**Case No: 1601385 / 2020**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr C Palfrey**

**Respondent:** **Cape Environmental Services Limited t/a Altrad Services**

**Heard at:** **Cardiff by video** **On:** **9th July 2021**

**Before:** **Employment Judge Howden-Evans**

**Representation**
Claimant: Mr Cross, legal representative
Respondent: Mr Warren-Jones, legal representative

# RESERVED JUDGMENT

The employment judge's decision is that the complaint of unfair dismissal is well founded. This means the respondent unfairly dismissed the claimant.

# REASONS

**The parties**

1. The respondent, an industrial services provider, employed the claimant as a rigger at the respondent's client's premises, Dow Corning Silicones in Barry.

2. The claimant started employment with the respondent on 23rd October 2017 and was summarily dismissed for gross misconduct on 24th February 2020. At that time, he had a 2 years' continuous service and a clean disciplinary record.

**The issues**

3. Following a period of ACAS early conciliation, on 17th June 2020 the claimant presented an ET1 form asserting he had been unfairly dismissed. At a case management hearing on 5th October 2020, Employment Judge Sharp identified (at paragraph 13 [p24]) the claimant was asserting:

3.1. The respondent did not have a genuine belief the claimant had committed an act of misconduct;
3.2. That any such belief was not based on reasonable grounds;
3.3. The investigation was not reasonable;
3.4. Dismissal was not within the range of reasonable responses open to a reasonable employer; and/or
3.5. The procedure used was not fair as during the disciplinary hearing the claimant was asked questions and not allowed to answer fully.

4. Under the heading “The Issues”, Employment Judge Sharp had noted the following issues to be determined (in relation to liability):

 4.1. What was the reason or principal reason for dismissal and was it a potentially fair one in accordance with Section 98(1) and (2) of Employment Rights Act 1996 (“ERA”)? The Respondent says the reason was conduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct and this was the reason for dismissal.

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

  4.2.1. there were reasonable grounds for that belief;
  4.2.2. at the time the belief was formed the Respondent had carried out a reasonable investigation;
  4.2.3. the Respondent otherwise acted in a procedurally fair manner;
  4.2.4. dismissal was within the range of reasonable responses.

5. Both parties have been represented throughout these proceedings. Both representatives agree that the issues to be determined at today’s hearing remain those set out in Employment Judge Sharp’s order.

## The hearing

6. The hearing was conducted wholly remotely, with all participants attending by video. The claimant was represented by Mr Cross and the respondent was represented by Mr Warren-Jones.

7. Each witness had prepared a witness statement, which I read prior to the hearing. We heard evidence on oath from

 7.1. Mr Humphreys, Site Manager, who took the decision to dismiss the claimant;
 7.2. Mr Trotman, Operations Manager who considered the claimant’s appeal;
 7.3. Mr Gregory, the claimant’s colleague who attended both the disciplinary hearing and appeal hearing to support the claimant; and
 7.4. The claimant.

8. The procedure adopted was the same with each witness – I allowed supplemental questions from the representative that had called the witness, before cross examination, any questions from myself, and finally any reexamination (from the representative that had called the witness).

9. I was also provided with a written statement from Mr Cawthorn who was the claimant's former manager. Mr Cawthorn was not able to attend the hearing to give evidence but was keen to provide a character reference for the claimant. I note that Mr Cawthorn's evidence has not been tested by cross examination and as such can only carry little weight.

10. I also had the benefit of a bundle of documents of 72 pages.

11. Prior to today's hearing, the claimant had made an application for the following documents to be disclosed:

    1 the full unredacted witness statements, whether used or not, that were taken by the respondent relating to the dismissal; and
    2 copies of any unused material, emails, memos, notes of meetings relating to allegations that the claimant had made racist comments and
    3 a list of the people present in the W 410 permit hurt on Tuesday 4th February when the claimant was alleged to have made the racist comments

12. This application was considered by Employment Judge Jenkins who had ordered that these documents (if they existed) should be disclosed to the claimant. The claimant was provided with unredacted notes at lunchtime yesterday, which have been put into a supplemental bundle of 6 pages that I have been able to consider during today's hearing. Mr Warren-Jones, on behalf of the respondent, confirmed that there were no further documents to be disclosed. Whilst the late disclosure of documents is not ideal, neither party has any objection to us proceeding with the hearing today.

## **Findings of Fact**

13. The claimant was employed by the respondent from the 23rd October 2017 to 24th February 2020 as a rigger, working on their client, Dow Corning Silicones' site in Barry, South Wales.

14. On 4th February 2020 the respondent received a telephone call from a manager at Dow Corning Silicones (the client) reporting that "a member of their maintenance team" had made a verbal complaint that the claimant had, whilst he was in the 410 permit office, made a remark when referring to the permit book "*does it say on there we can kill black people*".

15. On the 5th February 2020 the claimant was suspended pending investigation.

## **The investigation**

16. An investigation was conducted by Mr. Jones HSEQ advisor and Mr Morris, engineering supervisor. There is no evidence from either investigating officer; they are not attending this hearing as witnesses.

17. The investigation documents included [at pages 38 to 42] attendance notes of:

    17.1. the Dow Corning Silicones manager's conversation in which it was reported that a member of the maintenance team had made a complaint about the claimant;
    17.2. the claimant's suspension meeting; and
    17.3. meetings with three separate anonymous witnesses.

18. The documents [at pages 38 to 42] had all been anonymised with asterisks ("*") used to replace every witness's name. The problem with using an asterisk, rather than using letters for each witness's name was that it was not clear how many witnesses were saying something. These were the same versions of documents that were provided to the claimant and to the decision makers – it was not until yesterday that the Claimant and decision makers had sight of the unredacted witness statements. At the time of taking the decision to dismiss the claimant, Mr Humphreys was working with documents full of asterisks rather than documents that clearly identified who said what. It was the same for Mr Trotman, when he considered the claimant's appeal – he too was working with asterisks rather than a letter for each witness, which meant both decision makers mistakenly believed that the person that had complained to a manager in the site office (who in turn complained to the respondent) was one witness, whose account was subsequently corroborated by another witness (witness 2). In fact, these were the same person; there was only <u>one</u> person (the person that had complained) that had allegedly heard the claimant make a racist comment – this was an uncorroborated complaint and the complainer didn't want to make a statement.

19. The documents that Mr Humphreys (and subsequently Mr Trotman) had in front of them at the time of considering their decisions comprised:

    19.1. an attendance note dated 2pm *"Anonymous Employee Complaint"* in which * is reported as having attended the engineering site office to complain about the claimant. This notes * as saying the claimant had *"made a remark at the 410 permit office along the lines of "Can we kill black people*"." The attendance note records *" * stated that * was annoyed about it and that [the claimant] is known to have made comments like this before. * was asked if he would be willing to make a statement. He didn't want to commit at the time unless other people present highlighted it."*

    19.2. An attendance note headed "Suspension" which records *"…CJ informed [the Claimant] that an allegation has been made against him regarding an alleged racially offensive comment yesterday. CJ asked [the Claimant] if he could recollect. [The Claimant] stated that he has no idea what I'm talking about…..CJ asked [the Claimant] if it could be conceivable that he could make any negatively racial comments. [The Claimant] replied "no more than anyone else" [Paused] then said "no"…".*

19.3. An attendance note of interviews on 6th February 2020

*"10am – anonymous statement 1*
** was clearly very agitated and anxious and had assumed that * had been asked to attend regarding the incident above. * stated that * was very anxious and not prepared to give any statement over what had happened. * felt that * job would be jeopardised and would face backlash from * colleagues….* confirmed that * would not provide any statement and that * didn't hear any specific comments made by [the claimant].*

*10.20 – anonymous statement 2*
** stated straight away that * not willing to provide a statement as * has already feeling that * is being treated differently by * colleagues and aware that people * are talking about it. * no longer feels comfortable with the situation and said that * doesn't want anything to go on record….* explained that any statement can be anonymous and if the statement can be corroborated by other witnesses can remain anonymous. * stated that people already know and * not prepared to be the only person making a statement. CJ asked if we can obtain statements from others, would * be prepared to provide a statement. * hesitated then said no. CJ explained that effectively without any witness statements if would prove difficult to substantiate that the offensive comments were made and essentially, we are saying that it's ok for this type of language to be used. * replied that it's not ok and that everyone knows he often makes racially offensive comments. CJ confirmed that I was not aware of any previous comments being made but unless we are provided with information ie statements to support the claims, we are in a difficult position to take appropriate action. CJ asked exactly what did [the claimant] say. * initially said "you know what he said". CJ asked to confirm again. * said that [the claimant] made the comment when he was completing his 60b stated "Does it say on the permit, can we kill black people". * followed up by saying that * was not going to fill out a statement.*

*10.40am – anonymous statement 3*

*CJ asked if * was aware why * had been asked to come into the office. * said yes, sat down and said that * didn't see or hear anything and whilst * was aware that something may have been said afterwards * was not willing to provide a statement.*

19.4. Minutes from the claimant's investigation meeting of 13th February 2020 (see below); and

19.5. an email dated 11th February 2020 addressed to Graham Morgan. The sender's name was blanked out. This said

*"On Tuesday 4th February a member of the maintenance team came to my office to ask for advice. They were concerned about being asked to give*

*a statement to Altrad on a comment that was made by [the claimant]. In W410 permit hut. The maintenance team member recalled the following words said by [the claimant] when referring to the permit / permit book he said "does it say on there we can kill black people". The team member stated that another Altrad employee reacted by saying "why would you say that" to which [the claimant] replied something about "monkeys"."*

20. On 13th February 2020 the claimant attended an investigation meeting with Mr Morgan. The minutes from this meeting [46 & 47] note the claimant's response to the allegation

    *"As I explained to Chris on 5th, I have no idea what you're talking about. We were in the permit hut having a laugh and joke as usual but as far as saying anything untoward or offensive language and behaviour I am not aware of anything said by anybody, there was a lot of people in the room, up to a dozen…and everyone was talking at the same time."*

21. Mr Morgan said to the claimant *"various people including this client say you made comments of a racially offensive nature, can you explain why they would say that?"* The claimant asked *"Can you tell me specifically what the comment was?"* and was told *"In relation to the PTA or permit it is alleged that you said "Does it say on there we can kill black people".* The claimant responded *"All I can say is I 100% did not say that, I'm shocked by the comment and outraged".* Mr Morgan went on to say *"In addition to the alleged comment it has been alleged you were challenged and made a remark about monkeys. Was that the case?"* The claimant responded "*It certainly was not the case, I was not challenged and I did not say that...I am in shock at the whole incident"*

22. During the investigation meeting, the Claimant told Mr Morgan that his recollection of his conversation on 4th February 2020 in the W410 permit hut was that the W410 permit official (who happens to be a minority ethnic person) had been talking to the Claimant and a colleague about a raunchy film that he had seen called "Sausage Party" and there had been a light-hearted conversation about the film. The Claimant categorically denied having said anything of an offensive nature and was shocked that someone would make "such an untrue allegation" about him.

**The disciplinary hearing**

23. By letter of 14th February 2020 the claimant was invited to attend a disciplinary hearing that would be considering the allegation *"On Tuesday 4th February 2020 you were heard to make offensive and inappropriate comments of a racist and threatening nature".* The claimant was advised that one potential outcome was dismissal and advised that he could bring a colleague or union representative to the hearing. The claimant was provided with the documents detailed in paragraphs 17 to 20 of this judgment and a copy of the disciplinary policy.

24. The claimant attended the disciplinary hearing on 19th February 2020 and was accompanied by a colleague Mr Gregory. The hearing was chaired by Mr

Humphreys. The claimant was asked about the allegations and vehemently denied making the comment. The claimant was told by the respondent *"we have also got anonymous statements that when completing the P60b you made those comments so there are more than one person saying this".* The claimant questioned the accuracy of the anonymous accounts as he said he [the claimant] "had not completed the 60B" form on that day.

*25.* Mr Gregory noted (and I accept) that at one point the claimant was asked whether he was a racist and denied being a racist and was trying to explain why he was not a racist when his answer was interrupted, and the claimant was not able to give the full evidence that he wanted to provide to the disciplinary hearing. At the disciplinary hearing, the claimant gave Mr Humphreys a written testimonial from Mr Cawthorn, the claimant's manager, which explained Mr Cawthorn had known the claimant for over 10 years and was shocked and amazed at the allegations as he had the highest regard for the claimant and had known him to help people from diverse ethnic backgrounds train in martial arts and the claimant had never shown prejudice in any shape or form.

**The decision to dismiss the claimant**

26. At the end of the disciplinary hearing, Mr Humphreys adjourned the meeting for 15 minutes during which time he made his decision to dismiss the claimant. The claimant returned to the hearing and was told that *"more than one person has made a statement that you have made these comments….there are enough statements to give me a reasonable belief that such statements have been made*" and that the claimant was being dismissed.

27. Mr Humphreys made this decision after considering the documents in front of him (those detailed in paragraphs 17 to 20 of this judgment). I note that what Mr Humphreys had in front of him were attendance notes (littered with * rather than identifying witnesses by letter) and an email reporting someone else's account – he did not have witness statements. None of the witnesses were prepared to give a witness statement; nor had they approved the accuracy of the attendance note / email account. The claimant vehemently denied having made the comment. Two of the three witnesses had not heard the claimant say anything. Mr Humphreys erroneously believed the complainant (the maintenance team member) was a different person from the person referred to as anonymous statement 2 and that the complaint had been corroborated by another person and that both of these people had heard the claimant say something but neither of them was prepared to give a statement.

28. In evidence, Mr Humphreys said this was enough for him to have a "reasonable belief" that the claimant had made racially offensive comments as he believed the complaint was being corroborated by other witnesses. He accepts he did not make any attempt to write questions to the anonymous witnesses or test their account in any way. He did not make further enquiries as to whether the claimant had completed the 60B form on that day.

29. By letter of 26th February 2020, Mr Humphreys confirmed his decision to summarily dismiss the claimant because he had found the allegation *"On Tuesday 4th February 2020 you were heard to make offensive and*

*inappropriate comments of a racist and threatening nature"* to be proven. His letter notes *"The company received a complaint that you were heard making comments of an offensive racist and threatening nature. This was corroborated by witnesses albeit these witnesses were reluctant to make statements owing to the current culture on the site at Dow and for fear of reprisals. Nevertheless, you have provided me with no reason as to why more than one individual would confirm that they heard you making offensive comments of a racist nature. I am therefore of the belief that such an event did occur…."*

**The appeal**

30. By email of 3rd March 2020 the claimant appealed this decision. His grounds of appeal were:

*"1. At no time did I ever make any such offensive racist or threatening remark as is being alleged.*

*2. It is not for me to have to prove my innocence – eg "you have provided me with no reason as to why"…it is for management to satisfy itself on a balance of probabilities after a full and proper investigation that I committed the alleged disciplinary offence…..none of the makers of the three anonymous statements have been either willing or prepared to provide a written statement. Indeed, the maker of anonymous statement 1 concedes they did not hear any specific comments made by [the claimant]….anonymous statement 2 not willing to provide a statement. The maker of anonymous statement 3 states "[I] didn't see or hear anything". Accordingly, your own investigations have not found sufficient evidence of my having used offensive words and you cannot rely upon such a defective investigation as justification for my dismissal on the basis that I did use them - when I absolutely did not.*

*3. None of the anonymous statement makers were prepared to attend my disciplinary hearing either to give their evidence in person or to allow me to challenge the truth of any such statements being made – which statements I maintain to be categorically untrue. Neither was….the anonymous statement that management relied upon corroborated by the other two witnesses…*

*4. The good character testimony of Mr Cawthorn, Rigging Lead of Dow Corning confirming my high moral standards and good working relationships with all irrespective of race or ethnic origin have not been properly considered by management in making its decision to dismiss me."*

31. By letter of 6th March 2020, the claimant was invited to attend an appeal meeting on 13th March 2020. The claimant attended the appeal with his colleague, Mr Gregory. The claimant's appeal was considered by Mr Trotman, who had been provided with an appeal pack containing the same documents Mr Humphreys had been provided, the claimant's appeal letter and minutes from the disciplinary hearing.

32. During the appeal hearing, Mr Trotman read out the attendance notes from the anonymous witnesses and treated the attendance notes as though they were witness statements. In the minutes he is recorded as saying *"Not our company process to ask witnesses to attend disciplinary hearing, we have the statements already"* .

33. As a result of the confusing use of asterisks, Mr Trotman also mistakenly believed that there was more than one person alleging the claimant had made offensive remarks. The appeal minutes note him saying *"I have read some statements that have said you have said the comment".*

34. During the appeal hearing, the claimant continued to vehemently deny he had made any offensive comment and said *"Has the manager considered that the witness may have something against me?...There could be an ulterior motive".*

35. Mr Trotman asked *"Do you think it's been set up against you?"* to which the claimant responded *"It's a possibility"*

**The appeal outcome**

36. After the appeal meeting, Mr Trotman spoke to Mr Morgan who confirmed the statements were anonymous as the witnesses were in fear of reprisals and were very reluctant to say anything. In oral evidence Mr Trotman confirmed that he was uncomfortable that the witnesses were remaining anonymous – he would have preferred to have a name and a face attached to the document.

37. By letter of 20th March 2020, Mr Trotman confirmed he was upholding the decision to dismiss the claimant. In his decision, he noted *"you were unable to provided me with any reason as to why* ***more than one*** *individual confirmed they heard you making offensive comments of a racist nature ….you referenced that the witness could have an ulterior motive against you however you were unable to provide a reason as to why…..Anonymous statement 2 did confirm you made the comment and even relayed what was said which is recorded in the* ***statement.*** [employment judge's emphasis]

38. Unfortunately, Mr Trotman was still working under the mistaken belief that that the complaint had been corroborated by another person. He was also treating attendance notes (which had not been approved by witnesses) as though they were witness statements.

## <u>The law</u>

### Unfair dismissal (liability)

39. The respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for one of the potentially fair reasons set out in Section 98(2) of the Employment Rights Act 1996 (ERA). The respondent states that the claimant was dismissed by reason of his misconduct; see Section 98(2)(b) ERA. If the respondent persuades me that it <u>did</u> have a genuine belief in the claimant's misconduct, and that it <u>did</u> dismiss him for that

potentially fair reason, I must go on to consider the general reasonableness of that dismissal under Section 98(4) ERA.

40. Section 98(4) ERA provides that the determination of the question of whether the dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing the claimant. This should be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

41. In considering the question of reasonableness, I have had regard to the decisions in *British Home Stores Ltd v. Burchell* [1980] ICR 303 EAT; *Iceland Frozen Foods Ltd v. Jones* [1993] ICR 17 EAT; the joined appeals of *Foley v. Post Office* and *Midland Bank plc v. Madden* [2000] IRLR 82 CA; and *Sainsbury's Supermarkets Limited v. Hitt* [2003] IRLR 23 CA. In short:

    40.1 When considering Section 98(4) ERA, I should focus my enquiry on whether there was a reasonable basis for the respondent's belief and test the reasonableness of its investigation.

    40.2 However, I should not put myself in the position of the respondent and test the reasonableness of its actions by reference to what I would have done in the same or similar circumstances. This is of particular importance in a case such as this where the claimant is seeking, in effect, to "clear his name".

    40.3 In particular, it is not for me to weigh up the evidence that was before the respondent at the time of its decision to dismiss (or indeed the evidence that was before us at the Hearing) and substitute my conclusions as if I was conducting the process myself. Employers have at their disposal a band of reasonable responses to the alleged misconduct of employees and it is instead our function to determine whether, in the circumstances, this respondent's decision to dismiss this claimant fell within that band.

    40.4 The band of reasonable responses applies not only to the decision to dismiss but also to the procedure by which that decision is reached.

42. The Court of Appeal highlighted the dangers of the "acquittal mindset" in *London Ambulance Service NHS Trust v. Small* [2009] IRLR 563. According to Mummery LJ (at paragraph 43):

    *It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the*

*employer acted fairly and reasonably in all the circumstances at the time of the dismissal.*

43. The ACAS Code of Practice: Disciplinary and Grievance Procedures applies to misconduct dismissals and the Tribunal is required to have regard to this Code, when considering the range of procedures that a reasonable employer might adopt.

44. On behalf of the claimant, Mr Cross has referred me to A v B [2003] IRLR 405; Salford Royal NHS Foundation Trust v Roldan [2010] UKEAT/0166/10/DM; TDG Chemical v Benton [2010] 9 WLUK 182; and Sneddon v Carr-Gomm Scotland Ltd. [2012] IRLR 820 Ct Sess (Inner House). In short, these provide:

    44.1. it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where the employee's reputation or ability to work in his or her chosen field of employment is potentially at stake.

    44.2. In cases of alleged misconduct, where the evidence consists of diametrically conflicting accounts of an alleged incident with no, or very little, other evidence to provide corroboration one way or the other, employers should remember that they must form a genuine belief on reasonable grounds that the misconduct has occurred. However, they are not obliged to believe one employee and to disbelieve another. There will be cases where it is perfectly proper for the employer to say that they are not satisfied that they can resolve the conflict of evidence and accordingly do not find the case proved. This is not the same as saying that they disbelieve the complainant. For example, they may tend to believe that a complainant is giving an accurate account of an incident but at the same time it may be wholly out of character for an employee who has given years of good service to have acted in the way alleged. It would be perfectly proper in such a case for the employer to give the alleged wrongdoer the benefit of the doubt without feeling compelled to have to come down in favour of one side or the other.

45. On behalf of the respondent, Mr Warren-Jones referred me to *Linfood Cash & Carry Ltd v Thompson* [1989] IRLR 235, in which the Employment Appeal Tribunal gave the following guidance:

    *"…a careful balance must be maintained between the desirability to protect informants who are genuinely in fear, and providing a fair hearing of issues for employees who are accused of misconduct. We are told there is no clear guidance to be found from ACAS publications and the lay members of this appeal tribunal have given me the benefit of their wide experience.*

    *Every case must depend upon its own facts, and circumstances may vary widely – indeed with further experience other aspects may demonstrate themselves – but we hope that the following comments may prove to be of assistance:*

*1. The information given by the informant should be reduced into writing in one or more statements. Initially these statements should be taken without regards to the fact that in those cases where anonymity is to be preserved, it may subsequently prove to be necessary to omit or erase certain parts of the statements before submission to others in order to prevent identification.*

*2. In taking statements the following seem important: a. date, time and place of each or any observation or incident. b. The opportunity and ability to observe clearly and with accuracy. c. This circumstantial evidence such as knowledge of a system or arrangement, or the reason for the presence of the informer and why certain small details are memorable. d. Whether the informant has suffered at the hands of the accused or has any other reason to fabricate, whether from personal grudge or any other reason or principle.*

*3. Further investigation can then take place either to confirm or undermine the information given. Corroboration is clearly desirable.*

*4. Tactful enquiries may well be thought suitable and advisable into the character and background of the informant or any other information which may tend to add to or detract from the value of the information.*

*5. If the informant is prepared to attend a disciplinary hearing, no problem will arise, but if, as in the present case, the employer is satisfied that the fear is genuine, then a decision will need to be made whether or not to continue with the disciplinary process.*

*6. If it is to continue, then it seems to us desirable that at each stage of those procedures the member of management responsible for that hearing should himself interview the informant and satisfy himself what weight is to be given to the information.*

*7. The written statement of the informant – if necessary with omissions to avoid identification – should be made available to the employee and his representatives.*

*8. If the employee or his representatives raise any particular and relevant issue which should be put to the informant, then it may be desirable to adjourn for the chairman to make further enquiries of that informant.*

*9. Although it is always desirable for notes to be taken during disciplinary procedures, it seems to us to be particularly important that full and careful notes should be taken in these cases.*

*10. Although not peculiar to cases where informants have been the cause for the initiation of an investigation, it seems to us important that if evidence from the investigating officer is to be taken at a hearing it should, where possible, be prepared in a written form.*

46. I note that these are just guidelines – employers are not required to follow this guidance to the letter.

**Conclusions**

47. I remind myself that it is not my role to decide whether the Claimant actually did make offensive and inappropriate comments of a racist and threatening nature – instead I must ask myself whether the respondent had a genuine belief the claimant had committed this misconduct and whether the respondent's decision to dismiss him for this reason was reasonable.

48. The sole reason relied upon by the respondents was that the claimant had made offensive and inappropriate comments of a racist and threatening nature. The claimant accepted that, if correct, this would amount to gross misconduct.

49. The first matter I must address is whether Mr Humphreys held a genuine belief that the act of misconduct had been committed. Having heard evidence, I am satisfied that he genuinely believed the claimant had made offensive and inappropriate comments of a racist and threatening nature as he mistakenly believed that more than one person had witnessed the Claimant make offensive comments albeit they wished to remain anonymous. I am also satisfied that Mr Trotman also genuinely believed that the Claimant had committed this act of misconduct, as he too shared the same mistaken belief that the complaint was corroborated by another witness. I accept that the reason for dismissal was misconduct.

50. The next issue to address is whether that genuine belief was based on reasonable grounds. From this point on, the burden of proof is neutral. Both Mr Humphreys and Mr Trotman knew that the Claimant was vehemently denying the allegation but had formed a belief in misconduct based upon attendance notes (littered with * rather than identifying witnesses by letter) of meetings with anonymous people and an email reporting someone else's account. The witnesses had not been given an opportunity to approve the accuracy of attendance notes. The decision makers did not have witness statements; each attendance note reported that the witness was not prepared to provide a witness statement. I am satisfied that, in circumstances in which an employee is denying the alleged misconduct occurred <u>and</u> witnesses are not prepared to be identified, a reasonable employer <u>would</u> expect something more by way of grounds on which to form a belief in misconduct. The investigating officer recognised that something more would be required for reasonable grounds on which to form a belief in misconduct as he noted in the attendance note of his discussion with anonymous witness 2 "*CJ explained that effectively without any witness statements it would prove difficult to substantiate that the offensive comments were made".* I accept that there were not reasonable grounds on which a reasonable employer could have formed a belief in misconduct.

51. For the sake of completeness, I considered whether the respondents had conducted a reasonable investigation in all the circumstances, having regard to their size and administrative resources. I accept that Mr Humphreys and Mr Trotman were placed in a difficult position, as they were handling anonymous evidence which was difficult to follow because of the use of asterisks rather than letters. As the authority of *Linfood Cash & Carry Ltd v*

*Thompson* explains, employers need to take greater care when considering the weight of anonymous evidence. To his credit, Mr Humphreys accepted that he had not made efforts to test the accounts of the anonymous witnesses in any way. He had not looked for evidence which might have supported the Claimant's account, such as checking whether the 60B form had been completed by the Claimant on that day. In the appeal letter, Mr Trotman was told by the Claimant that the accounts relied upon were "categorically untrue" and yet he also made no attempt to meet or write questions to the anonymous witnesses or look for further evidence. As such I am satisfied that this investigation did not fall within the range of reasonable investigations that a reasonable employer could regard as being reasonable.

52. I am satisfied that the dismissal was not procedurally fair. As the ACAS code explains, procedural fairness requires an employer to listen to the employee's account and look for evidence on both sides. I accept that the respondent did not look for evidence on both sides – there was no attempt to test the accuracy of the accounts contained in the attendance notes, which the claimant had told the respondent were "categorically untrue".

53. Finally, I considered whether the respondents' decision to dismiss, and the standards by which that decision was reached, fell within the band of responses open to a reasonable employer of a similar size and with similar administrative resources. Both decision makers were presented with anonymous accounts recorded in attendance notes rather than witness statements as witnesses were not prepared to provide witness statements and they were considering an employee who vehemently denied making the comments, had an unblemished record and a statement from his manager that indicated he was unlikely to have made these comments. Decision makers did not make any attempt to meet or write questions to the anonymous witnesses or test their account in any way. I am satisfied that, in circumstances in which the employee was vehemently denying the allegation and witnesses were not prepared to provide even an anonymous witness statement, a reasonable employer would have made further efforts to investigate the allegations before taking the decision to dismiss the claimant. The decision to dismiss the claimant was beyond the range of reasonable responses of a reasonable employer.

54. The employment judge will set out directions to prepare the case for a remedy hearing in a separate Order.

______________________________________

Employment Judge Howden-Evans

Date 29 September 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 30 September 2021

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FOR EMPLOYMENT TRIBUNALS Mr N Roche