EMPLOYMENT TRIBUNALS

Claimants: Mr P Shepherd
Mr R Jarvis

Respondent: Manchester Metropolitan University

Heard at: Manchester **On:** 13-14 August 2018
4 September 2018
(In Chambers)

Before: Employment Judge Humble

REPRESENTATION:

First Claimant: In person
Second Claimant: In person
Respondent: Mrs Guilding

JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. In the case of Mr P Shepherd, case number 2404546/18, the claimant was not unfairly dismissed. The claim is dismissed.

2. In the case of Mr R Jarvis, case number 2410319/18, the claimant was not unfairly dismissed. The claim is dismissed.

3. The second claim of Mr R Jarvis, case number 2410339/18, was a duplicate of case number 2410319/18 and was dismissed on withdrawal by the claimant.

REASONS

The Hearing

1. The hearing took place at Manchester Employment Tribunal on Monday 13 and Tuesday 14 August 2018. The claimants each represented themselves at the hearing. The respondent was represented by Mrs Guilding, a solicitor.

2. The claimants gave evidence on their own behalf and both claimants had prepared witness statements, Mr Jarvis's extending to 46 pages. Witness statements were also produced by the claimants from Mrs Gail Lucas, Mr Mark Doocey, who were work colleagues of the claimant, and a lengthy statement from Gustaf Anthony Pilsel, Mr Shepherd's trade union representative. Those witnesses did not appear before the tribunal and therefore, while the tribunal read the statements, it was explained to the claimants that little weight would be attached to them since the witnesses were not present for the respondent to cross examine.

3. The respondent called as witnesses Catherine Little, Head of Manchester Law School and the disciplinary officer, and Kurt Weideling, the respondent's Director of Information Systems and Digital Services who was the appeals officer. The first claimant, Mr Shepherd, was critical of the respondent for not calling various other witnesses, in particular the investigating officer, Professor Birchauld Schoene. An earlier application had been made by Mr Shepherd to seek to secure the attendance of various witnesses, which had been refused by the tribunal under cover of a letter dated 5 July 2018. In that letter Regional Employment Judge Parkin stated, "*witness orders will not be made to secure the attendance of witnesses from whom witness statements have not been obtained. Parties are not generally permitted to question or cross examine their own witnesses (which includes witnesses ordered to attend at their request)*". No further application was made to have witnesses attend.

4. There was a substantial bundle of documents prepared by the respondent, which ran to 575 pages. In addition, there were several bulky lever arch files which had been prepared by the claimants. On close examination the claimant's lever arch files appeared to contain duplicates of the documents in the respondent's bundle and the tribunal directed that it would proceed on the basis that the respondents bundle would be treated as the trail bundle, and if the claimants wished to submit any further documents in evidence during the course of the hearing which was contained in the bundles they had prepared, then those documents would be added to the trial bundle. In the event several further documents were added by Mr Shepherd, including a compliment slip and payslips which were added at pages 500G to 500J, and a statement and some photographic evidence which were added at pages A135 to A143.

5. The witness evidence of both sides was taken as read. Cross examination and submissions were completed on the afternoon of Tuesday 14 August 2018. There was insufficient time for deliberations and to deliver an oral judgment and judgment was therefore reserved. The tribunal reconvened in chambers for deliberations on 4 September 2018.

The Issues

The issues were discussed and agreed at the outset of the hearing. Both the claimants were bringing claims for unfair dismissal and the issues were identified as follows:

6.1 It was for the respondent to show that the dismissals were for a potentially fair reason under Section 98(1) and (2) Employment Rights Act 1996. The potentially fair reason relied upon by the respondent was conduct.

6.2 If the respondent could show that the dismissals were for a potentially fair reason the tribunal would go on to assess whether the respondent acted reasonably under Section 98(4) ERA 1996 having regard to:

(a) whether the respondent had a genuine belief in misconduct on reasonable grounds having conducted a reasonable investigation;

(b) whether the respondent followed a fair procedure having regard to the ACAS code of practice; and

(c) whether the decision to dismiss was within the band of reasonable responses of a reasonable employer.

6.3 In this case, the claimants took issue with whether there was consistency of treatment. In particular, it was submitted that the respondent had not treated the claimants in a manner consistent with Gail Lucas, their manager, and Mark Neary, another work colleague.

6.4 If one or more of the dismissals were held to be unfair, then tribunal would be required to determine whether Polkey reductions should apply and whether the claimants contributed to their dismissals.

7 There was a further issue which related to the respondent's contention that the claimants had been overpaid wages in the sum of approximately £2,600 in the case of Mr Shepherd, and approximately £2,400 in the case of Mr Jarvis. The claimants did not accept that any overpayments had been made. The respondent initially sought to pursue these alleged overpayments by way of a counter claim, but the tribunal had no jurisdiction to hear such a claim since the claimants had not brought breach of contract claims before the tribunal. The matter was therefore only relevant to remedy since, if the claimants were successful and were awarded compensation, any sums due to them might be subject to a set off if the respondent were able to establish that it had made overpayments.

The Law

8. The tribunal applied the law at Section 98 of the Employment Rights Act 1996. By sub-section 98(1) ERA:

"*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 sub-section (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."

Then by sub-section (2):

"*A reason falls within this sub section if it:*

b) relates to the conduct of the employee…"

Then by sub-section (4):

"*Where the employer has fulfilled the requirements of sub-section (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."

9. In considering this alleged misconduct case, the tribunal applied the long-established guidance of the EAT in British Home Stores v Burchell [1980] ICR 303. Thus, firstly did the employer hold a genuine belief that the employee was guilty of an act of misconduct; secondly, did the employer have reasonable grounds upon which to sustain that belief and thirdly, at the final stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances.

10. The burden of proof in establishing a potentially fair reason within Section 98(1) and (2) rests on the respondent and there is no burden either way under Section 98 (4). Thus, as confirmed by the EAT in Sheffield Health and Social Care NHS Foundation Trust v Crabtree UK EAT/0331/09, this means that the respondent only bears the burden of proof on the first limb of the Burchell guidance (which addresses the reason for dismissal) and does not do so on the second and third limbs where the burden is neutral.

11. The tribunal reminded itself that it must not substitute its own view for that of the employer as to what is the proper response on the facts which it finds (Iceland Frozen Foods Limited v Jones [1982] IRLR 439, EAT) as confirmed in Post Office v Foley/HSBC Bank v Madden [2000] IRLR 827, CA). It was held in the case of Iceland Frozen Foods that:

"*It is the function of the [employment tribunal] to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside the band it is unfair.*"

There may be occasions where one reasonable employer would dismiss, and others would not, the question is whether the dismissal is within the band of reasonable responses.

12. The band of reasonable responses test applies to the investigation and procedural requirements as well as to the substantive considerations see Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, CA, Ulsterbus Limited v Henderson [1989] IRLR251, NI CA.

13. The tribunal must take in to account whether the employer adopted a fair procedure when dismissing having regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. If the tribunal hold that the respondent failed to adopt a fair procedure the dismissal must be unfair (Polkey v A E Deighton [1987] IRLR503, HL) and any issue relating to what would have happened with a fair procedure would be limited to an assessment of compensation (i.e. a Polkey reduction). The only exception to Polkey is where the employer could have

reasonably concluded that it would have been utterly useless to have followed the normal procedure (it is not necessary for the employer to have actually applied his mind as to whether the normal procedure would be utterly useless, Duffy v Yeomans [1994] IRLR, CA).

14. On appeals, in Taylor v OCS Group Limited [2006] IRLR 613, the Court of Appeal stated: "*What matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair.*"

15. As to the consistency of approach, the Tribunal applied Hadjioannou v Coral Casinos Limited [1981] IRLR 352, EAT and Paul v East Surrey District Health Authority [1995] IRLR 305, CA.

16. The Tribunal were also referred and had reference to the cases of City and County of Swansea -v- Gayle [2013] UKEAT/0501/12/RN and to RSPB -v- Croucher [1984] IRLR 425, EAT.

Note:

For the purposes of the remainder of this judgment, and for the sake of clarity, the first claimant is hereafter simply referred to as Mr Shepherd and the second claimant as Mr Jarvis and are collectively referred to as "the claimants".

Findings of Fact

The Employment Tribunal made the following findings of fact on the balance of probabilities (the tribunal did not make findings upon all the evidence presented but made material findings of fact upon those matters relevant to the issues to be determined):

17. Manchester Metropolitan University ("the respondent") is a higher education provider with campuses in Manchester City Centre. Both claimants were employed as security officers and were based at the respondent's All Saints Building, on Oxford Road, Manchester. Mr Shepherd was employed from 18 June 2012, and Mr Jarvis from September 2014 and both men were dismissed because of alleged gross misconduct on 13 December 2017. At the time of his dismissal Mr Jarvis was also undertaking the role of Assistant Duty Manager.

18. The claimants were subject to the respondent's disciplinary procedure which was recited at page 497 of the bundle. Examples of matters which could constitute gross misconduct under the procedure were: "*Verbal abuse, bullying, harassment, victimisation, intimidation or other serious acts of discrimination, and serious breaches of the University's Equality and Diversity policy."*

19. The claimants had some diversity training while employed by the respondent, although the training was limited to an online questionnaire which they were each required to complete during their working hours. It took the form of a multiple-choice test based on different scenarios to which the claimants were required to give a response. The respondent operated a Dignity at Work Policy, which was reproduced at pages 500A to 500F, and which set out at some definitions of harassment and bullying. These included, by way of examples "*racial, homophobic, biphobic or transphobic comments*" and "*oral and written harassment through jokes, offensive language, name calling, gossip and slander.*"

20. As part of their duties the respondent's security officers were required to wear body cameras which could capture both visual and audio recordings. These were normally switched off and were supposed to be activated only in emergencies or in potentially dangerous situations. On the morning of 8 October 2017 however an audio recording, apparently made by a body camera earlier that day, was obtained by Mr Bilal Hussain, the line manager of the claimants. Mr Hussain believed that it was a recording of conversations between Mr Shepherd, Mr Jarvis and Gail Lucas, the duty manager who had been on shift with the claimants earlier that day. Parts of the recording were transferred on to audio file on a USB stick and this was transcribed by Mr Hussain who passed it to another manager.

21. The edited version of the recording was extracted from a four-hour recording and it lasted approximately eight minutes. The eight minute recording was transcribed and the relevant parts of the transcript for the purposes of this case is recited below as it appears in the bundle (pages 158-159): -

Counter	Comment	Initial
02:20	He's just not a mixer is he really	(GL)
	Nah	
02:25	I suppose we are all different Yeah never mind	(GL)
02:31	That shit back stabbing shit will be on in a minute	(RJ)
02:34	Yeah that fucking horrible bastard will be here in half an hour … wanting to know what's happening with that secret whispers that he does …	(PS)
02:42	He already knows I would have thought	(GL)
02:43	Fucking cock	(PS)
02:45	We'll all know won't we	(GL)
02:51	Martin…gloat…knock his fucking teeth out…say that's one for Pete dickhead	(PS)
03:07	Might play the backstabber theme when he comes in	(PS)
03:09	GL Laughs	

Counter	Comment	Initials
07:02	Wait till Balal comes in	(PS)
07:06	Seen this when it comes on	

07:11	Not come on 'as it	
07:14	You must have gone to school a bit to pass them	(GL)
07:20	*Song is played* …. "you are a cunt, you are a cunt"	
07:28	All three start laughing	
07:32	'eh I'm being serious I wouldn't play that 'cause he will have you done for that he won't think its funny	(GL)
07:36	He can try, his fucking house will be burnt down the night he does, fucking … (inaudible)	(PS)
	Conversation about Mark making tea… Alah help ?? In background	
08:14	I wouldn't play that to Balal would you	(GL)
08:17	I would	(RJ)
08:18	Ha ha	
08:24	On when he comes in then play the bacon song	(RJ)
08:26	What's the Bacon song?	(GL)
08:27	You dirty fucking Muslim	(RJ)
08:29	No don't … no seriously don't he's the sort that would have you down the road	(GL)
08:38	Chop his head off …	(RJ)
08:40	Making pancakes, making pancakes song …	
08:50	"Oh bacon oh bacon oh bacon" (via electronic device)	
08:54	…something do… whilst shagging his arse	(PS)
08:59	"I'm going to rub some ham all over your bike"	(RJ singing)
09:02	Are you bothering to put that on…about or not Liberty Court	(GL)

22. On 9 October 2017 both Mr Shepherd and Mr Jarvis were suspended on full pay pending a disciplinary investigation. The suspension meetings were carried out by Michael Dunlea, a Human Resources Advisor, and Ian Hamlett, a line manager of the claimants. It was said by the claimants that the respondent failed to follow its

disciplinary procedure when carrying out the suspension since the procedure (at page 492 of the bundle) stipulated that a decision to suspend a staff member "*would normally be taken by one of the following individuals: The Vice Chancellor or the Deputy Vice Chancellor; or the Chief Operating Officer*". It was not clear on the evidence before the tribunal who took the decision to suspend but it was not said by the respondent that it was any one of those three individuals.

23. The claimants' suspension from duty was confirmed in writing on 10 October 2017 (pages 135 to 138). The letter stated that the claimants were suspended on full pay pending a disciplinary investigation into the allegation that, "*on 7 October 2017 you used language that was extremely offensive and totally unacceptable. This could be considered a serious act of harassment, intimidation or other acts of discrimination and a serious breach of the Universities Equality and Diversity Policy and the Universities Dignity at Work Policy*".

24. There followed an investigation into the allegations of gross misconduct against both claimants and Gail Lucas who had been suspended at about the same time. During the course of the investigation six people were interviewed and the claimants were required to attend investigation meetings on 27 October 2017. The investigation was conducted by Professor Berthold Schoene, Head of Faculty Research. During his investigation meeting, Mr Shepherd was shown a copy of the transcript and played the recording. He denied that it was his voice on the recording although his voice was identified by four work colleagues, including Gail Lucas who had taken part in the conversation. The claimant did, during his evidence before the tribunal, concede that it was his voice on the tape but his position during the investigation meeting was that it was not him. His position at the disciplinary and appeal hearing on this point was rather more ambiguous. He did not admit that it was his voice but said that *if* it was his voice then he did not make any racist comments and it did not justify a dismissal.

25. At his investigatory meeting, Mr Jarvis refused to listen to the tape recording. He said that he could not remember saying the words that were attributed to him in the transcript. Mrs Little's evidence was that Mr Jarvis accepted, at the later disciplinary hearing, that the comments made in the transcript were in fact made by him. In his evidence before the tribunal Mr Jarvis denied that he had made such a concession at the disciplinary hearing but rather he said the words he used were to the effect that "*if it was me then it was a 'stupid' thing to do.*" The tribunal preferred the evidence of Mrs Little who presented as a credible witness and whose evidence was consistent with the notes from the disciplinary hearing in which Mr Jarvis is recorded as admitting, "*I stupidly made them comments and I apologise however it happens throughout the department*" (page 239). Mr Jarvis's evidence as to whether he admitted making the comments or not was inconsistent before the tribunal, but he did consistently seek to defend them by saying that such comments were "*banter*" and were not uncommon in the work place.

26. On 21 November 2017, the claimants were invited to disciplinary hearings in relation to the same allegations set out in the suspension letters. The letters stated that: *"…these allegations may be considered to constitute potential gross misconduct, which could result in your summary dismissal from the University.*" A similar disciplinary hearing was also convened for Gail Lucas.

27. All three disciplinary hearings took place on 4 December 2017. Mr Shepherd's principal defence at his hearing, and the one which he maintained during the course of the tribunal hearing, was that he had been "*set up*" by Mr Hussain. Mr

Shepherd suggested that either the body cameras were deliberately switched on by Mr Hussain, which Mr Weideling (the appeals officer) admitted was at least a possibility, or alternatively that Mr Hussain had covertly recorded the conversation using a different device and then uploaded it into a body cam in order to "*set them up*". It was not explained how Mr Hussain was said to have covertly recorded the conversations using a different device or how this had been uploaded into the body cam and there was no evidence to substantiate that theory. It was Mr Hussain who had then edited the recording and prepared the transcript thereby instigating the whole process. Further, the initial recording was downloaded on to a USB stick which Mr Shepherd said was "*stolen property*" belonging to a student. For these reasons Mr Shepherd maintained that the evidence against him was "*toxic*" and Mr Hussain's actions amounted to "*entrapment*".

28. Mr Shepherd is a former police man which may help explain why the basis of his defence to the allegations against him focussed upon the method by which the evidence was obtained rather than upon the substance of the allegations. His principal arguments during the disciplinary process and throughout the tribunal hearing were that the evidence against him was "toxic" since the recording was covertly obtained, and he said that the evidence upon which the respondent relied was transmitted to human resources by illegal means. Essentially, his case was that the evidence against him was tainted and could not be relied upon.

29. In respect of the USB stick, it was a device which had been left in lost property for a period of time. It was not suggested that the stick was not returned to the lost property department after the transcript had been prepared and the edited recording transmitted to the HR department. The tribunal found that there was a possibility that the recording of Mr Shepherd and Mr Jarvis was made deliberately, but whether the recording was made deliberately and covertly and how it was transmitted made no difference to the substance of the allegations against the claimants. Once the recording and transcript were in the possession of the respondent, it was obliged to investigate and act upon it.

30. While Mr Shepherd did not accept that he made any racist comments, and indeed did not accept that his voice was on the recording until the tribunal hearing, Mr Jarvis took a different approach at the disciplinary hearing. He did not deny that it was his voice on the recording and, although he refused to listen to it, he said that the conversation contained, "*childish comments, racist comments if you take them that way.*" He also admitted that he said, "*something like dirty fucking Muslim*". Mr Jarvis's principal defence was that this was "*banter pure and simple.*" He said that the department in which he worked was rife with "*banter*" which included derogatory and disparaging remarks made by Mr Hussain who he said referred to him as a "*fucking scouser*". Mr Jarvis also said, in terms, that it was a private conversation which had been covertly recorded.

31. Mr Shepherd ran a similar argument to the effect that "*banter*" was part of the "*culture*" in the department and that Mr Hussain was a willing participant, both during the disciplinary process and before the tribunal. Prior to the disciplinary hearing Mr Shepherd submitted a grievance against Mr Hussain in which he alleged that Mr Hussain had "*bullied him*" at some point prior to the Christmas of 2016 when there had been an exchange of gifts by way of a "*Secret Santa*" process which involved work colleagues giving gifts to each other anonymously. Mr Shepherd complained that Mr Hussain had given him some penis rings, which Mr Shepherd said related to a "*disability*" from which he suffered. No grievance was raised by Mr Shepherd at

the point the 'gift' was given to him and therefore when it was raised, over a year later and immediately before the disciplinary hearing, the respondent attached little weight to it.

32. Following the disciplinary hearings, Mrs Little gave consideration to the matter. She listened to the recording and formed her own view that it was Mr Shepherd's voice on the recording. Four people had identified Mr Shepherd's voice on the recording, including Mrs Lucas who was a party to the conversation. Mrs Little's view was that the reason or method by which the recording came about was not relevant, the University was obliged to take account of the content of the recording and the language that was used irrespective of its source. She was of the view that Mr Jarvis's language was inappropriate and racist. She was not convinced by the claimants' submissions that the language used was within the "*culture of the security department*". During the disciplinary hearing and during the course of his evidence Mr Jarvis consistently sought to assign equivalence between his comments and the disparaging comments which he said were directed towards him because he was a "*scouser*". Mrs Little did not accept that comparison, her view was that the comments made by him were racist since they related to a protected characteristic while the comments he said were directed at him were not. She was of the view that Mr Jarvis's remarks were extremely offensive and that he did not appear to have any concept of acceptable boundaries.

33. On the other hand, Mr Shepherd's comments, when taken in isolation, did not contain directly racist language. She considered whether Mr Shepherd's conduct warranted a lesser sanction but took the view that he was actively participating in a highly offensive conversation and responding to Mr Jarvis's racist comments in a way which showed he was in agreement or was encouraging them. Her view was that Mr Shepherd did not assist himself with his evasive approach during the investigation and disciplinary stages as to whether it was his voice in the recording. Mrs Little therefore took the decision to summarily dismiss both claimants without notice, and both claimants' employment was terminated with effect from 13 December 2017. The letters of dismissal were reproduced at 245-248 of the bundle for Mr Shepherd, and 249-251 for Mr Jarvis.

34. A different view was taken in Mrs Lucas's case. It was thought that she did not actively engage in the most offensive parts of the conversation and she made some attempt to restrain the claimants, she also admitted her part in it and showed remorse. Mrs Lucas was issued with a final written warning.

35. Mr Shepherd submitted an appeal against his dismissal (page 253) in which he asserted that the disciplinary procedure was not correctly followed and that he was not given the right to a fair hearing. He submitted some lengthy submissions (pages 254 to 267 of the bundle), again his main line of attack was focused upon the process and the manner in which the evidence was produced and used against him. He submitted some detailed points relating to the use of body cameras and whether it was possible that any "*accidental recording*" could have been taken without the knowledge of management. He alleged that Mr Hussain had "*form*" for covertly recording staff and using those recordings to instigate disciplinary proceedings, and said that Mr Hussain had recently boasted to a colleague that he even had "*one in the female changing rooms to catch anyone talking about us*".

36. Mr Jarvis also submitted a letter of appeal (page 275). The basis of his appeal was summarised as follows: an "*unfair investigation; inconsistent evidence against us; not being able to provide evidence even though asked to do so; failure to*

follow the correct departmental disciplinary procedures; and double standards during the investigation and evidence". A letter was sent to Mr Jarvis on 12 January 2018 requiring some further information in respect of the basis of his appeal to which Mr Jarvis submitted a more detailed response (pages 288 to 291).

37. The appeal hearings took place on 1 February 2018. Both appeals were conducted by Mr Weideling, with Angela Shields and Mrs Little in attendance. The respondent's evidence was that Mrs Little's role was to present the case for dismissal and that, in line with its disciplinary procedures, the dismissing officer attended the appeal hearing to enable the appeals officer to properly understand the basis of "*the company's case*". Both Mr Jarvis and Mr Shepherd challenged the involvement of Mrs Little in the hearing and alleged that it went beyond simply presenting a case at the outset of the meeting but rather she took an active part in the hearing and, at times, challenged their evidence thereby influencing the outcome.

38. Mr Shepherd's stance at the appeal hearing was somewhat contradictory. While he continued to deny that it was his voice on the recording, he also said, in respect of specific words attributed to him, "*I know its offensive but it's a private conversation…agree its abusive language but not racial*". Mr Jarvis on the other hand accepted that his comments could be interpreted as racist, but advanced further arguments that it amounted to "*banter*" and was a reflection of the "*culture*" within the department. He also pointed out that another employee, Mark Neary, had made racist comments during an earlier incident but he had not been dismissed and was only subjected to a final written warning. In addition, Gail Lucas who was a participant to the conversation in question was not dismissed but only issued with a final written warning

39. After considering the claimants' representations Mr Weideling concluded that both appeals should not be upheld. The claimants were advised of the outcome of their appeal by way of letters dated 19 February 2018 (page 427-440). These were detailed letters which set out at length the findings made in respect of each of the claimants' points of appeal. In brief, Mr Weideling found that the disciplinary process was correctly followed; both men had been given a fair hearing which included an opportunity to make representations at three separate meetings, and there was no new significant evidence at the appeal stage. Mr Weideling explained that, in the case of Mr Shepherd, the fact that he had denied that it was his voice on the recording and had not showed remorse or contrition but instead focussed on procedural matters and the manner in which the evidence against him was obtained, was to his detriment when the appropriate sanction was considered. Mr Weideling accepted that Mr Shepherd did not make any overtly discriminatory comments but found that he did make offensive comments and appeared to be "*going along with*" those comments made by Mr Jarvis which were directly discriminatory as well as offensive.

40. Mr Weideling found the case against Mr Jarvis more straightforward since he had made overtly racist comments. Mr Weideling's view was that the comments made by Mr Jarvis went beyond the bounds of anything that could be considered to be 'banter'. While he accepted that there might be a culture within the security department which involved swearing and inappropriate jokes, he formed the view that these comments went well beyond anything which could be described as workplace banter and that they were offensive and discriminatory.

41. There was an argument of inconsistency of treatment which was raised on appeal and before the tribunal. The contention was that Mrs Lucas should have been treated in the same way as the claimants since she was the duty manager, she took an active part in the conversation and yet she received only a final written warning. The other case was that of Mark Neary who was issued with a final written warning and denied a promotion, it was alleged by the claimants, in similar circumstances to them. When this matter was raised at the appeal stage and, before determining the outcome of the appeal, Mr Weideling made enquiries about the case and was informed that Mr Neary was found to have referred to a group of students as a "*pack*" of students. Mr Shepherd's case was that Mr Neary in fact referred to, at least one student as a "*paki*" but this was not the finding of Mr Weideling who did not consider Mr Neary's case to be comparable to that of the claimants.

Conclusions

42. The tribunal was satisfied that the respondent had a genuine belief in the claimants' misconduct. Both Mrs Little and Mr Weideling genuinely believed that the transcript and the recording were of a conversation between Mr Jarvis, Mr Shepherd and Gail Lucas and that it contained offensive and racist language. The tribunal held that they were entitled to make that finding, particularly given that Mrs Lucas and Mr Jarvis admitted that it was their voices and other colleagues had identified them from the recording. The content of the recording and associated transcript was undisputed and self-explanatory. Mr Jarvis made highly offensive and racist comments while Mr Shepherd engaged in the conversation and made offensive, albeit not directly racist, remarks of his own. In the circumstances, little further investigation was required.

43. The basis of the claimants' defence was largely procedural, and much of the time taken during the disciplinary process and at the tribunal hearing was with the adequacy of the investigation and alleged flaws in the procedure. The main challenge to the investigation was essentially an allegation that the respondent failed to adequately investigate whether the claimants were 'set up'. There was circumstantial evidence to support that contention, it was Mr Hussain who apparently discovered the recording, edited it, prepared the transcript and passed it to human resources. The respondent took the view that there was insufficient evidence to conclude that the claimants were 'set up', it was more likely that the recording was done inadvertently. Mr Weideling, when considering the matter, allowed for the possibility that the recording was made deliberately by Mr Hussain but, even if had been, it made no difference to their approach. The respondent had received compelling evidence that Mr Jarvis made overtly racist comments and Mr Shepherd had engaged in a racist conversation and made highly offensive comments, and they took the reasonable step of investigating and acting upon the matter.

44. The case of City and County of Swansea -v- Gayle [2013] EAT/0501/12/RN is relevant here. The essential finding in that case applicable to this one was that, whether the recording was done covertly and whether there was a breach of the claimants' right to privacy did not necessarily impact upon the statutory question which the tribunal was required to assess. The EAT put it this way, "*There is no freestanding right to hold a dismissal unfair because an Employment Tribunal has a criticism of the way in which or a distaste for the way in which an employer has behaved…it is only the extent to which that impacts upon the fairness of the dismissal which is relevant to the tribunal's decision.*" In this case it did not impact upon the fairness of the dismissal at all since, even if the recording had been made deliberately, there was no suggestion that the offensive and racist comments were

made by anything other than the claimants' own volition. They were not 'set up' to make those remarks and they were responsible for the words they used.

45. The respondent did not rely solely upon the recording and transcript, they did conduct further investigations, including interviewing several witnesses. Another employer may have investigated more thoroughly whether Mr Hussain was covertly recording his staff but that would have gone only to Mr Hussain's conduct, which might have had disciplinary consequences for him, and it would not have assisted the claimants with the allegations against them. The claimants had a full opportunity to put their case at the investigation meetings and disciplinary hearings. The tribunal was satisfied on the balance of probabilities that a reasonable investigation was conducted and that the respondent's belief in the claimants' misconduct was held on reasonable grounds.

46. There were a number of procedural points raised by the claimants, most of which were of little or no significance. They objected to the timing that evidence was presented to them at various stages. The key piece of evidence however was always the recording and transcript which was available to them at the investigation stage. The claimants had all the relevant evidence by the time of the disciplinary hearing and had adequate time in which to respond to it. It was correct that Mr Dunlea and Mr Hamblett carried out the suspension and there was no evidence that anyone more senior made the decision to dismiss, which was a requirement under the respondent's disciplinary procedure. This was a minor flaw however and was not one which rendered the disciplinary procedure unreasonable.

47. The tribunal did have some concerns about the involvement of Mrs Little at the disciplinary appeal stage. While it is not uncommon for a dismissing officer to attend an appeal hearing to present the case for dismissal, it is not desirable for such a dismissing officer to be present throughout the hearing or to engage further with the process while an employee is seeking to present his or her case. This might well give rise to a situation in which the dismissing officer unduly influences the partiality and outcome of the appeal. Having reviewed the notes from the appeal hearing and heard the evidence of Mr Weideling, who was a credible and consistent witness throughout, the tribunal was satisfied that Mrs Little did not improperly influence the outcome of the appeal. After presenting her case, her further involvement in the appeal was to respond to questions put to her by the claimants and Mr Weideling. Crucially, the tribunal was satisfied that Mrs Little took no part in the decision-making process which was solely down to Mr Weideling. While the extent of the involvement of Mrs Little in the appeal was less than ideal, it did not render the procedure sufficiently flawed such that it was outside the band of reasonable responses. The tribunal held that there was no aspect of the disciplinary or appeals procedure which, having regard to the guidelines in Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, CA, rendered the dismissal procedurally unfair.

48. In respect of consistency of treatment, the claimants did not make out that either of the two employees to whom they referred were in parallel circumstances to their own case. In the case of Mrs Lucas, she did not make any racist or highly offensive comments in the same manner as the claimants and she made some attempts to restrain the claimants from making offensive remarks, albeit in a rather ineffectual way. Mrs Lucas acknowledged the severity of the matter and was open and honest about her involvement in the conversation, in contrast to the claimants who sought to down play their roles as "banter" or, in the case of Mr Shepherd, to deny that he even took part in the conversation. The case of Mr Neary was rather

odd. It did not seem plausible to the tribunal that he was issued with a final written warning and denied a promotion because he referred to a group of students as a "pack" of students. Nevertheless, that was the view which Mr Weideling took and he had made reasonable enquiries and formed a genuine belief to that effect.

49. Applying Hadjioannou v Coral Casinos Limited [1981] IRLR 352, EAT and Paul v East Surrey District Health Authority [1995] IRLR 305, CA the tribunal found that the respondent was entitled to treat Mrs Lucas's case differently and there was no persuasive evidence before it to the effect that the case of Mr Neary was similar to that of the claimants. The tribunal therefore found that there was no inconsistency of treatment and the only matter left for the tribunal to address was whether the decision to dismiss was within the band of reasonable responses of a reasonable employer. In the case of Mr Jarvis this was not a difficult decision to make given the nature of the comments made by him. These were overtly racist and highly offensive and in breach of the respondent's equality and diversity and dignity at work policies. The fact that it was a "*private*" conversation was not relevant, it took place at the claimants' place of work during contractual hours and the comments were made to work colleagues. The decision to dismiss was therefore within the band of reasonable responses.

50. The case of Mr Shepherd was somewhat different since he did not make any direct comment which could be deemed to be racist. He did make some offensive remarks and was reasonably found to be a willing participant in the conversation with Mr Jarvis. One of the difficulties with Mr Shepherd was his apparent lack of contrition and the way he conducted himself during the investigation and disciplinary process, refusing to admit it was his voice on the recording and raising multiple 'evidential' points to challenge the case against him. The tribunal formed the view that Mr Shepherd's decision not to be open and honest from the outset, and his preoccupation with "*toxic evidence*" and "*entrapment*" were not deliberate attempts to obfuscate. Mr Shepherd treated the matter in the same manner as a police investigation and, in line with his police training, assumed that it was for the respondent both to prove the allegations and to do so with untainted evidence. These issues might be relevant to criminal proceedings, but they do not apply in the same way to the legal tests applied by an employment tribunal. Mr Shepherd did not make any overtly racist comments and at the tribunal hearing he admitted that made some inappropriate remarks for which he showed contrition. If he had taken that approach at the disciplinary or appeal stage it may have resulted in a different outcome for him but unfortunately Mr Shepherd's focus on procedural points, his refusal to accept that it was his voice on the recording, and his lack of contrition undermined his position. In those circumstances, it was within the band of reasonable response to dismiss.

51. Accordingly, both claims for unfair dismissal are dismissed.

52. As a foot note, it should be recorded that the tribunal were not required to make any determination upon the issue of the alleged over payments of wages. This would only have been relevant if the claimants had been successful and the tribunal had needed to determine whether there should be an offset against any awards. We therefore do not make any findings upon that matter.

Employment Judge Humble

Date: 30th September 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

2nd October 2018

FOR THE TRIBUNAL OFFICE

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