



EMPLOYMENT TRIBUNALS

Claimant: Mr K Enyiazu

Respondent: Devon Partnership NHS Trust

Heard at: Exeter **On:** Tuesday 16 and
Wednesday 17 July 2019

Before: Employment Judge Matthews

Members: Ms R A Clarke
Mrs W Richards Wood

Representation:
Claimant: Mr J Lewis-Bale of Counsel
Respondent: Ms I Ferber of Counsel

UNANIMOUS RESERVED JUDGMENT

1. Mr Enyiazu's claim of unfair dismissal is dismissed.
2. Mr Enyiazu's claims that he was discriminated against by the Respondent by being treated less favourably than others because of his race, by reference to section 13 of the Equality Act 2010, are dismissed.

REASONS

INTRODUCTION

1. Mr Kenneth Enyiazu claims that he was unfairly dismissed by the Respondent Trust. Mr Enyiazu also claims that he was discriminated against by the Trust in that he was treated less favourably than a comparator because of his race. This latter claim is brought as one of direct discrimination by reference to section 13 of the Equality Act 2010 (the "EA"). That claim is in two parts. First, Mr Enyiazu says that he was discriminated against in that he was not given the requisite number of supervisions. Second, Mr Enyaizu says that his dismissal was tainted by

discrimination. We deal with how this is put in our conclusions below. The Trust says that Mr Enyiazu was fairly dismissed for gross misconduct (or some other substantial reason) and that there was no discrimination.

2. On the Trust's side we heard evidence from Mr Timothy Beardsmore (Community Team Leader/Clinical Lead), Mr James O'Donoghue (Community Team Manager/Clinical Lead for Torbay South and West Specialist Team for Early Psychosis), Ms Penelope Rogers (Managing Partner for Safeguarding and Public Protection and Trust Lead for Equality and Diversity) and Mr Gerald Marshall (Non-Executive Director, formerly Chief Probation Officer for Thames Valley Probation Trust, National Lead for the National Probation Service and an independent member of the Thames Valley Police Equalities Board). Each produced a written statement. We heard from Mr Enyiazu who also produced a written statement. There was a bundle of documentation supplemented by a Remedy Bundle and a Schedule of Loss. All references in this Judgment are to pages in the bundle unless otherwise specified.
3. The case had been set down for three days. In the event, it was possible to hear the evidence and argument inside two days with Judgment reserved to allow us to better consider the evidence and our conclusions.

FACTS

4. The Trust is an NHS Trust based in Exeter recording that it employed some 2,679 people at the time of its response in these proceedings.
5. Mr Enyiazu describes himself as of Black African origin.
6. Mr Enyiazu started work for the Trust on 12 May 2003 and was dismissed on 11 June 2018. Mr Enyiazu had, therefore, just over fifteen years' service. Latterly, Mr Enyiazu's job was as a part time Community Support Worker with the Torbay North Community Mental Health Team. Mr Enyiazu worked Mondays and Tuesdays. In essence, Mr Enyiazu worked with clients that could be challenging and difficult to motivate because of their mental state. Those clients could be vulnerable and in need of safeguarding.
7. Mr Beardsmore became Mr Enyiazu's line manager in October 2016. From that time, Mr Beardsmore was responsible for Mr Enyiazu's supervision meetings. There was one such meeting on

3 October 2016. The next was on 23 January 2017 (59-61). In January/February 2017 Mr Beardsmore carried out Mr Enyiazu's appraisal (55-58) and there was another supervision meeting on 18 July 2017 (62-63).

8. It seems that supervision meetings with full time Community Support Workers should take place around ten times a year (Beardsmore – WS6). However, part time Community Support Workers typically had fewer supervisions and Mr Beardsmore's evidence is that Mr Enyiazu was due three a year (WS6). Specifically, as far as Mr Enyiazu was concerned, Mr Beardsmore's evidence was (WS4):

“Usually, when I carry out supervision meetings, I try to arrange the next supervision meeting at the time as it can be a difficult task to arrange it later. However, at our last supervision meeting in July 2017, Mr Enyiazu was unable to commit to a future date as he was having some personal issues at the time and he required some flexibility from me. I left it that he could come back to me and we would arrange a mutually convenient date.”

9. Mr Enyiazu puts forward Ms Fiona Kiehne as a comparator as far as supervisions are concerned. Ms Kiehne was (or is) a full time Community Support Worker and it seems that she may only have had three supervision meetings herself in the relevant time period (Beardsmore WS6).

10. Mr Beardsmore's evidence on the subject of the supervisions also includes this (WS14):

“Mr Enyiazu's allegations that he has been discriminated because of his race are completely untrue. Any shortfall in relation to his supervision meetings had nothing to do with his race. Since leaving the Trust, Mr Enyiazu has provided my name as a referee for other positions and he has also personally thanked me and apologised to me for letting me down.”

11. One of Mr Enyiazu's clients was a Mr “X”. It seems to be common ground that X had a clinical diagnosis of Paranoid Schizophrenia.

12. We see from Mr Enyiazu's telephone records (72) that, at 0943 on Monday 27 November 2017 he had a nine minute and fourteen second conversation with X's Mother, Mrs “Y”. There is little doubt that Y was complaining to Mr Enyiazu about various things including a transaction with guitars, which we will come to

in more detail below. It may well be that Y told Mr Enyiazu that she intended to complain to the Trust. In any event, we have no doubt that, recognising he was in potential difficulty, this call (and/or the text message from Y to Mr Enyiazu received by him on Monday 27 November mentioned below) prompted Mr Enyiazu to engage in the pre-emptive damage limitation exercise we describe below.

13. On Monday 27 and Tuesday 28 November 2017, Mr Enyiazu made entries in X's Notes. No mention was made of the telephone conversation with Y on 27 November but the Notes for 28 November included (64):

"I met X outside his home this afternoon"...."he apologised for text message from his mum regarding update on PIP and about a couple of guitars which X sold to someone in Exeter through me which I fail to record as I thought it was not work related at the time. X was paid for the Guitars in full by the person who bought them."

14. Late the same day, 28 November, Mr Enyiazu contacted Mr Beardsmore concerned to tell him about the dealings he had had with X. Mr Beardsmore asked Mr Enyiazu to put the concern in writing.
15. This Mr Enyiazu did the next day, Wednesday 29 November 2017. The e-mail is at 67-68 and is timed at 1148. It is a key document in these proceedings and should be referred to for its full content. Salient parts of it are these:

"A few months ago, i think around August time, X had asked me if i would buy a couple of guitars that he wishes to sell,"...."i advised him that i can not buy his guitar that it is against my employer policy and procedure.

He then said if i knew anyone that would like to buy a guitar to inform him. I knew someone that buys guitars and send it to less privileged countries so children could benefit from it, i told him and he said he do be interested, i informed X who was happy to sell, at the time i thought it was helping. If i remember correctly, X wanted about £170-£180 for the two guitars, i passed the message to the buyer, he was happy but said he would not be able to pay in full but in parts, i advised him that i will ask the seller to hold on to the guitars until he has paid at least half of the amount before he could have them and he was ok with that.

I informed X who was happy with that, so when ever the buyer gives the money, i give to X,”....“After a few payments, he informed me that he told his mum that he sold the guitar to me, he said that she can be over protective towards him, so she would feel more secure if she thought it was me. I didn’t think it was a problem, X continued to be paid until payment was completed,”....

“I then received a text message from his mum when i came into work on Monday” [27 November]“and then mentioned the guitars, i advised her that”....“X was paid in full for the guitars.”

16. As can be seen from reading the e-mail itself, Y was unhappy about another issue, Mr Enyiazu’s support for an application that X had made for a Personal Independence Payment (“PIP”). For our purposes, however, the e-mail describes the transaction that had taken place between X, Mr Enyiazu and the alleged third-party purchaser of the guitars.

17. Mr Enyiazu’s e-mail continued. Again, reference should be made to its full content, but we record the following:

“Now, like i said yesterday, i do not blame anybody in this incident but myself, i should have focused on my role as a support worker instead of being helpful and supportive outside work role,”....

“I admit, it was a poor error of judgement on my part, now whether it was somebody else or myself that bought the guitar is irrelevant because i can not prove otherwise or whether he was paid in full, all i can say is that it should not have happened in the first place, even though i thought i was trying to help, i should have fully documented it.

Now i have had a discussion with the person who bought the guitars, he has stated that he still has the guitars in his possession and is willing to give it back if he gets his money back, i have decided to take it upon myself to pay him the full amount and collect the guitars so i could return it to X and would bear the cost.”

18. As events unfolded, the exact nature of the transaction between X, Mr Enyiazu and any third party (the Trust came to suspect that there had been no third party) and how that transaction should be viewed was the subject of forensic debate. Whatever that debate, Mr Enyiazu’s account of events, at its best from his point of view,

cannot be other than he set out in this e-mail. Nor can Mr Enyiazu gainsay his acceptance of responsibility for his “*poor error of judgement*”. During the course of the Tribunal Hearing (this was also the direction of travel in the disciplinary process), Mr Enyiazu sought to limit his acceptance of responsibility to the narrower issue of not documenting the transaction. In doing so, Mr Enyiazu did himself a disservice. The Trust did not and the Tribunal does not accept that construction. It plainly does not flow from the e-mail itself (which refers to the transaction as something that “*should not have happened*”, not just the documenting of it) and Mr Enyiazu’s insistence on it makes it more difficult to accept other aspects of his evidence.

19. As Mr Enyiazu had anticipated, on Wednesday 29 November 2017, an e-mail detailing a complaint from Y was passed to Mr Beardsmore. Mr Beardsmore initiated a safeguarding alert (69-71). That alert describes Y’s complaint. The complaint mentioned the PIP issue. It also included a complaint about the guitar transaction:

“...we also have the issue of” [Mr Enyiazu] “buying two guitars off my son. One is acoustic and the other is a turquoise electric guitar, along with two cases, one being a “Fender” case, two music stands, and various music magazines. The total agreed was £180, to be paid off within three payments.

I was dismayed when X told me of this deal, and said to my son this was ethically wrong of” [Mr Enyiazu] “to enter into this agreement.

As the weeks went on, X complained about” [Mr Enyiazu’s] “lack of routine with the payments, some weeks a ten pound note would be paid, some weeks nothing.”....

“X mentioned two weeks ago that” [Mr Enyiazu] “had told him he had fully paid for the guitars. X doubted this so I suggested he said to” [Mr Enyiazu] “that a final £20 was owed, this way we could gauge” [Mr Enyiazu’s] “reaction and honesty.” [Mr Enyiazu] “said to X “OK, I will fetch it next Monday”. This week came and he gave X £10 and said was it all paid?

I am not comfortable with this and going by the past few weeks I do wonder if it was actually paid in full.

Also, quite disturbingly this week when” [Mr Enyiazu] “took X food shopping, whilst in the car together” [Mr Enyiazu] “asked X to cover his tracks for him should Louisie” [we think Ms Louise Files – Senior Mental Health Practitioner] “ask questions. X was asked to reiterate that” [Mr Enyiazu] “only transported the guitars to Exeter for X at his request.

X begged me not to say anything as he said he is scared of” [Mr Enyiazu]....

“So in a nutshell, my son has lost his PIP, HB reduced” [Housing Benefit] “and entered somewhat unwittingly into a financial arrangement with his care worker. All of which with hindsight and proper care could have easily been avoided.

I am sorry it has come to this point but feel I need to stand up for my disabled son.

X is stressed and insecure again and it has undone some of the previous good work he has done to stabilise himself.”

20. On Mr Enyiazu’s next working day, 4 December 2017, Mr Beardsmore called him to a meeting which included Ms Cath Hill (Manager of Torbay Central Community Mental Health Team). Ms Hill’s note of what happened is at 73. Mr Enyiazu was suspended and handed a letter confirming the position. The Note records:

“Ken feels very upset about what has happened and hopes to have learned lessons from it. He acknowledged that he was at fault because he did not follow Trust policies.”

21. Mr O’Donoghue was appointed to investigate the complaints about Mr Enyiazu. This was the first time that Mr O’Donoghue had performed such a role. In reading the investigation notes and report and the transcript of the subsequent disciplinary hearing it is clear that Mr O’Donoghue was somewhat zealous in his approach and displayed some lack of experience. This was acknowledged by the disciplinary and appeal panels (for example, 200).

22. On 15 January 2018 Mr O’Donoghue interviewed Mr Beardsmore. The note is at 74-75.

23. On 18 January 2018 Mr O’Donoghue interviewed Ms Kiehne. The note is at 79.

24. On 23 January 2018 Mr O’Donoghue interviewed Y. The note is at 80. Y mentioned that X thought Mr Enyiazu had a gang that

would get him if he told Y about the guitar transaction. Y suspected “*foul play*” over the guitar transaction and that Mr Enyiazu had done it for personal gain. The matter had caused X to have a serious setback.

25. On 24 January 2018 Mr O’Donoghue interviewed Ms Files. The note is at 81-82.

26. On 30 January 2018 Mr O’Donoghue interviewed X in the company of Y. The note is at 83-91. X was in hospital where he had been admitted on 22 December 2017 and was receiving a high dose of anti-psychotic medication. It was Mr O’Donoghue’s judgement that X’s condition had stabilised sufficiently to allow him to engage and answer questions. X mentioned that he was worried about being “*targeted by the black community*” if he told anyone about the guitar transaction and that “*I felt alienated by the black people*”. During the course of the Tribunal Hearing the Trust accepted (for example Mr Marshall in oral evidence) that these comments amounted to racially discriminatory stereotyping, although, as Mr O’Donoghue pointed out, they were made by someone with a diagnosis of Paranoid Schizophrenia and, in any case, he did not believe they had any foundation.

27. Finally, on 14 March 2018 Mr O’Donoghue interviewed Mr Enyiazu. The note is at 92-98. Mr Enyiazu was accompanied by his UNISON representative, Mr Jim Clawson. During the course of the meeting Mr Enyiazu identified the third party in the guitar transaction as “Joseph” and supplied a telephone number.

28. Mr O’Donoghue says that, immediately after interviewing Mr Enyiazu, he telephoned “Joseph” on the number he had been given. Mr O’Donoghue did not make a separate note of this but fed it into his subsequent Investigation Report. The relevant sections are at 105-106. Here we provide a brief summary. Joseph confirmed that he had bought the guitars from Mr Enyiazu for a single payment of £180 (contradicting Mr Enyiazu’s account that the payment was in instalments). Joseph was not prepared to meet and discuss the position further until he had spoken to Mr Enyiazu. Joseph refused to give his surname but said that he worked for D & N Quality Used Furniture. When pressed by Mr O’Donoghue, Joseph hung up. Mr O’Donoghue was unable to get a further response from Joseph’s telephone number. Mr O’Donoghue called D & N Quality Furniture and was told that no-one called Joseph worked there. It is unsurprising that, as he confirmed in answer to a question from us, Mr O’Donoghue did not believe what he was told by Joseph. Mr O’Donoghue’s view was that Joseph had been briefed by Mr Enyiazu to cover for him.

29. Mr O'Donoghue's Investigation Report is at 100-110. The Report started with some historical information concerning Mr Enyiazu, which should not have been there. The Trust's evidence, which we accept, is that, to the extent that this was seen by the disciplinary and appeal panels, it was discounted. The Report listed and addressed seven allegations, one being that concerning the guitar transaction. As far as that allegation was concerned, the Report detailed multiple possible breaches of Trust policies that might amount to gross misconduct and recommended that the matter should proceed to a formal hearing.
30. On 14 May 2018 Ms Jenny Parker (Workforce Business Partner, Adults) wrote to Mr Enyiazu requiring him to attend a disciplinary hearing (111-113). There were seven allegations to answer. Of the eight, five were either directly concerned with or otherwise relevant to the guitar transaction (2, 4, 5, 7 and 8). The letter warned of possible dismissal for gross misconduct.
31. As Ms Parker had invited him to do, Mr Enyiazu sent in a written response to the allegations made against him (114-128). Apart from alleging a racially discriminatory motive behind Y's complaint, this did not materially alter Mr Enyiazu's position in respect of the guitar transaction.
32. Ms Cath Keane (Deputy Managing Partner, Adults) and Ms Rogers were tasked to take the disciplinary hearing. Ms Keane has since died and it was for that reason that we heard from Ms Rogers.
33. The disciplinary hearing took place on 6 June 2018. Ms Keane and Ms Rogers had Mr David Hunt (Workforce Business Partner, Adults) in attendance as HR support. Mr O'Donoghue and Ms Parker attended to present the management's case and Mr Enyiazu was accompanied by Mr Mark McSheehy of UNISON. There is a full transcript of the hearing at 129-165. A portion of this was taken up with Mr Enyiazu reading out his written response (see paragraph 31 above). We note the following passage:

"....I was just trying to help him. Was just a casual and mutual agreement, you know help me with this and no one needs to know about it which is not ethical, you know thinking about it now it's not ethical. I shouldn't have helped him but even if I agreed to help him, I should have understand, consulted my colleagues and discuss with my colleagues which I failed to do. I'm not trying to use it as an excuse, I don't know maybe because I was going through an

emotional time as well; my emotions as well was everywhere and took things for granted and just thought I'll just help him. But all I can say is that I'm sorry for not following Trust policies."

34. On 11 June 2018 Ms Keane wrote to Mr Enyiazu setting out the disciplinary panel's conclusion (166-169). Ms Keane explained that four of the seven allegations had not been upheld but three relating to the guitar transaction were upheld amounting to breaches of several of the Trust's policies. Mr Enyiazu was dismissed for gross misconduct although he was paid in lieu of notice. Core findings were:

"You repeated that you knew what you should have done in your role and that you recognised entering into a financial contract with a patient could be viewed as financial exploitation, however you could offer no convincing reason as to why you entered into a verbal contract with a patient to dispose of their musical property, or why you failed to record the sale of the guitars and equipment belonging to the service user on care notes or share this information with your colleagues or line manager. This was only done by you after you became aware that the Service user's mother was going to make a complaint.

In addition your account relating to the disposal of the guitars and equipment, the payment for them, and the role of "Joseph" in all this is riddled with inconsistencies."...."This whole account is not credible."

35. As he had been invited to do in the disciplinary hearing outcome letter, Mr Enyiazu appealed against the decision to dismiss him. This Mr Enyiazu did in two letters dated 21 June (170-171) and 31 July 2018 (172-180). Those letters can be referred to for their full content. In summary Mr Enyiazu's points were that the appeal focussed on irrelevant historical information, witness statements were not verbatim, there had been leading questioning of witnesses (X being in no fit state to be interviewed in hospital), there had been no written statement from "Joseph", "*Black Ethnic Minority Prejudice*" from X and Y had caused Y to complain, the penalty was too harsh, no account had been taken of Mr Enyiazu's own emotional state at the relevant time and there had been a lack of adequate supervisions. Mr Enyiazu concluded with a biblical quotation concerning true justice from the Old Testament Book of Zechariah.

36. The appeal hearing took place on 15 August 2018. The transcript is at 181-219. It was chaired by Mr Marshall accompanied by Ms Victoria Burns (Interim Deputy Director of Allied Health Professions). Mr Hunt attended as did Ms Keane and Ms Stevie Middleton (Workforce Business Partner, Specialist). Mr Enyiazu was accompanied by Ms Caroline Emery of UNISON.

37. During the hearing Ms Keane read out most of a written Management Response to Mr Enyiazu's appeal (220-223). We note that, in response to Mr Enyiazu's allegation that X and Y displayed "*Black Ethnic Minority Prejudice*" and without that Y's complaint would not have been made, the Response included this:

"It was accepted by the hearing panel that this was how Kenneth may have felt, however it was not the role of the panel to question the motives behind the complaint being made by Y or the evidence given by the service user X, but to examine the conduct of the employee of the Trust."

38. At the end of the hearing, after an adjournment, Mr Marshall explained that the disciplinary panel's decision was upheld and a detailed letter would follow.

39. On 17 August 2018 Mr Marshall wrote a letter of explanation to Mr Enyiazu (224-229). This included full references to the policies of the Trust that Mr Enyiazu had been found to have breached. From the start Mr Enyiazu had accepted that he had not complied with Trust policies and this was not an issue at the Tribunal Hearing. We, therefore, confine ourselves to recording the most obvious point. The Trust's "Professional and Personal Boundaries Policy" includes:

"7.6 Under no circumstances should staff form inappropriate, non-therapeutic intimate personal or sexual relationships with people using Trust services. Staff should not behave in a way either inside or outside of the workplace which may call into question their professional conduct or endanger the confidence people using Trust services, relatives and carers place in the Trust to deliver care. Examples of inappropriate actions or relationships include:"....

"Entering into a financial relationship"

40. Finally, Mr Marshall explained his conclusions as far as mitigation was concerned.

APPLICABLE LAW

41. Section 94 of the Employment Rights Act 1996 (the “ERA”) provides an employee with a right not to be unfairly dismissed by his employer.
42. Section 98 of the ERA sets out provisions for determining the fairness or otherwise of a dismissal. So far as it is relevant it provides:

“98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-”....

“(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.”

43. The test for a fair conduct dismissal is well established. In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an employment tribunal has to decide whether the employer who dismissed the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This

involves three elements. First, the fact of that belief must be established, that is that the employer did believe it. Second, the employer must have had in his mind reasonable grounds upon which to sustain that belief. Third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation as was reasonable in all the circumstances. The first of these elements goes to the reason for dismissal, which it is for the employer to show. Otherwise, the burden of proof is neutral.

44. Added to this test is the requirement that the sanction imposed by the employer is within the band of reasonable responses.
45. Implicit in all this is that it is not for the tribunal to substitute its view for that of an employer provided that the employer's view falls within the band of responses which a reasonable employer might adopt.
46. We were referred to *BHS v Burchell* [1978] IRLR 379 and *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23.
47. So far as they are applicable, sections 4 and 9 of the EA provide as follows:

“4 The protected characteristics

*The following characteristics are protected characteristics-
”....*

“race:”

“9 Race

(1) Race includes-

(a) colour;”....

“(c) ethnic or national origins”

48. So far as it is applicable, section 13 of the EA provides as follows:

“13 Direct Discrimination

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

49. So far as it is applicable, section 39 of the EA provides as follows:

“39 Employees and applicants”...

“(2) An employer (A) must not discriminate against an employee of A’s (B)-”....

“(c) by dismissing B;

(d) by subjecting B to any other detriment.”

50. So far as it is applicable, section 109 of the EA provides as follows:

“109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A’s employment must be treated as also done by the employer.”

51. So far as it is applicable, section 136 of the EA provides as follows:

“136 Burden of Proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

CONCLUSIONS

52. Unfair Dismissal

53. It is for the Trust to show a permissible reason for the dismissal and it puts forward “conduct” under subsection 98(2)(b) of the ERA (it also put forward “some other substantial reason in the alternative). In short, the Trust points to Mr Enyiazu’s conduct in relation to the guitar transaction. That is a reason related to conduct and, on the evidence, plainly the reason why the Trust dismissed Mr Enyiazu. In the pleadings Mr Enyiazu mentions a disguised redundancy as a possible reason but that was not pursued at the Tribunal Hearing. We will address Mr Enyiazu’s allegation that the dismissal was tainted with race discrimination below.

54. There is no evidence on which we could conclude that any of the Trust's employees charged with the investigation, disciplinary and appeals processes did not believe that Mr Enyiazu was guilty of the misconduct in question.
55. We next consider whether or not Mr O'Donoghue, Ms Keane, Ms Rogers, Mr Marshall and Ms Burns had reasonable grounds for sustaining that belief. The question is, was it within the band of reasonableness for them to conclude on the evidence before them that Mr Enyiazu had committed the misconduct alleged?
56. On the evidence Mr Enyiazu, from the outset, accepted that the conduct in question was "*a poor error of judgement*" and that "*it should not have happened in the first place*". Later Mr Enyiazu offered "*all I can say is that I'm sorry for not following Trust policies.*" In the circumstances we cannot see how it can be said that it was unreasonable for the individuals concerned to conclude that Mr Enyiazu had committed the misconduct alleged. Clearly, the conclusion was reasonable.
57. As far as the investigation is concerned, the test is, had the employer, at the stage at which he formed his belief in the misconduct in question, carried out as much investigation as was reasonable in all the circumstances?
58. Mr O'Donoghue carried out a wide-ranging investigation. The Trust recognised that what the Tribunal has described as a somewhat zealous approach combined with a lack of experience resulted in some flaws. There was nothing, however, that would allow the Tribunal to find that the investigation was outside the range of reasonableness.
59. Mr Lewis-Bale maintained four arguments, in particular, on this subject.
60. First, it was argued that the interview with X was flawed. X had (contrary to the subsequent understanding of the disciplinary and appeal panels) only been in hospital for a few weeks which (as Ms Keane intimated) might have meant that he was not sufficiently stable to give reliable evidence. In addition, many of the questions put to X by Mr O'Donoghue were leading. These are probably fair arguments but they go nowhere in context. This is because the interview added nothing material to the picture. The picture had been painted by Mr Enyiazu's own admissions.
61. Second, it was argued that X and Y's evidence included racially discriminatory stereotyping. This was accepted by the Trust.

Again, however, it goes nowhere. As the Trust explained, the purpose of the disciplinary process was to consider Mr Enyiazu's alleged misconduct, not Y's motivation for complaining about it.

62. Third, the way in which "Joseph" was "interviewed" by Mr O'Donoghue was criticised. In particular, "Joseph" never gave a statement. In the Tribunal's view the process of "interviewing" Joseph was within the band of reasonableness.
63. Fourth, it was argued that the disciplinary panel's sight of the "historical information" fatally tainted its decision. On the evidence, the Tribunal finds such information was honestly discounted.
64. We then move to the question of whether or not the sanction imposed by the employer was within the band of reasonable responses.
65. We did consider this in some depth. Mr Enyiazu was a long serving employee who had been reasonably open in his admissions. We accept, however, that whether or not Mr Enyiazu was being completely truthful about exactly what had happened, the Trust had plenty of grounds for suspecting that he had not. Against that background and given that Mr Marshall, in particular, clearly carefully considered the issue of mitigation, we cannot come close to finding that the sanction of dismissal was outside the band of reasonable responses.
66. Accordingly, Mr Enyiazu's claim of unfair dismissal is dismissed.

67. Discrimination

68. Supervisions

69. Mr Enyiazu's claim in this respect is very clear. Mr Enyiazu says that the Trust, through Mr Beardsmore, discriminated against him because of his race by treating him less favourably than the Trust treated Ms Kienhe or would treat others. The alleged less favourable treatment was being given fewer supervisions than Ms Kienhe or others.
70. Ms Kienhe is not a suitable comparator. Although Ms Kienhe does not share the protected characteristic, her circumstances were materially different from those of Mr Enyiazu in that she was a full-time employee. We therefore use a hypothetical comparator being materially in Mr Enyiazu's circumstances (in particular, working two days a week) but not sharing his protected characteristic.

71. Are there facts from which we could decide, in the absence of any other explanation, that Mr Beardsmore gave Mr Enyiazu fewer supervisions than he would have given the hypothetical comparator because of Mr Enyiazu's race? We do not see any. We are entitled to take all the circumstances into account. There is evidence that Mr Beardsmore was sympathetic to Mr Enyiazu. There is evidence that Mr Beardsmore could not arrange supervisions because of Mr Enyiazu's personal circumstances. There is evidence that supervisions were pro-rated for part time employees, whatever the Trust's policies had to say on the matter. If we were to be wrong about this and, despite these factors, we should draw an inference, we would conclude that, through that evidence, Mr Beardsmore and the Trust have shown us that the reason for the less favourable treatment was not Mr Enyiazu's race.

72. A Tainted Dismissal?

73. On several occasions we addressed with Mr Lewis-Bale exactly how Mr Enyiazu put this aspect of the discrimination claim. It is no fault of Mr Lewis-Bale's that it remained somewhat obscure. The best we can do is to turn to the pleadings where we find this (12-13 - paragraphs 6-9 of the "Further Particulars of Claim"):

"6. It is the Claimants case that the Respondent had, or should reasonably have had, the issue of possible racial motivation in their mind at the time of dismissal.

7. It is the Claimant's case that the Respondent can be liable for the racially motivated actions of third parties, in this case the service user.

8. It is the Claimant's case that racial motivation has affected the sanction in contributing towards the service users complaints. Had the Claimant not been perceived in the manner he was by the service user, he would not have been dismissed. Therefore his race was a material factor and the Respondents failure to discount race as a contributing factor amounted to direct discrimination in the course of dismissal.

9. It is the Claimant's case that he raised questions relating to issues of race discrimination during his appeal. This was dismissed without any, or any adequate, investigation. It was simply stated that the appeal panel were not looking to consider whether the complaint was a racially motivated complaint."

74. We take each point in turn.
75. Paragraph 6. The relevant employees of the Trust were aware that X and Y had made racially discriminatory stereotypical comments to Mr O'Donoghue. In the Tribunal's view they properly distinguished between the propriety of those remarks and their task of considering Mr Enyiazu's alleged misconduct.
76. Paragraph 7. This, as we understand it, is a correct statement of the legal position.
77. Paragraph 8. This pleading is obscure to us. We think that what is being said is that Y would not have lodged her complaint if she had not held racially discriminatory views. If there had been no complaint, there would have been no dismissal, so the dismissal itself is tainted with discrimination. The first and obvious point about this is that it is not supported by the evidence. The evidence is that Y lodged her complaint because she was dissatisfied with Mr Enyiazu's support for X's PIP application and the guitar transaction. Even discounting that, we do not think the argument can run. It does not matter how Mr Enyiazu's alleged misconduct came to light, the Trust was entitled to address it. Whether, especially had Mr Enyiazu not been dismissed, the Trust should have addressed the matter separately, is something else entirely.
78. Paragraph 9. On the evidence it is not the case that the relevant employees of the Trust dismissed the issue of X's and Y's remarks. It is the case that they differentiated between the alleged misconduct and the issue of X and Y's remarks. As we have explained above, that was perfectly proper.
79. For the avoidance of doubt, we do not see any allegation that, other than through the somewhat tortuous pleadings dealt with above, the Trust's decision had any racially discriminatory motive. In other words, there is no allegation that any of the Trust's employees involved in the process had any discriminatory motive.
80. Accordingly, the claims of race discrimination are dismissed.

Employment Judge Matthews
Date: 22 July 2019