disciplinary Code and does not fall within the specified areas in paragraph 3.2, the grievance procedure does not apply. I am therefore writing in response to your letter and will address the points you raise in turn". Ms Goodwin then addressed those matters.

92. On 23 July 2013 the Claimant wrote again to Ms Goodwin seeking clarification of some of the matters addressed in Ms Goodwin's previous letter and reiterating her complaints.

93. The Claimant attended at the further investigation interview 23 July 2013 and was again represented by TU (notes of that meeting are at pages 114 to 116).

94. On 23 July 2013 the Claimant wrote to Ms Payne stating: "I am writing to you in regards to the serious allegation I made to UM (Manager at Unit) and DM (Deputy Manager) on 17 January 2013". The Claimant then recounted the locked toilet incident. The letter continued: "Since this incident in January I have witnessed and been informed of some very disturbing issues in regards to SRW surrounding the young people that use the Unit". No other details were provided. The letter was copied to the LADO and Mr Paul Robinson, Director.

95. A response was provided to the Claimant by letter dated 25 July 2013 from Ms Payne, which states: "The allegation you have referred to is serious and as I have no previous knowledge of it, I need to investigate how the allegation was handled when it was made and consider whether appropriate action has been taken to follow this up. If this has not happened we will need to undertake that investigation now".

96. Ms Payne asked for details about the identity of the second witness to the incident, notified the Claimant that UM was on annual leave and the matter would be investigated as soon as possible upon her return. The letter was also copied to the LADO and Mr Robinson.

97. The Claimant responded to inform Ms Payne that the second witness was agency worker ARW (see page 120). As set out above, the statement from ARW records that ARW recalled RW falling, but did not recall any instance of the locked bathroom incident.

98. The Tribunal has been taken to a number of photographs produced by the Claimant, but the Tribunal concludes that they were not produced as part of the internal process. The Claimant's evidence on how they came to be taken and for whom was poor.

99. By a letter dated 14 August 2013 employee E wrote to UM: "It has come to my notice that [the Claimant] a worker at the Unit has reported two matters involving SRW a senior residential work at the Unit. The first is that SRW was locked in a bathroom with a client. [A second incident is set out]. I know nothing of the second incident but I am concerned re-the first as, around six months back I discovered SRW was in a locked bathroom talking to someone. I know the door was locked, not because I tried the handle, but because the lock mechanism was showing a different colour to normal. It was evening and bath routines with other staff and clients would have been going on. Although I could hear SRW talking I remember nothing he specifically said. My impression was he was assisting a client with bathing and offering encouragement of verbal prompts. I had intended to speak with SRW about the locked door but regret that I didn't get round to it. From many years experience I know that SRW works extremely hard for the clients. I have never heard him speak to them in a temper, he always provides activities and plans when shift leading and is meticulous about client care plans and updating. Relevant to this letter is that he is very popular with less able clients especially. They have frequently showed smiles and excitement if they have understood that SRW will be working with them. He in turn shows great patience. I have tried to show balance in my reporting with truthful relevant context." (see pages 274 to 275).

100. The Tribunal considers that this event referred to by E is more consonant with SRW's account to UM where SRW accepted that he had locked the door to the bathroom because he wanted to preserve the service user's privacy, than the Claimant's account of SRW being locked in a toilet (which she later accepted in evidence was a bathroom).

101. UM passed this letter to Ms Payne and it was raised in a strategy meeting.

102. An email dated 16 August 2013 from the LADO to Ms Payne contains a note of a meeting between the LADO, Mr Kuhan Valleekanthan, Deputy Manager of the Safeguarding Standards Service, and the Claimant. The purpose of the meeting was for the Claimant to expand on the reference in her letter dated 23 July 2013 that she had "witnessed and been informed of some very disturbing issues" involving SRW.

103. That e-mail is in the Tribunal bundle at pages 267 to 268. The Claimant told the LADO of a number of matters: An alleged event that the Claimant stated she had witnessed that occurred on 22 February 2013; Circumstances that the

Claimant stated had been told to her by another member of staff on 23 April 2013; and a number of matters alleged in conversations with staff between February and May 2013 and with a member of night staff in January 2013.

104. The feedback to the Claimant by the LADO was: "I advised BH that information she had given me was about concerns she held. It was not about a specific incident and indicated immediate safeguarding worries or risks. In terms of LADO procedures I gave the assessment that it did not at this stage require any formal investigation by SSS *(Social Services)* or passing on to the Police (CAIT). I gave the view that the information she had given today needed to be investigated by the Unit management and due to the current disciplinary matters that it may be felt the HoS carried this out. Once a management investigation had taken place information will be reviewed by HoS and SSS in terms of whether there are any specific safeguarding concerns and a decision made as to what steps if any should be taken".

105. By letter dated 20 August 2013 Ms Rosie Sauvage, Head of Children Looked After Service, wrote to the Claimant informing her the outcome of the investigation subsequent to her meeting with the LADO, Mr Valleekanthan. It states: "As Carol Payne has been on annual leave over the last two weeks I undertook to follow up the investigation of the incident reported in January 2013. I am satisfied that appropriate action was taken at the time to follow up the incident which you raised with UM, Manager at the Unit. The matter was taken up with SRW in January. The explanation of the events did not give rise to any safeguarding concerns. Feedback was given to the whole staff group at a staff meeting that bathroom doors should not be locked at any time. However, an issue with staff going into bathrooms without knocking when colleagues were giving personal care was considered and that this did not respect children/young people's privacy and dignity either. The message regarding workers showing respect through knocking was also reinforced at the staff meeting. I therefore do not consider that there is any further action to be taken in relation to this incident. I understand that you have provided Mr Valleekanthan with additional information regarding other incidents and Carol Payne will be following up this part of the investigation now she has returned from annual leave".

106. Ms Payne conducted an investigation interview with SRW on 2 September 2013 and the notes of that meeting are at pages 270 to 272 of the bundle.

107. On 5 September the Claimant reported to the Police the locked door incident the Claimant then put as occurring on 11 January 2013 and the two main matters raised with the LADO (which the Tribunal will refer to as “the LADO issues”).

108. It is notable from these Police reports the Claimant is recorded as reporting that the first event happened "in the subject's bedroom" and not in the lounge as she had earlier reported. With regard to the second event, the Police report records that "the informant has walked in” but in actual fact the Claimant had been told of this event by a staff colleague.

109. The evidence before the Tribunal was that the Police decided no action was to be taken.

110. The Tribunal also observes the very serious delay by the Claimant in raising the matters that were reported by her to the LADO. The Claimant's evidence to the Tribunal was expressly clear that before any of the events under review occurred (i.e. before 2013) she considered SRW to be a paedophile. The Claimant was unequivocal in that view. However, she was quicker relaying the incident to UM of SRW stepping over RW than she was regarding SRW being in a locked bathroom with a service user.

111. Even more remarkably, the Claimant had delayed for a period of *five* months raising with the Respondent (or any other relevant body) the first and serious issue she had relayed to the LADO, which she contended she had personally witnessed and had also delayed for three months in reporting the second issue she had raised with the LADO, despite clearly being fully aware of her duty to report immediately any safeguarding issues.

112. The Claimant manifestly failed to report these issues despite the fact she bluntly considered SRW to be a paedophile at those times and had allegedly been involved in discussion with members of staff regarding SRW as relayed to the LADO. Instead, she chose to raise the matters immediately upon the conclusion of the disciplinary investigation against herself. The Claimant is quick to criticise UM about the way she dealt with the locked door information, but the Claimant's own actions regarding the LADO issues, if they are to be believed, were manifestly inadequate. The Tribunal concludes that this series of events seriously damages the Claimant's credibility. It gives the strong impression of seeking to introduce these matters to assist her own disciplinary matters either by deflection or by trade-off.

113. The Tribunal concludes that the timing of the complaints and the hearsay nature of all but one allegation is very likely to account for the LADO's approach to the issue.

114. On 13 September 2013 there was the first strategy meeting held by the Wandsworth Borough Council Children's Services Department Safeguarding Standard Service (see pages 304 to 311). The LADO was present as was a Detective Sergeant from the Police Child Abuse Investigation Team. All of the events were discussed and it was agreed in that meeting with the relevant experts present that: "Ms Payne advised it was not felt suspension was a required response. It was agreed that this was a proportionate response while preliminary disciplinary processes commenced".

115. On 23 September 2013 SRW was redeployed.

116. By an email dated 24th of September 2013 from Ms Marie Morgan, Senior HR Advisor, the Claimant was invited to a disciplinary hearing. The three specific allegations remained. The Claimant was warned that the process could result in her dismissal. The Claimant was informed of her opportunity to call any witnesses and was given the right to be accompanied. The Claimant was

provided with UM's investigation report which was also the management statement of case (see pages 160 to 169 of the bundle). The recommendation in UM's report was: "that serious consideration should be given to the Claimant's summary dismissal from the Council Service".

117. The disciplinary hearing took place on 2 October 2013. It was conducted by Mr Benaim, Assistant Director of the Children Specialist Services. The Claimant was represented by TU. The notes of the meeting are at pages 176 to 191 of the bundle.

118. The outcome was given to the Claimant on the day and confirmed in a letter dated 3 October 2013 at pages 190 to 195 of the bundle.

119. The letter sets out the evidence relating to the three allegations and conclusions reached by Mr Benaim on a balance of probability. Mr Benaim concluded that all three allegations were well-founded, considered mitigation, the overall circumstances and seriousness of the incidents as he had found them, and decided that the Claimant should be summarily dismissed.

120. The Claimant appealed against that decision by letter dated 8 October 2013 (pages 196 to 197 of the bundle).

121. There were further safeguarding strategy meetings on 11 October 2013 and 29 October 2013.

122. At the meeting on 29 October 2013 with the LADO present it is recorded: "A further strategy meeting was convened on 11 October 2013 to decide what further action was required. It was agreed that: . . . UM to continue to support SRW".

123. The notes of that meeting confirm that in relation to the locked door incident the meeting decided that: "There will not be further safeguarding action or disciplinary action regarding the allegation against SRW".

124. At the third strategy meeting on 29 October 2013 it was confirmed in the summary of the discussion: "Members of the strategy meeting believe that SRW did not follow unit staff policy and demonstrated poor practice. In relation to the LADO issues there will not be any further safeguarding action required as the allegations against SRW could not be substantiated. Ms Payne will complete her Disciplinary Investigation Report and forward it to the Assistant Director. A decision will then be made whether a Disciplinary Hearing should be held as part of the investigation". These were also confirmed in the actions agreed at the meeting.

125. Ms Payne completed an investigation report into SRW's conduct dated 5 December 2013 (pages 231 to 241 of the bundle). Under recommendations it states: "In two cases evidence has been found that SRW has admitted that he has breached Unit policies and procedures. In spite of some mitigating information in the rationale given by SRW for his actions, these incidents do

constitute misconduct and the recommendation is these should be considered at a disciplinary hearing".

126. By a letter dated 11 December 2013 SRW was invited to a disciplinary hearing on 18 December. On 3 January 2014 SRW was informed of the disciplinary outcome and given a written warning for two years and awarded six points in accordance with the "amalgamation of action" as noted in section 3 of the Respondent's Disciplinary Code of Practice. The points would be expunged from SRW's record on the expiration of the warning (pages 201 to 202 of the bundle).

127. The Claimant's disciplinary appeal hearing took place on 17 January 2014 and was conducted by Mr Paul Robinson, Director of Children's Services.

128. The notes of the meeting are at pages 211 to 218.

129. The Claimant's grounds of appeal were dismissed and the notes of the meeting state: "Having weighed up everything you have said today I have decided to dismiss your grounds of appeal and uphold the decision of MB. I have given careful thought to all of your grounds and have heard nothing today that concerned me about MB's decision. Generally in terms of weighing up the case there did not appear to be a contradiction in terms of the allegations and your response. You accepted this happened and it was outside of the Care Plan. You still think it is ok as others may have done the same but the fact that others may have done it is irrelevant. You did not seem to accept that it was wrong and learned from this."

130. That decision was conveyed to the Claimant in a letter dated 21 January 2014 at page 220 of the bundle.

131. The ethnicity breakdown of staff in the Unit from April to June 2013 is set out at page 230 of the bundle and these figures were not materially challenged by the Claimant.

<u>Protected disclosure and unfair dismissal</u>

132. The Claimant relies upon two protected disclosures. The first a verbal disclosure to UM about the 'locked door' incident sometime in January 2013 and the second the Claimant's letter dated 23 July 2013 to Ms Payne about the 'locked door' incident.

133. With regard to the first alleged protected disclosure, it was the Claimant's evidence to the Tribunal that this conversation took place on 17 January 2013. On balance the Tribunal prefers the evidence of the Respondent. The evidence of when the Claimant considered the actual event of the locked door occurred was inconsistent. DM does not recall the details of any complaint being made to him and UM during the discussion on 17 January 2013. There was no obvious benefit to UM to falsify her evidence to change the date of the conversation by one day.

134. The Tribunal concludes that the discussions occurred as described by UM. No detailed allegation was made on 17 January 2013 and only outline information was given on 18 January 2013. However, it was sufficient information for UM to raise the matter with SRW, accept his explanation and to follow that through in discussions with staff regarding locking doors and also respecting privacy.

135. Therefore, the Tribunal concludes that information was provided by the Claimant about the locked door incident and SRW accepted to UM that it had happened (although the Tribunal concludes on balance that it did not occur on 11 January 2013 as contended by the Claimant). Therefore, on balance, the Tribunal concludes that the Claimant believed raising the matter tended to show a breach of a legal obligation by SRW with regard to his contract of employment. The Tribunal also concludes that, as the allegation was accepted by SRW, it was objectively reasonable for the Claimant to hold that belief.

136. The Tribunal also concludes on balance, it was a disclosure made in good faith at that time, although the Tribunal took care to consider the other matters clearly at play regarding the Claimant's working relationship with SRW, performance issues having been raised with her and the non-reporting at the time of the LADO issues.

137. With regard to the second disclosure, the Tribunal concludes that the letter contained information provided by the Claimant that in her belief tended to show a breach of a legal obligation. As SRW accepted the matter occurred it was again objectively reasonable for the Claimant to hold that belief. As this disclosure occurred after the changes made to the statutory protected disclosure provisions, 'good faith' is no longer an issue. The Tribunal concludes that a potential child protection issue is inevitably in the public interest.

138. However, the Tribunal concludes that the Claimant's dismissal was not by reason of the protected disclosures, but was for a reason relating to the Claimant's conduct.

139. The Tribunal considered the evidence of Mr Benaim and concludes that it was quite clear that he genuinely considered the Claimant's alleged misconduct to be the reason for dismissal. Indeed, it was not suggested otherwise by the Claimant in her cross-examination of Mr Benaim. The Claimant was an able advocate who has been through the Tribunal process on this matter before. She put no questions to Mr Benaim that his reason for dismissing her was due to the protected disclosures.

140. Accordingly, the Tribunal unanimously concludes that the genuine reason for dismissal related to the Claimant's conduct.

141. With regard to process, there was an investigation into the allegations, a detailed report was produced; the Claimant was invited to a disciplinary hearing; given detail of the allegations; given the right to be accompanied; provided with a copy of the investigation report; informed of the opportunity to call witnesses; warned that the process could result in her dismissal; a

dismissal hearing was held; the Claimant had a full opportunity to participate; the decision was confirmed in a detailed letter; the Claimant was given the right of appeal, which she exercised; given the right to be accompanied; an appeal hearing took place in which the Claimant had a full opportunity to participate; the grounds of appeal were considered and a detailed outcome was provided in writing.

142. The areas that required the Tribunal to have greater focus with regard to process were UM undertaking the investigation process; the circumstances surrounding the Claimant's suspension; the difference in potential sanction between the Claimant and SRW; and the calling of witnesses.

143. With regard to UM undertaking the investigation, the Tribunal concludes that although UM fairly and reasonably highlighted her concerns, it was not outside the range of reasonable responses for her to undertake the investigation. UM fairly collected the relevant facts and information. In any event, Mr Benaim conducted his own thorough review of the facts and circumstances as part of the formal disciplinary hearing and arrived at his own conclusions on the evidence. It was not a case of Mr Benaim simply accepting or 'rubber stamping' the conclusions reached by UM. The same can be observed about the appeal process by Mr Robinson.

144. Accordingly, this matter does not place the dismissal process outside the range of reasonable responses.

145. With regard to suspension, the allegations against the Claimant were made by SRW to UM on 17 May 2013 and the Claimant was suspended on 21 May 2013 on potential allegations of gross misconduct. The complaint against SRW was made by the Claimant to UM who raised the matter with SRW and the staff and considered the matter had been adequately addressed. The Claimant raised the matter again with Ms Payne on 23 July 2013 together with the spectre of being informed of some "disturbing issues". UM was on annual leave until 05 August 2013. The LADO met with the Claimant on 15 August 2013 and Ms Sauvage reported back to the Claimant on 20 August 2013. SRW was not suspended during this period.

146. The Tribunal concludes that it was not outside the range of reasonable responses for the Respondent to suspend the Claimant in respect of the allegations relating to her as these were all clearly matters that placed service users at risk.

147. The decision immediately to suspend the Claimant but not SRW does not in the circumstances place the dismissal of the Claimant outside the range of reasonable responses. SRW was redeployed on the advice of the safeguarding meeting, albeit in close proximity to his normal area.

148. When the Claimant was suspended and the investigation undertaken the allegations against her were described by Mr Benaim as being potentially "gross misconduct" matters. At the time that SRW's investigation report was completed the circumstances were described by Ms Payne as "potentially

misconduct". The letter inviting SRW to a disciplinary hearing from Mr Benaim referred to the range of sanctions as being from no action "through to a formal or final warning".

149. The Tribunal concludes that the circumstances regarding the Claimant and SRW are not sufficiently similar to raise successfully any arguments of disparity of treatment. The reality was that by the time that SRW's disciplinary matter lead to an Investigation Report conclusion on 05 December 2013 and the subsequent disciplinary hearing on 18 December 2014, the safeguarding meeting on 19 September 2013 and the subsequent meetings on 11 October and 2013 had confirmed that there were no safeguarding issues arising with regard to SRW. These were decisions by relevant experts including the LADO and a Detective Sergeant from CAIT. The Tribunal concludes that it is not appropriate to go behind that decision in the circumstances of this case where there is an absence of any evidence that materially places that decision in doubt. It is not outside the range of reasonable responses for Mr Benaim to rely upon it.

150. Therefore the issues relating to SRW were assessed as not being a safeguarding matter and had become a disciplinary matter of not complying with policy and procedures and potentially bringing the Respondent into disrepute on that basis only. Accordingly, it was within the range of reasonable responses for the potential sanctions against SRW and the sanction actually applied, to be different from that relating to the Claimant.

151. With regard to calling witnesses, the disciplinary invite letter to the Claimant stated that if the Claimant intended to call any witnesses she should advise the Respondent who she would be calling no later than Friday 27 September 2013.

152. By an e-mail dated 25 September 2013 TU, the Claimant's trade union representative, wrote to Ms Morgan requesting five witnesses be available for the hearing. An e-mail by return Ms Morgan asked TU to confirm that he had been in contact with the witnesses. TU simply repeated his request. By a letter dated 26 September 2013 the Claimant requested the attendance of six witnesses (see page 152D).

153. Three of the named witnesses confirmed that they were not willing to attend and two confirmed that they would attend. The Claimant was informed of the witnesses non-attendance in a letter from Ms Morgan dated 30 September 2013, copied to TU, and which also informed the Claimant that witnesses attendance needed to be arranged through the Claimant's representative. This general approach to the attendance of witnesses being arranged by the trade union representative was confirmed in oral evidence to the Tribunal by the Respondent. The Tribunal accepts that evidence, but observes that it should be made clearer in the Disciplinary Policy.

154. At the disciplinary hearing, where the Claimant was represented by TU, one witness attended and no issue was pursued regarding the non-attendance of any other witnesses and importantly, the matter was not raised as an issue on appeal where again the Claimant was represented by TU.

155. The Tribunal concludes that the issue of witness attendance does not place the procedure outside the range of reasonable responses.

156. Overall the Tribunal concludes that the process adopted by the Respondent was objectively fair.

157. With regard to reasonable belief in the Claimant's conduct, the Tribunal concludes that the Claimant broadly admitted the disciplinary matters raised of leaving the service user alone in the bath, feeding toast to the service user contrary to the care plan and having taken a service user out on a trip on her own contrary to the care plan.

158. Having regard to the terms of the dismissal letter (see pages 193 to 194) and the evidence reasonably before Mr Benaim, the Tribunal concludes that it was reasonable for Mr Benaim to believe the conduct of the Claimant as set out in his decisions regarding each alleged incident and to weigh on a balance of probability the evidence before him as he describes.

159. Once Mr Benaim came to that reasonable belief after a reasonable investigation, he reasonably concluded that the circumstances amounted to gross misconduct. That conclusion was consistent with the Respondent's Disciplinary Policy.

160. Mr Benaim took into account the Claimant's service record and noted that the Claimant had not put forward any other factors in mitigation. Mr Benaim also considered the appropriate penalty, the surrounding circumstances and the seriousness of the incidents.

161. The Tribunal concludes objectively that in the circumstances summary dismissal was an option reasonably available to the Respondent.

162. The Tribunal concludes that the process adopted by Mr Robinson on appeal and the conclusion reached upholding the decision to dismiss fell within the range of reasonable responses. The Tribunal also concludes that the appeal process would remedy any procedural flaw that may have occurred at the initial disciplinary stage before Mr Benaim, should the Tribunal be incorrect on its findings above regarding the process.

163. Accordingly, the Tribunal concludes having regard to equity and the substantial merits of the case that in all the circumstances including the size and administrative resources of the Respondent's undertaking, the Respondent acted reasonably in treating the Claimant's conduct as sufficient reason for dismissal and that, therefore, the dismissal was fair.

Direct race discrimination

164. With regard to the complaint of direct race discrimination, the Claimant pursues it on the basis of colour defining race and the racial group.

165. The only actual comparators can be SRW plus a hypothetical comparator. The remaining comparators listed in the list of issues quite clearly had materially different circumstances.

166. The Claimant argues two allegations of less favourable treatment of the speed with which the Respondent investigated allegations of misconduct against the Claimant and the decision to dismiss the Claimant in light of the findings of misconduct against her.

167. The Tribunal concludes that SRW was not a proper comparator to the Claimant from 15 August 2013, the time when the LADO met with him and decided there were no safeguarding issues. There has to be no material difference between the circumstances relating to each case. In the case of SRW, it was concluded by the LADO and confirmed in safeguarding meetings, that there was no safeguarding issue and therefore the matters were principally of non-compliance with policy and procedure. The service users involved in the Claimant's allegations were at risk of harm in respect of all three allegations.

168. The only period where it is arguable that SRW is an appropriate comparator is during the period prior to the LADO intervention. There were different types of alleged offences reported against the Claimant and SRW, but the Tribunal concludes that at that stage they were both potentially gross misconduct offences sufficiently similar in seriousness.

169. Accordingly, the Tribunal concludes that SRW is an appropriate comparator at this time, but not at the time of the Claimant's dismissal when comparing the disciplinary sanction applied to SRW. At that stage the LADO and the safeguarding committee's view of events meant SRW's circumstances were materially different to those applying to the Claimant.

170. In any event, the Tribunal has considered the Claimant's claim on the basis that there is an appropriate actual in SRW and/or hypothetical comparator.

171. In doing so the Tribunal has been careful not just to focus on the difference in disciplinary sanction between the Claimant and SRW but has also considered the evidence in a broader context.

172. Also, the Tribunal has taken care to focus on the actions of the people involved. The list of issues is couched in terms of "the Respondent", but of course organisations do not discriminate, it is the acts or omissions of the relevant individuals that could lead to unlawful discrimination.

173. In general support of the claim of race discrimination the Claimant argued that black workers had been moved out of employment at the Unit by the Respondent. However, the Claimant accepted in cross-examination that a number of those people were not subject to any disciplinary proceedings when they left and those that had been dismissed had been found culpable of substantial misconduct recorded on CCTV. There also was no evidence to show who were the decision makers in each case. There was certainly no evidence to support any contention that black employees were being replaced

by white employees as alleged and the diversity statistics provided do not support that contention.

174. The statistics at page 230 of the bundle identify a multicultural workforce reasonably reflecting the Respondent's geographic area.

175. The real issue raised by the Claimant can be expressed simply. The Claimant argues that it was direct race discrimination for her allegations to be investigated quicker than those relating to SRW and that she was dismissed and he was not.

176. However, the Tribunal concludes that the Claimant has not identified the 'something more' contemplated in cases such as *Madarassy*. Being a member of a protected class and being the subject of detrimental treatment is not enough for a successful discrimination claim.

177. With regard to the Claimant's dismissal, the Tribunal concludes that Mr Benaim dismissed the Claimant because he genuinely considered the Claimant to be guilty of the gross misconduct as alleged and despite the Claimant accepting a good deal of the surrounding circumstances she had proved deficient in recognising the seriousness of the incidents and the Respondent's concerns.

178. That decision was upheld on appeal by Mr Robinson and no material issue has been raised in this respect.

179. The circumstances relating to SRW were different in so far as the safeguarding meeting concluded there would not be further safeguarding action or disciplinary action regarding the 'locked door' allegation against SRW and that there would not be any further safeguarding action regarding the other LADO issues. Furthermore, Mr Benaim considered that SRW showed sufficient remorse and insight into his actions to persuade him that they would not be repeated.

180. There is no allegation that the safeguarding committee as a whole acted in a race discriminatory manner, or that the decisions made by the LADO were tainted by race discrimination.

181. Therefore, the disciplinary matter against SRW was one principally of breaches of policy and procedure and potential reputational risk, with the services users therefore not being in the same category of risk as they were with regard to the Claimant. As Mr Benaim described it, it was a disciplinary matter that did not involve a child protection issue.

182. There was no evidence whatsoever to suggest, even by inference, that Mr Benaim would have come to any different decision regarding either the Claimant or SRW had they been of a different race.

183. The disciplinary decisions made by Mr Benaim were not tainted, either consciously or subconsciously, by colour. The reason why the respective

disciplinary decisions were made was based entirely and genuinely on the evidential material before Mr Benaim when making those decisions.

184. With regard to the delay in investigating the circumstances relating to SRW, the Tribunal accepts Ms Payne's evidence that until the letter from the Claimant dated 23 July 2013 she was unaware of the January 2013 allegation. UM had addressed the matter herself and had not reported the matter to anyone. Once that matter became known to Ms Payne together with the suggestion of the Claimant being informed of some "disturbing issues", it was addressed through the LADO. After the Claimant was interviewed by the LADO, investigation proceedings were commenced promptly.

185. At that stage there was no material difference in the speed with which both circumstances were considered that objectively amounts to a detriment and no evidence to infer any difference in timing was because of the Claimant's race.

186. There is equally no evidence to infer Ms Payne acted any differently after being in receipt of knowledge of the Claimant's January allegation than she would have done for anyone else.

187. The Tribunal received no evidence, particularly when being careful to assess all the circumstances and overall evidence, that any failure immediately to suspend SRW was a decision or omission in respect of which the race of the Claimant and/or SRW played any part. The Claimant and SRW are of a different race, in this case colour, but even if the immediate suspension of the Claimant compared to SRW may objectively be described as a detriment, there is nothing else from which the Tribunal could conclude that the decision was tainted by race. Importantly there were different decisions makers. Mr Benaim made the decision to suspend the Claimant with Ms Payne and HR, Ms Payne made the decision not to suspend SRW and then took advice from the safeguarding committee. There was no evidence to suggest Ms Payne had a pervading influence.

188. The Tribunal has also considered the actions of UM in January 2013 in not sharing the circumstances of the allegation with anyone, which when later discovered with the additional alleged disturbing issues were considered worthy of consideration by LADO.

189. UM considered that she had dealt with the matter adequately when it arose in January particularly having regard to the manner and circumstances in which it had arisen. Whilst Ms Payne took a different view when the matter was raised with her together with the additional "disturbing issues", the Tribunal concludes from the evidence that it has received that UM acted genuinely when deciding upon her actions. Others may not have acted in the same way, but there was no evidential material to infer that her actions were because of the race of the Claimant or SRW. Indeed, the Claimant argued strongly that UM and SRW were friends which accounted for UM's actions.

190. The Tribunal concludes that there is no evidence from which the Tribunal could conclude that UM's actions were because of the Claimant's race. The reason

why UM dealt with the matter in the way she did was that in the circumstances she genuinely considered that was the correct course of action.

191. Therefore, the Tribunal unanimously concludes that the Claimant's claims are not well-founded.

Employment Judge Freer
Date: 07 July 2017