Case Number: 3300257/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs E Clarke	**v**	**Interserve FS (UK) Limited**

Heard at: Watford

On: 22 to 29 October 2018
30 October 2018 (In chambers)

Before: Employment Judge Bedeau
Members: Mr I Bone
Ms H Edwards

Appearances
For the Claimant: In person
For the Respondent: Ms A Ahmad, Counsel

RESERVED JUDGMENT

1. The unfair dismissal claim is not well-founded and is dismissed.

2. The claim of harassment related to race is not well-founded and is dismissed.

3. The claim of direct discrimination because of race is not well-founded and is dismissed.

4. The claim of victimisation is not well-founded and is dismissed.

5. The accrued unpaid holiday claim is not well-founded and is dismissed.

6. The unauthorised deduction from wages claim is not well-founded and is dismissed.

7. The wrongful dismissal claim had not been proved and is dismissed.

8. The case is listed for a costs hearing on Friday 15 March 2019 for one day to start at 10.00am.

REASONS

1. By a claim form presented to the tribunal on 21 December 2015, the claimant made claims of: unfair dismissal; accrued unpaid holiday; arrears of pay; race discrimination, and other unspecified payments.

2. In the amended response presented to the tribunal on 16 May 2016, the respondent denied liability.

3. At a preliminary hearing held in private before Employment Judge Heal on 3 January 2018, the claims and issues were identified and are set out below.

The issues

4. <u>Unfair dismissal (claim number 1301392/2017)</u>

    4.1 When did the claimant commenced employment with the respondent and when did it come to an end? The claimant says that she was employed from July 2014. The respondent contends that the employment ended on 7 February 2017. The claimant says it ended on either 7 or 14 February 2017. There is no dispute that the claimant was dismissed.

    4.2 What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for the purposes of section 98(2) Employment Rights Act 1996. The misconduct was mainly unauthorised absence. The claimant had been re-instated and was expected to start work on 22 December 2016. The respondent says that she failed to attend work at all, failed to comply with the absence reporting procedure and failed to attend the disciplinary hearing on 7 February 2017. The respondent regarded this as gross misconduct. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal. It is not in dispute that the claimant did not return to work after 22 December 2016.

    4.3 The claimant disputes the reason for the dismissal. She says that the respondent dismissed her because of race.

    4.4 Did the respondent hold that belief in the claimant's misconduct on reasonable grounds? On the same burden of proof, did the respondent carry out as much investigation was reasonable in all the circumstances?

    4.5 The burden of proof is neutral here but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows. The claimant says that:

4.5.1 On 7 and 12 December 2016, the claimant had a discussion with Nick Turner, the Regional Manager. On 12 December 2016 she visited him at Radlett and they both agreed that the false allegation in 2015 that she had been frying chicken 'before time', was taken into account in August 2016 and placed on her file which would have to be removed before she could return to work. He agreed that he would remove it and would put that in writing. He did not do so and the claimant could not come back to work without the "agreement" being recorded in writing.

4.5.2 The dismissal letter dated 14 February, gave claimant a right of appeal. When the appeal was fixed, she was unwell and abroad and had asked Mr. Turner to relist the hearing, but he did not do so. The respondent says that the appeal hearing was re-listed.

4.5.3 The procedure for the original dismissal (letter dated 18 August 2016) after which the claimant was re-instated, was not followed in that the claimant was not told what the allegation against her was; there was no investigation; no evidence sent to the claimant; and no hearing. The claimant requested the name of the informant, the nature of the allegation and the evidence for 9 months without success. The respondent says that the events of the earlier dismissal are not relevant.

4.5.4 When a letter was sent on 22 November 2016, the claimant was told that a more junior staff member who had no qualifications would now become her supervisor.

4.5.5 On 8 July 2016, the claimant made a report about Ms McPhillips who was shouting and rude in the way she addressed the claimant in the kitchen. She told the claimant that she must mop the kitchen and clean the floor at the end of the day. The claimant said that she had worked 12 hours and it would be too much given that she lived in London. The hearing of the claimant's grievance was on 8 July and after that meeting the claimant went back to work and David Marsh was passing through the kitchen. The claimant asked when he would get more staff. He said that the respondent could not get anyone. The claimant offered to go to the Job Centre and find people to work. He is alleged to have said, 'We don't want people like you'. The claimant understood this to be a racial comment showing that he did not want a black person in the kitchen. The relevance of this may be as evidence that the respondent dismissed the claimant on racial grounds.

4.5.6 The claimant says that she spoke a lot about her entitlements: about the money she was owed for holidays; about the items she bought on authorisation for the hospital; the money owed

to her; and about the transport to work during the Christmas holiday season 2014 -15. She asked the respondent for that money and she considers that this is one of the reasons for the dismissal.

4.6 Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

4.7 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct in not attending work on or after 22 December 2016? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

4.8 Does the respondent prove that there was a percentage chance of a fair dismissal in any event? If so, what is the percentage and when would dismissal have taken place?

5. Section 26: Harassment on grounds of race (claim number: 3300257/2017)

5.1 Did the respondent engage in unwanted conduct as follows:

5.1.1 On 5 July 2016, Kelly McPhilips was shouting and rude in the way she addressed the claimant in the kitchen. She told the claimant that she must mop the kitchen and clean the floor at the end of the day.

5.1.2 On 2 June 2016, John Gorman shouted at the claimant in the kitchen saying, ‘go back to where you come from’ and, ‘I hope you go on holiday and don’t come back’.

5.1.3 On the same day Mr. Gorman called the claimant a ‘fucking bitch’ in the kitchen because she was trying to make sure that the lunch was on time.

5.1.4 On the same day Mr. Gorman said that the claimant was a ‘fucking bitch’ to Mr. Marsh.

5.1.5 In about July 2016 Mr. Gorman tried to push the claimant inside the standing oven.

5.1.6 Mr. Marsh would say repeatedly to the claimant in around June and July 2016, ‘Is that what you do in South Africa’, ‘Is your qualification from South Africa’, ‘Did you have your degree in this country’ and ‘You are not in South Africa’.

5.2 Was the conduct related to the claimant’s race?

5.3 Did the conduct have the purpose of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

5.4 If not, did the conduct have the effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5.5 In considering whether the conduct had that effect, the tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

6. <u>Section 13: Direct discrimination on grounds of race (claim number: 3300257/2017)</u>

6.1 Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely

6.1.1 Dismissing her on 18 August 2016;

6.1.2 David Marsh said, 'we don't want somebody like you' in about July 2016;

6.1.3 The respondent did not deal at all with the claimant's grievances against John Gorman and Kelly McPhillips;

6.1.4 On or about 22 November 2016, the respondent gave the claimant a supervisor who was unqualified, less skilled, and junior to her;

6.1.5 The respondent failed to follow employment procedures leading up to the dismissal on 18 August 2016;

6.1.6 Placing untrue information in the claimant's file beginning 3 August 2015 and continuing during a period unknown to the claimant; and

6.1.7 Failing to pay the claimant the money owed to her for holidays, for the things she bought and for transport to work?

6.2 Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on the following comparators: John Gorman; Michael Godfrey; Michael Rooney;, Mary Hurley and/or hypothetical comparators.

6.3 If so, has the claimant proved primary facts from which the Tribunal could properly and fairly decide that the difference in treatment was because of the claimant's race?

6.4 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

7. Section 27: Victimisation (claim number: 3300257/2017)

7.1 Has the claimant carried out a protected act? The claimant relies upon the following:

7.1.1 On 5 July 2016, the claimant reported Ms McPhillips and said that Ms McPhillips treated her like a slave; and

7.1.2 The claimant said in an email to David Marsh between October and December 2016 that intentionally making a decision without any allegation, and to keep the claimant without progress, is a racial issue.

7.2 If there was a protected act, has the respondent carried out any of the treatment identified below because the claimant had done a protected act?

7.2.1 David Marsh was angry with the claimant at the meeting on 7 or 8 July 2016 (related to 5 July 2016);

7.2.2 Dismissing the claimant in February 2017 (related to Oct/Dec 16 allegation)

7.2.3 Mr. Marsh persistently asked for the claimant's passport.

8. Is the claim in time?

8.1 The claim form in claim number 3300257/2017 was presented on 21 November 2016. ACAS received notification on 2 November 2016 (day A) and an EC certificate was sent on 16 December 2016 (day B). Accordingly, any act or omission which took place before 3 August 2016 is potentially out of time, so that the tribunal may not have jurisdiction.

8.2 Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

8.3 Was any complaint presented within such other period as the employment tribunal considers just and equitable?

9. Unauthorised deductions.

9.1 The claimant says that she was not paid at all when she was on holiday in June to July 2016, for about three weeks returning on 3 July. The respondent says that this is out of time.

10. Breach of Working Time Regulations

10.1 In 2014 – 15 the respondent only gave the claimant 4 days holiday because of lack of staff. The respondent says that this is out of time.

11. Unpaid accrued annual leave

11.1 What was the claimant's leave year?

11.2 What was the termination date?

11.3 What is the period of leave to which the claimant was entitled under regulations 13 and 13A? (A)

11.4 What is the proportion of the claimant's leave year which had expired before the termination date? (B

11.5 What period of leave had the claimant taken between the start of the leave year and the termination date? (C)

11.6 What is the relevant net daily rate of pay?

11.7 Applying the formula (AxB) – C, to how many days unpaid accrued annual leave is the claimant entitled?

11.8 How many days remain unpaid?

11.9 What is the relevant net daily rate of pay?

11.10 Therefore, how much pay is outstanding to be paid to the claimant?

12. Breach of contract

9.1 It is not in dispute that the respondent dismissed the claimant without notice.

9.2 Does the respondent prove that it was entitled to dismiss the claimant without notice because the claimant had committed gross misconduct as set out above? NB This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the gross misconduct.

9.3 How much notice was the claimant entitled to be given?

13. Other claims

10.1 Further, the claimant says that she was entitled to be re-imbursed for transport for 2014 (£120 per day for three days= £360), expenses for bread and milk (£220) and gluten free meals (£17.50).

10.2 The respondent says that these matters are out of time (although if these were debts outstanding on the termination of employment they will not be out of time).

10.3 The claimant says that she has not been given an annual increment to her wages to which she was entitled. How was the claimant entitled to that increment?

14. Remedies

14.1 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy. The claimant seeks compensation and re-instatement.

14.2 There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.

The evidence

15. The tribunal heard evidence from the claimant who did not call any witnesses.

16. On behalf of the responded evidence was given by:

- Mr Adrian Haigh, Senior Account Manager;
- Mr David Marsh, Catering Manager;
- Ms Kelly McPhillips, Contract Services Manager;
- Mr Nick Turner, Regional Operations Manager; and
- Mr Paul Pradella, Soft FM Mobilisation Manager

17. In addition to the oral evidence the parties produced a joint bundle of documents comprising in excess of 500 pages. References will be made to the documents as numbered in the bundle.

Claimant's application to call witnesses

18. At the outset of the hearing the claimant applied to have Ms Andrea Costa, Cleaner, and Ms Mary Hurley, Retail Assistant, called as witnesses. She told us that at the preliminary hearing on 3 January 2018, she informed Employment Judge Heal that she would be calling Ms Hurley as a witness. The claimant told this tribunal that she did not enquire either of Ms Costa or Ms Hurley whether they would be willing to be a witness and whether they would attend to give evidence voluntarily. Both still work for the respondent. The tribunal did not have any information as to evidence they were likely to give were they called as witnesses.

19. Ms Ahmad, Counsel for the respondent, said that Ms Costa and Ms Hurley gave evidence during an internal investigation against the interests of the

claimant. In the absence of what they would be saying, it was difficult to see how their evidence could be of assistance to the claimant.

20. We ruled that the claimant did not apply for witness orders prior to the hearing. She made no attempt to contact them. She had the respondent's witness statements from 20 September 2018. We saw no reason why a timeous application could not have been made by her. We read the statements from the two proposed witnesses given in internal investigation and do take the view that they were unlikely to give evidence in the claimant's favour. For those reasons we refused to grant the claimant's oral application for witness orders.

Constructive unfair dismissal

21. At the beginning of the hearing after the tribunal had identified the claimant's claims from the case management summary sent to the parties following the preliminary hearing, the claimant said that another claim she was pursuing against the respondent was constructive unfair dismissal. The tribunal considered EJ Heal's summary and orders and noted that no reference is made to constructive unfair dismissal. The was unsurprising as the dismissal was admitted by the respondent. The claimant had not indicated at any point after the preliminary hearing that EJ Heal had made an error by excluding a constructive unfair dismissal claim. There was also no evidence that the claimant had resigned from her employment.

22. Her application to amend by adding constructive unfair dismissal was refused.

Findings of fact

23. The respondent provides comprehensive facilities management services to the National Health Service and to other care organisations including cleaning and catering which are the services material to this claim.

24. The contract with Hertfordshire TFM includes Kingfisher Court Hospital, Radlett, Hertfordshire, which caters for vulnerable adults. Another site, Warren Court, is a secure unit for people with mental health issues.

25. The claimant commenced employment with the respondent on 1 August 2014. She worked at Kingfisher Court as a Chef. She describes her race as black and was at all material times, the only black person working in the kitchen.

26. In the respondent's policy entitled "Managing Disciplinary", under the sub heading "Principles", paragraphs 3.4 to 3.6, reads as follows:

> "3.4 No disciplinary action will be taken against an employee until the case has been fully investigated. This needs to be carried out without unreasonable delay to establish the facts of the case. In some cases, this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others the investigatory

stage will be the collection of evidence by the company for use at any disciplinary hearing. In misconduct cases, where possible, different people should carry out the investigation and disciplinary hearing.

3.5 In the event that formal action is necessary, the company will advise the employee of the nature of the complaint against him or her and will be given the opportunity to state his or her case before any decision is made at a disciplinary meeting.

3.6 Employees will be provided, where appropriate, with written copies of evidence in advance of any disciplinary meeting.

3.9 There may be instances when suspension with pay is necessary whilst investigations are carried out, eg where relationships have broken down, in gross misconduct cases or where there are risks to an employee's or other company's property or responsibilities to other parties. Suspension with pay should only be imposed after careful consideration and should be reviewed to ensure it is not necessarily protracted. Suspension is not an assumption of guilt and is not considered a disciplinary sanction."

27. Examples of gross misconduct in the policy includes: "unauthorised absence; falsifying company documents; dishonesty or suspicion of dishonesty in the performance of duties; bullying, harassment or discrimination of any nature; gross negligence in the performance of the employee's duties." This list is not exhaustive.

28. The disciplinary procedure provides for the issuing of a Stage 1 written warning; Stage 2 final written warning; Stage 3 dismissal or other action.

29. Under Stage 1 written warning, paragraph 8.1.3 states:

"A warning will be placed on the employee's personnel file and will remain active for the specified period of time (normally no less than six months) depending on the severity of the case, date it is given, after which time it may be disregarded in deciding the outcome of future disciplinary proceedings."

30. Paragraph 8.1.4 states:

"The employee's conduct will be reviewed at the end of this period and if it has not improved sufficiently the company may decide to extend the active period or proceed to Stage 2 of the Procedures".

31. In relation to Stage 2, the final written warning, at paragraph 8.2.3, it states:

"The warning will be in place on the employee's personnel file and will normally remain active for no less than 12 months or, if the company decides that the matter is more serious, for a longer period."

32. Paragraph 8.2.4 states:

"The employee's conduct may be reviewed at the end of this period and if it has not improved sufficiently the company may decide to extend the active period or proceed to Stage 3 of the procedure."

33. Paragraph 8.2.5 states:

> "After the active period the warning may be disregarded in deciding the result of future disciplinary proceedings".

34. The employees have the right of appeal against dismissal. If the appeal is upheld, the employee will be reinstated and will receive back pay from the date of dismissal. The employee can appeal against the warnings.

35. Under paragraph 11.1:

> "Where an employee raises a grievance specifically related to the disciplinary, the company may decide that it is appropriate to consider to deal with both issues concurrently on the same day."

36. Under Employee Responsibility, paragraph 5.1.4 states:

> "All employees have a responsibility to attend the investigatory and disciplinary hearings, where an employee is unwilling to attend without good cause the employer may make a decision on the evidence available."

37. In Section 4 of the policy, in relation to the company and manager's responsibilities, paragraph 4.1 states:

> "All managers have a responsibility to ensure that a fair and consistent process is followed in the management of disciplinary matters."

38. Paragraph 4.2 provides:

> "The company is committed to dealing with matters in accordance with the principles and procedures set out in this policy and in accordance with the current ACAS Code of Practice".

39. The Managing Disciplinary policy does not form part of an employee's terms and conditions of employment. (Pages 90 to 102 of the bundle)

40. Under the respondent's policy on managing appeals covering discipline, dismissal and grievance, an employee can appeal within five working days from receiving the decision, paragraph 5.2 (104 to 109)

41. In the respondent's Grievance Policy, if an employee wishes to invoke a formal grievance, he or she may lodge written submissions stating: that the grievance procedure is being utilised; detail of the grievance including, where appropriate, against whom the grievance is lodged and the reasons for this; and how their grievance might be resolved to their satisfaction and/or what resolution is sought.

42. Under paragraph 3.6,

> "Where a grievance is raised by an employee while they are subject to disciplinary proceedings, the grievance will generally need to wait until the disciplinary process has been completed, unless it has any bearing on the

> disciplinary proceedings, in which case it can be raised as a relevant issue in the course of those proceedings". (110-116)

43. The respondent has an Equality and Diversity policy but we were not taken to any part of it.

44. It is not disputed in evidence that the respondent requires all managers to undertake online training modules in equality and diversity.

45. The respondent's Annual Leave policy states that the holiday year runs from 1 January to 31 December. At paragraph 3.4 it states:

> "All holiday must normally be taken during the holiday year in which it is accrued. In exceptional circumstances the company may consider allowing leave to be carried forward to the following leave year…"

46. The claimant worked four days a week, generally from Thursday to Sunday. Her leave entitlement was 4/5 of the statutory entitlement of 20 days plus 8 days public and bank holidays, total 28 days. 4/5ths of that is 22.4 days. The claimant was, therefore, entitled to 22.4 days annual leave from 1 January to 31 December. Only in exceptional circumstances would holiday untaken be carried over or paid in lieu.

47. Under Paragraph 3.3 the annual leave policy provides:

> "Where an employee joins or leaves the company part way through a holiday year, they will be entitled to a proportion of their annual holiday entitlement based on the period of their employment in that holiday year. This entitlement during the first and last year is calculated monthly in advance at the rate of 1/12 of the full years entitlement for each completed month in that year. During their first year with the company, employees will not normally be allowed to take more holiday than they have accrued at the time that holiday is taken."
>
> (127-133)

48. The claimant and the respondent failed to produce a copy of her contract of employment making it difficult for the tribunal to state precisely what the contractual terms and conditions were.

49. During the course of the claimant's employment she had undertaken training in a number of different areas, in particular, on 29 January 2015, Food Preparation and Cooking and in the use of Freezers and Refrigerators. (150-156)

50. She told the tribunal she has a Level 4 qualification in Food Safety as well as a Post Graduate Diploma in Human Nutrition from Sheffield University and OND, HND and HCIMA qualifications. In her witness statement she stated that she is a well-qualified Chef, Nutritionist and Lecturer with over 30 years' experience in all catering institutions and hospitality industries and possesses both international and United Kingdom qualifications.

51. Following an email from Mr Neil Shayler, Chef, dated 17 May 2015, in which he expressed concern about the claimant's kitchen hygiene practices in relation to: the cooking of chickens; her allegedly, bad hygiene practices; and her aggressive behaviour towards other staff. Ms Lisa Thompson, Contract Manager, was appointed to investigate the allegations which were set out as:

    - "Handling and preparation of high risk food on the Kingfisher Court site.
    - Conduct relating to interaction with colleagues on site.
    - A breach of food hygiene legislation.
    - Bringing the company into disrepute."

52. In the course of her investigation, Ms Thompson interviewed Mr Shayler; Mr Michal Godfrey, Chef; Ms Hurley; Multi-skilled Operative; and Ms Costa; Mr Antonio Teixeira, Supervisor. Mr Teixeira is married to Ms Costa. Ms Thompson had statements from these individuals and interviewed Mr Shayler, as the complainant as well as the claimant. She prepared a report dated 23 May 2015, in which she concluded that there was a case to answer in relation to the following allegations:

    - Conduct relating to interaction with colleagues on site;
    - A breach of food hygiene legislation; and
    - Bringing the company in to disrepute

    (160-188)

53. On 26 May 2015, after the claimant had received copies of the statements which formed part of Ms Thompson's investigation, she commented on them and forwarded her comments to Ms Thompson. (189-190)

54. After reviewing Ms Thompson's report, Mr Andrew Haigh, Contract Manager, decided to proceed with the original four allegations against the claimant. The claimant was suspended on full pay on 21 May 2015 and was invited to attend a disciplinary hearing on 15 June 2015. Attached to the letter were witness statements and a summary of the investigation. She was informed of her right to be accompanied by a fellow colleague or an appropriately certified trade union official. (191-192)

55. On 18 June 2015 the claimant emailed Mr Haigh requesting a copy of Ms Costa's statement regarding the 14 May 2015 incident because she had not seen it. One hour twenty minutes later Mr Haigh replied by email stating that all the information had been sent to her that day along with a letter inviting her to a rescheduled hearing but if she had any further queries she should contact him. (193)

56. On 29 June 2015, the claimant emailed Mr Haigh requesting the attendance of Ms Hurley as her witness. She also requested the attendance of a male member of staff but as that person was a Trust member of staff, Mr Haigh informed her that he would not be allowed to attend as her colleague. (194)

57. The disciplinary hearing was held on 2 July 2015 at which Ms Hurley attended as the claimant's work colleague. Mr Haigh conducted the meeting. He considered the evidence before him including the claimant's account and met with her on 3 August 2015 to give her his outcome. He removed her suspension and informed her that there was no case to answer in relation to the handling and preparation of food or the breach of food hygiene legislation, as it fell to one person's word against another and the evidence was not conclusive.

58. As regard the allegation of her interaction with colleagues, he wrote to her on 3 August 2015, the following:

> "…You'll have had a number of occasions where you have belittled and made comments to staff members that they have felt devalued in their contribution in the workplace. This was identified as part of the investigation into your behaviour and conduct and was reported by the member of staff concerned, but also by another member of staff who has witnessed this taking place. This is not acceptable and I made comment also when you were at your disciplinary meeting, asking you to refrain from the loud and potentially aggressive way in which you came across."

59. Mr Haigh made no finding in relation to the allegation the claimant had brought the company into disrepute.

60. The claimant was issued with a final written warning to be placed in her personnel file but would be disregarded for disciplinary purposes after a period of 12 months provided her conduct reached a satisfactory level. She was informed of her right to appeal against his decision and that her appeal should be sent to Mr Scot Shields, Contract Director, within 5 working days from receipt of the letter. (205-206)

61. The respondent's case is that it never received an appeal from the claimant against Mr Haigh's decision. In the claimant's late disclosure made on 20 September 2018, she disclosed what purports to be a handwritten letter of appeal, dated 19 August 2015. This was the first time the respondent had seen evidence of an appeal against the decision. Even by that date it would have been out of time. If she had lodged an appeal there was no evidence that she had chased it up either in later correspondence **or** orally. As will become apparent later in this judgment in respect of the claimant's appeal against her dismissal, the respondent did search for her earlier letter of appeal but could not find it and invited the claimant to produce it, but she did not do so.

62. We find, on the balance of probabilities, that the claimant did not appeal against the final written warning either within the five days or after.

63. On 27 April 2016, the claimant was invited to an investigation meeting with Mr Tariq Ahmed, General Services Manager, in relation to an allegation of falsification of documentation and was then invited to a disciplinary meeting with Ms Kelly McPhillips, Contract Support Manager, on 4 July 2016. ((207-208, 223-224)

64. She was on leave from 10 June 2016 and returned to work on 4 July 2016. (492)

65. On 4 July 2016, she approached Ms McPhillips and asked if the disciplinary meeting could be rearranged as she had just returned from leave. Ms McPhillips agreed and said that she would contact Human Resources.

Incident on 4 July 2016

66. Later that afternoon on, at or around 4.45pm, an incident occurred involving Ms McPhillips and the claimant. Ms McPhillips told the tribunal that while she was in her office she heard shouting but could not identify, at that stage, who were involved. Shortly after, Mr Teixeira entered her office and said that he claimant was "kicking off". At that point Ms McPhillips, being the only manager on site at the time, decided to manage the situation. She left her office and was walking along the corridor when she heard the claimant shouting. She spoke to the claimant who explained that she had been asked to clean the floor by Mr Teixeira and felt that it was an unreasonable request. She then gestured to Ms McPhillips, by raising and lowering her hand, that she was a Chef and was "up here" and "not down there". The claimant then stormed off into the kitchen and began to take food out of the oven. Ms McPhillips made her way back to her office but could still hear the claimant shouting. She decided to go to the kitchen. When she got there, she heard the claimant shout, "They have no staff here and think they can treat us like slaves". Ms McPhillips asked her to stop shouting and said that if she had an issue with staffing she should speak to her line manager. She was asked what time she was due to finish. The claimant responded by saying that it was 7.00pm. Ms McPhillips asked the question because she was concerned that the claimant was due to finish her shift at 5.00pm and would not have time to do the cleaning. As meals were served around 5pm, Ms McPhillips thought that the claimant had more than enough time to do the cleaning before leaving at 7.00pm. She informed the tribunal that all supervisors and chefs are expected to engage in cleaning duties as and when required.

67. In her oral evidence under cross examination Ms McPhillips said that the claimant did not "storm off" but walked briskly to the kitchen. She also accepted that the cleaning staff were not upset by the claimant's comments as none was present at the time.

68. The claimant's evidence was that Ms McPhillips came in to the kitchen and started to shout, saying that the claimant was supposed to be with her for a disciplinary hearing. The claimant responded by saying that she was unaware of the hearing as she had not received a letter because she was on leave. She asserted that Ms McPhillips' letter of 29 June 2016 inviting her to the disciplinary hearing was fraudulently written; was being harassed; victimised and discriminated.

69. On 5 July 2016 she lodged a complaint against Ms McPhillips with Mr Haigh. Amongst other things she wrote:

> "On 4 July 2016, first day back to work after my holiday, Kelly McPhillips who is not my line manager and without any understanding of how the kitchen operates or runs came forcefully into the kitchen to tell me that I must do the sweeping, taking the rubbish out and mobbing[mopping] of the kitchen after my own shift in a very slavery, disrespectful and rude manner. Again during the loading of the food trolleys, she entered the kitchen to yell at me that I will be having a meeting with her on Wednesday 6 July 2016, shouting on top of her voices several times and some staffs were coming to repeat her statements to me and asking "what was she talking about" and she was making derogatory comments about me with comments from gossips and backbiting". "People said that is how you behave and I will not have it from you". I was very upset about this as I have been in this job for a while and have not had any problems with any of my managers in the past. I enjoy my work and cannot understand her attitude towards me including when she is not my line manager. I would welcome the chance to talk this through with you at a convenient time and place. I would like to be accompanied to the meeting by a staff". (226)

70. Upon receipt of the email, Mr Haigh invited Ms McPhillips to respond to the claimant's complaint which she did on a note headed "4 July 2016" which should in fact read 5 July 2016. Ms McPhillips wrote the following:

> "I was in the Kingfisher Court office yesterday evening when Antonio one of the supervisors came in and stated Elizabeth was kicking off because he had asked her to clean the floor when she had finished cooking, I was in the middle of typing an email, I was the only manager on site.
>
> I then heard a raised voice and shouting. I went into the corridor and Elisabeth was shouting "I am a Chef, I am not on the floor with the cleaners". I asked her to stop shouting and what the problem was, she explained she had been asked to clean the floor, I asked her why she felt this was an unreasonable request and had a problem with this? She then repeated and gestured with her hands that she was up here as a chef and not just a domestic down on the floor, I said that no one expected her to stop cooking but to clean the floor before she left, she said she wouldn't have time, I asked her what time she was due to leave, she said 7 o' clock, I asked her what time she had started, she said 8am. I told her that we are all a team here and that no one is "up here" or "down there". We have supervisors and managers cleaning all the time to help out. She stormed into the kitchen and began taking food out of the oven, as I went to walk back to the office, I again hear her shouting, I went back to the kitchen, she was shouting, "they have no staff here and think they can treat us like slaves". I again asked her to stop shouting and that if she had an issue with staffing in the kitchen then she should speak to her line manager Tariq or the Catering Manager David, (I have no management involvement with KC, I purely use the office here).
>
> I then left and returned to my emails." (225)

71. This account was not a complaint against the claimant but merely Ms McPhillips' record of the incident.

72. On 6 July 2016, the claimant was invited by Mr Haigh, to a grievance meeting scheduled to take place on 8 July 2016. (227-228)

73. We shall return to the grievance shortly. We continue with the chronology.

74. Ms McPhillips spoke to Mr Haigh and said that as the claimant had lodged a grievance against her, she felt conflicted in conducting the disciplinary hearing in relation to the allegation that the claimant had falsified documents. Mr Paul Pradella, Account Manager North and West Essex, was, therefore, invited to conduct the disciplinary hearing.

75. On 6 July 2016, Mr Pradella invited the claimant to attend a disciplinary hearing on 12 July 2016. The letter enclosed a copy of the investigation meeting notes and she was informed of her right to be accompanied. (229-230)

76. The claimant attended the hearing on 12 July 2016 and gave her account of events. The falsification allegation was in relation to the claimant's work while at Warren Court, a secure unit. Keys have to be signed for when entering and when leaving the premises. There were some discrepancies in the key records and her timesheets. Mr Pradella found that there were discrepancies generally in the records in the evenings. The claimant did not provide an explanation for the discrepancies in the morning records. Notwithstanding that Mr Pradella felt that in relation to the discrepancies in the evening records, he would give the claimant the benefit of the doubt and decided, overall, to take no disciplinary action. He informed the claimant of the outcome when he saw her later in the day. She did not have any issues with the way in which he conducted the disciplinary process.

77. There was an issue as to whether the claimant had been informed of the outcome in writing. Mr Pradella agreed that Mr Marsh would send the outcome letter. During the course of the hearing Mr Marsh said that he did inform the claimant of the outcome in writing but could not find a record of it in the respondent's computer system.

78. Having considered the evidence, we find that the outcome letter was not sent to the claimant.

79. In relation to the claimant's grievance, Mr Marsh met with the claimant on 8 July 2016 to discuss her grievance. During the meeting she was asked by Mr Marsh:

> "You said that Kelly spoke to you in a slavery and disrespectful manner, are you saying that KM speak to you like a slave.
>
> Yes.
>
> At any point did you raise your voice?
>
> No."

80. Later, in their exchange, she was again asked by Mr Marsh:

> "I'm struggling with the fact that Kelly is talking to you like a slave.
>
> That is how I feel – she said people talk about you about the way you behave.

> Not here to judge – I'm here to collect the facts – I wanted to hear your side. Do you have anything to add?
>
> I appeal to you to have everything in the kitchen.
>
> Not part of this meeting.
>
> I do not want any manager to shout at me in the kitchen – I want to go outside."

81. We find that at no point during the meeting did the claimant expand on what she meant by being spoken to in a slavery manner or as a slave. There was also no evidence that Mr Marsh was angry with her during the meeting. (231-234).

82. Before he could issue his grievance outcome he had to address the implications of an Environmental Health Officer's report which we detail later in this judgment. He did, however, inform the claimant on 6 December 2016, of his outcome decision which was that the allegations against Ms McPhillips were not substantiated as she made a reasonable management request by asking the claimant to engage in cleaning the kitchen floor after she finished cooking as every staff member helped out when necessary. Mr Marsh also found that the claimant did not like being told what to do by Ms McPhillips who was not her direct line manager. In addition, he also found that Ms McPhillips was entitled to question the claimant about her timekeeping as she, on occasions, had been late for work. (310-311)

83. Having heard the evidence and having considered our findings, we make a further finding, namely that the claimant was not instructed to mop the kitchen and clean the floor at the end of the day by Ms McPhillips, as she alleged, but informed that, as a team, supervisors and managers are expected, as and when required, to engage in cleaning duties. The claimant took umbrage at that as she felt that, as a Chef, her status was such that she was above engaging in the occasional cleaning duties.

<u>Mr John Gorman</u>

84. The claimant alleged that on 2 June 2016, while in the kitchen, Mr John Gorman, Chef, shouted at her saying "Fucking bastard", "Fucking black bastard" and "Fucking bitch". He also pushed her into the oven in the kitchen. His behaviour, she asserted, was threatening and intimidating. The matter was reported and Mr Gorman was the subject of disciplinary proceedings. The allegations being that he had engaged in unsatisfactory conduct, namely

    - "Acting in a manner intimidating to others – there has been allegations made against you that include threatening behaviour against another employee and also an allegation that you pushed an employee. Both of these alleged incidents occurred on 2 June at Kingfisher Court.

    - Unprofessional behaviour; aggressive and threatening language and behaviour at work."

85. A disciplinary meeting was held on 20 June 2016, conducted by Mr Marsh at which Mr Gorman attended. After considering the claimant's and Mr Gorman's accounts, Mr Marsh was of the view that something had occurred on the day in question but could not be sure precisely what that was. He, nevertheless, considered it to be quite serious and issued Mr Gorman with a final written warning to last for 12 months. (357-358)

86. Mr Gorman was subsequently dismissed on 9 December 2016, for engaging in similar behaviour though not towards the claimant. (359-360)

87. The claimant's case is that Mr Gorman had racially harassed her and had directly discriminated against her because of race in respect of the incident on 2 June 2016.

88. Mr Marsh was recalled by the tribunal and gave evidence in relation to how he dealt with this incident. He told the tribunal that there were no racial allegations raised by the claimant and there was no mention of either race or colour. Had there been a racial element, his approach would have been different, in that, it would have been treated more seriously.

89. In the claimant's amended grounds of claims, dated 2 June 2017, she referred to Mr Gorman being engaged in a catalogue of racial abuse, harassment, swearing, cursing and intimidation. He pushed her into the working oven. She alleged that he repeated such behaviour while in front of Mr Marsh. She claimed that Mr Tariq Ahmed witnessed the incident and reported it to Mr Marsh who, she alleged, did not care. She asserted that failure to take action was an act of discrimination.

90. The above account was only given after the respondent's amended response.

91. In the case management orders given at the preliminary hearing on 3 January 2018, paragraph 5.1.2 makes no reference to Mr Gorman calling the claimant "Fucking bastard", "Fucking black bastard", and "Fucking bitch". The allegations, as recorded by EJ Heal, was that Mr Gorman said, "Go back to where you come from" and "I hope you go on holiday and don't come back".

92. In paragraph 5.1.3, however, the Employment Judge recorded Mr Gorman as allegedly saying to the claimant "Fucking bitch" (page 67).

93. The difficulty here is that Mr Marsh was not aware that these statements were made by Mr Gorman. We find that for reasons to do with confidentiality, the outcome of disciplinary proceedings could not be disclosed to a complainant.

94. Although the claimant appealed against Mr Marsh's grievance outcome in relation to the Kelly McPhillips' allegations and appeal hearings were arranged on 12 and 19 January 2017 with Mr Stephen Grantham, Contract Manager, she did not attend, and a decision was taken in her absence that there was no case to review. (340-341)

Mr Marsh's alleged comments

95. The claimant alleged that during a discussion she had with Mr Marsh while he was passing through the kitchen, she raised the issue of employing more staff to which Mr Marsh responded by saying that "We don't want somebody like you". She said that the comment was made in July 2016. Mr Marsh denied making that comment. There was no contemporaneous document from the claimant referring to this allegation. We find that she was familiar with the grievance process and was in the habit of lodging complaints, but this did not feature in any of her complaints. (242)

96. Even if it was said which Mr Marsh denied, there is no reference to it being to the claimant's race and it could equally have been said to a white person who, as a Chef, his or her colleagues find it difficult to work with. The comment could well be a reference to the claimant's personality which was an issue of concern to her work colleagues.

97. The claimant further alleged that the respondent had planned to dismiss her while she was on holiday in 2016 and that Mr Marsh asked her which part of South Africa she came from. She replied that she was not from South Africa. In the case management orders, paragraph 5.1.6, it is recorded that one of the issues for this tribunal to hear and determine is whether "Mr Marsh would say repeatedly to the claimant in around June and July 2016, "Is that what you do in South Africa", "Is your qualification from South Africa", "Did you have your degree in this country" and "You are not in South Africa". (67)

98. The claimant did not raise a grievance against Mr Marsh in relation to these alleged South Africa statements. During the course of her evidence she did not provide evidence in relation to the context in which these alleged comments were made. Mr Marsh told us that he did not know which part of Africa the claimant was from and denied making the statements. Without more, it was difficult for this tribunal to make findings of fact in relation to these alleged statements. On balance, we find that they were not said by Mr Marsh.

Environmental health report - 14 July 2016

99. On 14 July 2016, a St Albans City and District Council Environmental Health Officer, Ms Carol Gregory, visited the Kingfisher Court Hospital site to carry out an unscheduled inspection. In her handwritten report she noted that the areas inspected were kitchen and visitors' service. She wrote,

> "Display chiller above 8˚c. Frozen meals reheated in hot cupboard. Daily record book poorly completed. Large sections never completed. Cream in fridge dated 11/7. Store eggs below ready to eat food. Date all food according to your system. No towels at kitchen basin dispenser. Agreed time for compliance: immediate and ongoing." (239)

100. At the time of the inspection the claimant was the only Chef present and was in charge of the kitchen. As a result of the failings identified, an

improvement notice was issued with immediate improvement being required.

101. Mr Marsh received a copy of the EHO's report and was of the opinion that a finding of lack of paper towels was a minor contravention and easily remedied. However, the finding that the meal was in a hot cupboard at 09.45 at 42˚**c**, was a major breach of food safety, in that the food was in the primary zone for bacteria multiplication. It was, in his view, within the "danger zone" of between 5˚c and 63˚c, meaning it is when bacteria multiply at their fastest rate thereby potentially causing serious food poisoning for a hospital patient if the meal had been consumed. His view was that it was the responsibility of the Chef on duty to perform opening checks to make sure everything was in order before commencing work. This included identifying out of date product, such as cream, and incorrectly stored items, such as eggs. This responsibility applied to all Chefs of all grades, and was, therefore, the responsibility of the claimant.

102. Given Ms Gregory's findings, on 15 July 2016, Mr Marsh met with the claimant and suspended her on full pay. He then wrote to her the same day inviting her to attend an investigation meeting on 21 July 2016. The matters under investigation were to be:

> "1. Gross negligence, in that you deliberately acted in a manner which posed a risk to others.
>
> 9. Major breach of Health and Safety, specifically actions leading to contamination."

103. He also stated that the investigation concerned allegations of gross misconduct and that her continued presence in the workplace would hinder the investigation. It was considered appropriate to place her on precautionary suspension from work, on full pay, while the investigation was ongoing.

104. In Mr Marsh's letter he also wrote:

> "Furthermore, during the period of your suspension we would advise you that you are required to:
>
> 1. Return any company property (for example swipe card keys) to me.
> 2. Refrain from having any contact with the company's clients, customers, suppliers and contractors.
> 3. Comply with such further conditions as the company may specify in relation to your attending at or remaining away from the Company's premises.
> 4. Remain available for work during your normal working hours should you be required.
> 5. Ensure that you do not perform work for any other employer, or undertake self-employment during your normal working hours.
> 6. Notify the Company if you fall ill or are incapacitated and provide appropriate evidence of your incapacity in accordance with the sickness absence provisions in your contract of employment.
> 7. Apply for annual leave, should you wish to take it, in accordance with the normal holiday procedure."

(240-241)

105. The claimant sent an email later in the afternoon, to Mr Marsh, complaining about her suspension. She stated:

> "Re; Complaint regarding sending me home from work today 15 July 2016 and discrimination and picking on me.
>
> I am complaining that sending me home today amounts to discrimination and picking on me amongst other Chefs in the kitchen. To me this is an issue as other pending issues that you have ignored and have to be discussed with everybody and not taking me out from the kitchen while others in the same situation are allowed to continue their work. I await your response with urgency." (242)

106. We find that having regard to the seriousness of the EHO's findings, the respondent had no option but to suspend the claimant pending an investigation. Her email complaint was in direct response to her suspension. Had it been a Chef not of the claimant's race, colour or nationality, it is very difficult to see how they would have been treated any differently as the matters raised in the EHO's report were serious given that this was potentially putting patients at risk of food poisoning.

107. The claimant failed to attend the meeting scheduled to take place on 21 July. Accordingly, Mr Marsh wrote to her on that day inviting her to attend the rescheduled meeting on 27 July 2016. (246-248)

108. She attended on 27 July and was interviewed by Mr Marsh. The following is an extract from the notes. "DM" is reference to Mr Marsh and "EC" to the claimant:

> "DM: Need to know what happened 14/7/17
> EC: Kelly came in and said EHO was here – She introduced herself – occasionally she would ask questions – she said she was happy except the puree food.
> DM: What did she mean by not happy?
> EC: Said it should be more hot in the microwave.
> DM: What time?
> EC: 10.00 something.
> DM: How did you heat the puree on that day?
> EC: We cook it in the microwave then put it in the hotplate.
> DM: You took the meals–then in the microwave?
> EC: Put it in the microwave for 10 minutes then 10 minutes.
> DM: What temp out of microwave on that day?
> EC: Not sure.
> DM: On this occasion at after 10am you took from freezer then in microwave.
> EC: Yes.
> DM: Read report – I have a statement from Tariq. Read Tariq's statement – I have spoken to EHO Officer – she said at 9.45 she probed them and it was 42°**c** – I have some questions.
> EC: OK
> DM: What do you understand is the danger zone.

EC: Temperature – 75˚**c**
DM: Now do you understand why 42˚**c** is wrong – How long have you been a Chef
EC: 20 years – We don't normally use Appitto we puree our own cooked food – who are using different methods – I was steaming.
DM: We use Cat D – Cat E.
EC: The nutritionist said that we have to use Appitto – and can't do our own.
DM: 14 July 16 only you told me that you heated it to 75˚**c** and then put it in the hot cupboard.,
EC: The hot cupboard – when meals are in we check before it goes to the Ward."

109. After further questioning the claimant confirmed she knew what she was doing in relation to safety and said she had a Food Safety Certificate and had attended training on 29 January 2015. Mr Marsh informed her that the food was not heated properly and that it could make people ill. The claimant alleged that Mr Marsh was picking on her as all Chefs did the puree the same way. Mr Marsh asked if she was saying that he was discriminating against her? The claimant responded by saying that sending her home and suspending her meant that she was being picked on. She repeated that all Chefs did the puree the same way. Mr Marsh advised that if she was alleging discrimination then she would need to contact Human Resources. At that point the meeting came to an end. (249-253)

110. At the conclusion of the investigation, Mr Marsh recommended that the matter should progress to a disciplinary hearing for gross misconduct. A letter dated 29 July 2016, was sent to the claimant in which she was invited to attend a disciplinary meeting on 4 August 2016. The allegations were the same as those notified to her on 15 July 2016. Copies of the following documents were enclosed:

- Investigating meeting notes;
- EHO handwritten report
- GSM statement (General Services Manager's statement)
- Training records

111. She was advised of her right to be accompanied at the meeting. (256-258)

112. The meeting was again rescheduled to take place on 10 August 2016 as the claimant did not attend on 4 August. She was notified of this in an email from Mr Marsh. (259)

113. In a letter dated 8 August 2016, she was formally invited to the rescheduled disciplinary meeting on 10 August 2016, by Human Resources Operations sent on behalf of Mr Adrian Haigh. The letter referred to copies of documents which were enclosed, in particular, the full written EHO report. (262-264)

114. The claimant alleged that if the letter was sent on 9 August, at the latest, she would have received it on the 10th, the very day she was due to attend the hearing at 10am. She said that she did not receive it prior to attending that meeting. If that was the case, we find that the charges remained the

same and the EHO's written report set out the issues which enabled her to give her account during the disciplinary hearing.

115. The hearing was chaired by Mr Haigh with an Administrator taking notes. The claimant confirmed that she was the senior person on duty on the day of the inspection and was aware of food safety principles, handling and chilling. She gave examples of cooking and cold temperatures. For cooking temperature, it should be, she said, 75˚**c** centigrade and that cold products should be 5˚**c** centigrade. Mr Haigh then put to her that on the day the EHO visited, a batch of meals were pureed and put in a hot cupboard at 45˚**c** Celsius. The EHO stated that the claimant had said it was common practice to defrost in a microwave and place them in a hot cupboard. Mr Haigh asked the claimant whether she understood that that practice was not safe. She replied that it was the way pureed food was prepared by the other Chefs. Mr Haigh then said to the claimant:

> Haigh: "It needs it be frozen or chilled and it needs to be cooked to above temperature or chilled quickly.
> EH: Yes I know."

116. Mr Haigh asked the claimant:

> "If you are not aware, about the risk, the ideal temperature must be above 75˚c or below 5˚c otherwise all food between these temperatures becomes the danger zone and bacteria grows fast and we can potentially cause food poisoning. Are you aware?
> EC: Yes I am aware"

117. Towards the end of the hearing the claimant alleged that when she was suspended and sent home that it was an act of discrimination. She repeated that all Chefs prepared food in the same way she did, but she was the one being blamed and was being used as a scapegoat. She further asserted that Mr Marsh had taken this personally as she had complained about Ms McPhillips. She stated that staff needed to be trained on Appitto meals and that she should not have been treated in the way she had been. Mr Haigh responded by saying that the treatment did not amount to discrimination as he saw it as a potential failure to provide safe food as witnessed by the EHO. (265-272)

118. In a letter dated 12 August 2016, which was sent in error, it stated that she was being summarily dismissed on grounds of gross misconduct. (273-274)

119. This was superseded by a further letter dated 18 August 2016 in which Mr Haigh wrote, amongst other things, the following:

> "A full investigation of the facts was completed prior to the disciplinary hearing and you were provided with an opportunity to comment on the specific facts at the hearing.
>
> The nature of the unsatisfactory conduct was;

- Gross negligence, in that you deliberately acted in a manner which posed a risk to others.
- Major breach of Health and Safety, specifically actions leading to contamination.

I am writing to confirm the decision taken that you will be given a written warning in accordance with the Company's Disciplinary policy.

Therefore, taking into consideration a previous, active, final written warning, received for similar misconduct, I write to confirm my decision to terminate your contract of employment on the grounds of misconduct. You are entitled to receive two weeks' notice. You are not required to work out this period of notice. I therefore confirm that the effective date of termination of your employment will be 10 August 2016.

You have the right to appeal against the Company's decision if you are not satisfied with it. If you do wish to appeal, you must inform the Company in writing detailing the grounds of your appeal with your full name, date of birth and employee number, to Nick Turner, Regional Operations Manager, … within five working days of notification of the decision."

(276-277)

120. On 19 August 2016, the claimant appealed alleging; error of facts; bias; discrimination; unfairness; serious faults in the investigation and disciplinary meeting; no similar issue in the past or within the previous year; that the decision was unreasonable and unfair; and there was a breach of her right to be accompanied. She stated that further appeal grounds would follow. (278-279)

121. In a letter dated 26 August 2016, Mr Turner instructed the claimant to provide more detailed grounds of her appeal. (280)

122. Mr Turner, in a letter dated 20 September 2016, informed her that the appeal would be heard on 27 September 2016 and that she had the right to be accompanied. He also wrote:

> "If you would like to submit a written statement for consideration in advance of the meeting, you may do so. This should be forwarded to me, at the HR Operations address above, at least one day before the meeting. At the meeting, you will of course be given an opportunity to set out the detailed grounds of your appeal, including providing any new evidence or new facts on which you may wish to rely". (281-282)

123. The claimant applied on 23 September 2016, for the meeting to be rescheduled and it was to 5 October 2016. It was further rescheduled to 11 October at the claimant's request and again to 19 October 2016. In a letter dated 11 October 2016, the claimant was informed that should she fail to attend the hearing without good reason it would be assumed that she no longer wished to pursue her appeal and the respondent would consider the case as closed. (283-289)

124. She attended the hearing on 19 October 2016 accompanied by Ms Hurley. Notes were taken. (290-292)

125. In a letter dated 22 November 2016, Mr Turner provided his detailed response to the 23 grounds of appeal and dismissed each in turn save for numbers 3 and 7 which he partially upheld. Number 3 was the claimant's assertion that there was no disciplinary decision taken against her in August 2015 because she appealed. Mr Turner concluded that after an extensive search for the grounds of appeal letter allegedly submitted by the claimant at the time, it could not be found, and the claimant failed to produce a copy. He noted that the claimant did not query at the time why an appeal hearing did not take place. In addition, it had only been raised in the grounds of appeal received on 14 August 2016, over a year later.

126. In relation to the ground number 7, the claimant alleged that Mr Marsh did not investigate her grievance and produced no report as he wanted to leave. Mr Turner enquired into this allegation and concluded that Mr Marsh did conduct an investigation into the claimant's grievance. The outcome should have been sent to the claimant and he, Mr Turner, arranged for that to be done.

127. On the final page of the outcome letter he wrote:

> "I consider that all points raised in your appeal were covered in the appeal hearing, and I do not recollect that you raised anything further which was either relevant or appropriate to the appeal. (not upheld)
>
> Summing up, although the majority of points raised within your appeal are not upheld, and valid reasons given, my decision is to reinstate you with acknowledgement that the final written warning issued to you on 3 August 2015 is extended for a further 12 months, and being removed from your file providing your conduct remains satisfactory during this time, on 2 August 2017.
>
> David Marsh will contact you within due course to arrange your return to work.
>
> You have now exercised your right of appeal under the Company Appeal Procedure. The decision is final and there is no further right of review."

128. Although Mr Haigh had considered the final written warning issued on 3 August 2015 in dismissing the claimant, Mr Turner told the tribunal that he had taken advice from Human Resources and was advised that he could discount that earlier final written warning if he wanted to do so. He told the tribunal that he considered the final written warning given to the claimant in 2015 was appropriate but discounted it on the basis that it was out of time at the date of the disciplinary hearing on 10 August 2016. (295-305)

129. We find that Mr Turner's decision was to reinstate the claimant to her substantive role on condition that a final written warning would be on her file until August 2017. He substituted the dismissal for a final written warning as he found the claimant's conduct was far from satisfactory.

130. We wanted to understand his reason/s final for issuing a final written warning. In evidence he said that he had lessened the sanction of dismissal to a final written warning to cover the claimant's behaviour towards her colleagues and the implications of the EHO's findings. The final written warning was for 12 months in the hope of giving the claimant a second chance to improve her behaviour and performance. It was a fresh warning.

131. The claimant contacted Mr Turner raising several issues. He decided to meet with her informally on 12 December 2016 to explain his decision and that it was final. He denied telling her that he would remove the first final written warning from her file as he had no power under the respondent's policy to do so. His involvement ended in November 2016. We were satisfied that he explained to the claimant the reasons for his decision.

132. On 29 November 2016, Mr Marsh wrote to the claimant inviting her to report to Warren Court to recommence her duties as a Chef from 1 December 2016. He told us that there was a full-time vacancy at Warren Court and the claimant had worked there before. She would be working with "Kevin the senior Chef on site". (306)

133. The claimant did not want to return to Warren Court as it was a high security unit. She asserted that she was Head Chef at Kingfisher Court and saw no reason why she should be a junior Chef at Warren Court. (315)

134. On 15 December 2016, to accommodate her, Mr Marsh wrote to the claimant inviting her to return to Kingfisher Court on Monday 19 December. He added:

> "For the avoidance of doubt, Michael Godfrey is the Senior Chef at Kingfisher Court and as such will be your immediate line report and I will remain your Manager in my role as Catering Manager for this contract." (320)

135. There was some discussion during the hearing on whether the claimant had the title of Head Chef. The respondent created the post of Team Leader at Kingfisher Court following the adverse Environmental Health Report to ensure that criticisms made by the EHO were properly addressed. This was after the claimant had been dismissed. Mr Michael Godfrey was appointed to that role.

136. The claimant said she had applied for that position in May 2016, but we find that such an assertion was untrue as the position was not created until after 14 July 2016.

137. Following the outcome of the disciplinary procedure, Mr Marsh wrote to the claimant on 6 December 2016 informing her of the outcome of her grievance. Amongst other things, he wrote the following:

> "I conducted the meeting on 8 July 2016 and Elaine Wellton, Site Supervisor, attended as notetaker. You were offered the right to be accompanied and you chose to decline this offer.

The delay in submitting the outcome has been due to the completion of the pending disciplinary case.

The main points of your grievance were as follows:

1. Attitude of Kelly McPhillips
2. Timekeeping

After discussing the points with you and concluding my investigations, I can now confirm that my findings are as follows:

Grievance point 1: Attitude of Kelly McPhillips

You stated that you were upset with the attitude of Kelly when she came to speak to you regarding cleaning the kitchen. You said that you were upset because Kelly was not your line manager and the way that she spoke to you.

Outcome of grievance point: Not upheld

Having carefully considered all aspects of your complaint and having spoken to other parties involved I find that whilst your perception of this situation was that Kelly's attitude upset you, I find that the instruction that Kelly issued to you about cleaning the kitchen was an entirely reasonable management request and therefore there is no case to answer.

Grievance point 2; Timekeeping

There was a point made by you that you felt Kelly was being rude by questioning your timekeeping, again having spoken to all parties concerned this was a legitimate comment because there had been instances of you being late for your duty.

Outcome of grievance point: Not upheld

Considering you being late on occasions for duty I find that the comment made whilst it may have upset you was a legitimate comment that a manager was entitled to make.

You were provided with a copy of the meeting notes earlier however, if this is not the case please advise so that these can be arranged to be sent.

You have the right to appeal against this decision…" (310-311)

138. The claimant was finally invited to return to work on 22 December 2016 at Kingfisher Court but failed to do so. (326)

139. In Mr Marsh's email of 22 December 2016, he informed her that she was instructed to return to Kingfisher Court on 22 December 2016 at 8am but failed to comply as instructed. He stated that he attempted to call her that day and left a message, but she did not respond. As a consequence of her actions, she was on unauthorised absence. He further stated that the sum of £4,000 had been paid into her nominated bank account. (326)

140. The sum of £4,000 represented unpaid wages from the date of her dismissal to 21 December 2016. As she did not return to work as instructed, Mr Marsh emailed her on 23 December 2016, reminding her that she was on continued unauthorised absence from 22 December and was not being paid until she returned to work. He stated that he tried to contact her be telephone but without success and she did not reply to his messages. He reminded her of the reinstatement instructions she acknowledged she received and of her work roster. He told her that transport had been organised to enable her to attend Kingfisher Court on Monday 26 December 2016 and that she would be picked up at 7am from her home address transported to work and to her home after her shift. If he did not hear from her by 2pm 23 December, he would have no option but to cancel the travel arrangements. (327)

141. As she failed to contact the respondent, Mr Marsh cancelled the travel arrangements.

142. The claimant's failure to engage in the process caused Mr Marsh to consider invoking the respondent's disciplinary procedure. On 30 December 2016, he wrote inviting her to an investigatory meeting on 12 January 2017 at 2pm regarding her unauthorised absence and her failure to comply with the respondent's absence reporting procedure. (329-330)

143. On 9 January 2017, the claimant emailed Mr Marsh stating that she was waiting Mr Turner's decision following an email sent on 23 December 2016. She stated that her attendance at the meeting scheduled to take place on 12 January 2017, would prejudice her case. and asserted that Mr Turner could not leave any legal decision in her file and that Mr Marsh could not place Mr Godfrey in a higher position to her in the kitchen because she had been employed by Interserve before Mr Godfrey and was more qualified, more experienced and more efficient than him. She further claimed that the decisions taken were racially motivated aimed at frustrating her. Once she received Mr Turner's decision she would revert to him, Mr Marsh. (331)

144. It was clear from the claimant's email that she was saying to the respondent that she would neither return to Warren Court nor to Kingfisher Court unless Mr Turner removed the 2015 final written warning from her file and that she would not be required to work under Mr Michael Godfrey.

145. On 25 January 2017, she was invited to attend a disciplinary meeting on 31 January 2017 to hear allegations of unauthorised absence and failure to follow the absence reporting procedures. She was advised of her right to be accompanied and was warned that should she fail to attend without good reason, a decision may be taken in her absence with the possibility that she may be dismissed. He stated that it was open to her to submit written representations in advance to be discussed at the meeting. The claimant, however, did not attend. (338-339)

146. On 1 February 2017, she was again invited to attend a disciplinary hearing on 7 February to hear the same allegations. The wording of the letter was the same as the earlier one but again, she failed to attend. Mr Pradella,

who conducted the disciplinary hearing, proceeded in her absence. She had earlier had a telephone conversation with him during which she informed him that she would be attending on 7 February but did not later say to him that she would not attend or was unable to do so. He, therefore, proceeded to hear the case in her absence. (342-343)

147. Mr Pradella said in evidence that having considered the papers before him, the claimant who did not provide evidence to assist her case, he concluded that she should be dismissed. On 14 February 2017, he wrote a letter informing her of his outcome decision. He wrote, amongst other things, the following:

> "I reviewed your case and it has become apparent you have given various reasons why you would not return to work. You stated you would not return to work until you received your back pay as you had no money. The back pay was given to you, yet still you did not return to work. You then proceeded to make various claims against management. The records show you lodged grievances and appeals prior to your dismissal and reinstatement which had been dealt with and concluded. Yet you have raised these issues as a reason for not returning to work. You had an appeal hearing with Nick Turner, Regional Operations Manager and an outcome was given. After you were reinstated you requested to meet Nick Turner to discuss the outcome of the appeal. Mr Turner met with you to discuss the outcome. He wrote to you confirming the appeal had now been closed, yet you still used this reason to not to return to work. You were asked to attend a further appeal meeting with Steve Grantham, Contract Manager to discuss another issue you raised, you did not attend the meeting even after the meeting had been rescheduled. Maureen Pascal-Rochester, HR Manager offered to meet with you to discuss any issues you raised, which you declined and informed her you would not return to work. This behaviour is unacceptable.
>
> In my invite letter to you on 1st February 2017, I explained that should you fail to attend the rearranged meeting without good reason, then a decision may be made in your absence, based upon the information available at the time.
>
> Having taken all the available information and facts of the case into consideration, I have concluded that there was sufficient evidence in support of the above allegations, as follows:-
>
> - You have failed to attend work since your reinstatement on 22nd December 2016, and therefore you have failed to fulfil the contractual obligations of the terms and conditions of your employment.
> - The explanation given for your non-attendance to work is unacceptable and your behaviour for not returning to work has shown a direct disregard for Company's policies and procedures.
>
> **I write to confirm my decision to terminate your contract of employment without notice in relation to the above allegations in accordance with the company's Disciplinary policy, as this behaviour is considered Gross Misconduct. Additionally our records show that you already have a Final Written Warning on your file.**

> Your final date of employment with the company will be recorded as 8th February 2017. Your P45 will be forwarded to you in due course and you will be paid the following:
>
> - A sum in respect of accrued but untaken annual leave entitlement.
>
> Please note that in accordance with your contract of employment, the Company reserves the right to deduct from your final termination payment a sum in respect of any annual leave taken in excess of your accrued entitlement as at your termination date." (346-347)

148. The claimant appealed against her dismissal which was received by the respondent on 21 February. On 27 February 2017, she was invited to an appeal hearing to take place on 8 March 2017. She was given the same previous information regarding being accompanied and submitting written representations. (350-351)

149. She did not attend the appeal hearing. She was informed in writing that it would be rescheduled and would take place on 13 March 2017. She was told that she must take all reasonable steps to attend the hearing. (352-353)

150. The claimant again did not attend the hearing and it went ahead on 13 March in her absence. It was decided by Mr Turner that the dismissal would stand for the reasons given by Mr Pradella. (354)

<u>The Claimant's conduct at the hearing</u>

151. Throughout the hearing the claimant was argumentative, evasive, and on many occasions refused to answer some of the questions put to her. She was warned by the judge that an adverse inference could be taken from her refusal to answer questions.

152. At the preliminary hearing on 3 January 2018, before EJ Heal, it was ordered that the claimant should serve on the respondent, by 17 January 2018, a properly itemised schedule of loss.

> "This should use figures net of tax and national insurance to calculate loss of earnings and should identify when and if the claimant has started any new employment and the sums she has earned in that employment."

153. She was cross-examined on her current employment because an Unless Order was issued on 3 July 2018 ordering her to: provide details of her claim for unpaid leave; a schedule of loss; and copies of relevant documents in her possession. She served her schedule by email, on 3 July 2018 in which she stated, amongst other things, that her future loss of earnings of £1,450 per month together with a monthly loss of £20 in looking for work, would continue for 12 months.

154. She was asked whether she was able to find employment and said that she started work for a different employer after her suspension on 15 July 2016. She acknowledged that while on suspension she received her full pay. She denied receiving a gross payment of £4,000 representing her loss of salary

from dismissal to reinstatement but later said she could recall receiving a net payment of £3,771.24. (407)

155. She did not tell Mr Marsh that she had found work with another employer. Despite a warning from the Judge, she refused to disclose the identity of her new employer but admitted that she had a contract of employment with that company. Details of her new pay and contract of employment should have been disclosed to the respondent in compliance with the Unless Order but they were not. On 25 October 2018, the tribunal ordered her to search for her new contract of employment and wage slips and for the matter to be discussed the following day. When we resumed next day, no documents were produced detailing her current employment. She told the tribunal that she commenced her new job on 30 August 2016 and was paid £9 an hour for 30 hours a week as a Chef. She said that as her earnings in her new job was less than what she would have earning had she remained in employment with the respondent, she was still entitled to claim her full loss of salary and her part-time earnings disregarded. This was the advice she said she was given by a Citizens Advice Bureau.

156. At the hearing on Monday 29 October 2018, the claimant surprisingly managed to produce an offer letter which she said she found in her work locker on Sunday 28 October 2018. The letter was not a contract of employment, but an offer letter dated 14 October 2016 referring to the claimant having joined her new employer from 30 August 2016. It is curiously worded, in that the offer was subject to receiving two satisfactory references and the completion of the company's security clearing procedures. She was required to log on to the current employer's website on the first day of her employment and on to its payroll to enable her to have access to her pay slips.

157. If the document is to be relied on, it would have been easy for the claimant to access her pay slips by logging on to the company's online hob. Pay slips had been singularly absent from these proceedings. Further, there was no contract of employment in relation to her current employment. We also noted that in relation to the offer letter, the spacing between the first and second paragraphs is much larger and different from the rest of the paragraphs. The claimant told us initially that she obtained employment during the period of the suspension and then later in her evidence said that it was from 30 August 2016.

158. We have difficulty in accepting her evidence in relation to when she commenced her new employment and her rate of pay, hours of work and job title.

159. At no point prior to these proceedings was the respondent informed by the claimant that she had obtained employment either during or after her suspension. She had received money from the respondent while at the same time her wages from her current employer. She also told us that she normally works 40 hours a week for her current employer.

160. The claimant alleged that she asked to be reimbursed for items bought for the benefit of the hospital and for her transport to work during the Christmas holiday period in 2014 to 2015. She also alleged that she was not paid for some of her holidays. She, however, did not produce receipts, or gave the dates in question nor did she produce documentary evidence in support. Expenses incurred have to be authorised and receipts provided. Holidays also have to be approved. Her assertions here, we find, are without merit.

161. We find that the claimant actively operated a deception on the respondent by deliberately failing to disclose details of her current employment until after commencement of this hearing. Her credibility, in our view, is in issue. Where her evidence came into conflict with the evidence given by the respondent's witnesses, we preferred the evidence of the respondent's witnesses.

162. The respondent is seeking the return of the £4,000 gross paid to the claimant in the belief she was not working between 15 July to 21 December 2016.

Requests for claimant's passport

163. The claimant asserted that Mr Marsh persistently asked her for her passport but no evidence was given as to when such requests were made and why. What was clear was that when the respondent took over the business from the predecessor company, it chased managers up for employee documents. The claimant might be referring to such a time. If so, it was prior to the claimed protected act on 5 July 2016.

Holiday entitlement

164. The claimant worked 4 days a week and was entitled, pro rata, to 22.4 days holiday. On 11 June 2017, she was paid for her holiday in the sum of £600 gross. From the list of holidays taken, she took leave from 10 June to 2 July 16, which meant that she had exceeded her full entitlement by 2 days, therefore, 1 and 2 July 2016, were unpaid. (371, 412, and 492)

Diversity statistics

165. The tribunal were taken to the respondent's statistical evidence in relation to the outcome of appeals by reference to race. We were unable to discern from that evidence any pattern emerging of racially discriminatory treatment. (361-362)

Breach of the Working Time Regulations

166. There was no evidence produced that the respondent had breached the provisions of the regulations.

Submissions

167. We have taken into account the submissions by Ms Said, on behalf of the claimant and the written, as well as oral submissions, by Ms Ahmad on behalf of the respondent. We do not propose to repeat their submissions herein having regard to Rule 62(5) Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

The law

168. Section 98(1) Employment Rights Act 1996 ("ERA"), provides that it is for the employer to show what was the reason for dismissing the employee. Dismissal on grounds of conduct is a potentially fair reason, s.98(2)(b). Whether the dismissal is fair or unfair having regard to the reason shown by the employer, the tribunal must have regard to the provisions of s.98(4) which provides:

> "Where the employer has fulfilled the requirements of subsection (1), and 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."

169. In the case of British Homes Stores v Burchell [1980] ICR 303, the EAT's judgment was approved in the Court of Appeal case of Weddel & Co Ltd v Tepper [1980] ICR 286. The following has to be established:

    169.1 First, whether the respondent had a genuine belief that the misconduct that each employee was alleged to have committed had occurred and had been perpetrated by that employee,

    169.2 Second whether that genuine belief was based on reasonable grounds,

    169.3 Third, whether a reasonable investigation had been carried out,

170. Finally, in the event that the above are established, was the decision to dismiss reasonable in all the circumstances of the case. Was the decision to dismiss within the band of reasonable responses?

171. The charge against the employee must be precisely framed Strouthos v London Underground [2004] IRLR 636.

172. Even if gross misconduct is found, summary dismissal does not automatically follow. The employer must consider the question of what is a

reasonable sanction in the circumstances Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854.

173. The Tribunal must consider whether the employer had acted in a manner a reasonable employer might have acted, Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT. The assessment of reasonableness under section 98(4) is thus a matter in respect of which there is no formal burden of proof. It is a matter of assessment for the Tribunal.

174. It is not the role of the Tribunal to put itself in the position of the reasonable employer, Sheffield Health and Social Care NHS Trust v Crabtree UKEAT/0331/09/ZT, and London Ambulance Service NHS Trust v Small 2009 EWCA Civ 220. In the Crabtree case, His Honour Judge Peter Clark, held that the question "Did the employer have a genuine belief in the misconduct alleged?" goes to the reason for the dismissal and that the burden of showing a potentially fair reason rests with the employer. Reasonable grounds for the belief based on a reasonable investigation, go to the question of reasonableness under s.98(4) ERA 1996. See also Secretary of State v Lown [2016] IRLR 22, a judgment of the EAT.

175. The range of reasonable responses test applies to the investigation as it does to the decision to dismiss for misconduct, Sainsbury's Supermarket Ltd v Hitt [2003] ICR 111 CA.

176. In the case of Taylor v OCS Group Ltd [2006] ICR 1602 CA, it was held that what matters is not whether the appeal was by way of a rehearing or review but whether the disciplinary process was overall fair.

177. The seriousness of the conduct is a matter for the employer, Tayeh v Barchester Healthcare Ltd [2013] IRLR 387 CA.

178. The Court of Appeal acknowledged that employment tribunals are entitled to find whether dismissal was outside the range of reasonable responses without being accused of placing itself in the position of being the reasonable employer. In Bowater-v-Northwest London Hospitals NHS Trust [2011] IRLR 331, a case where the claimant, a senior staff nurse who assisted in restraining a patient who was in an epileptic seizure by sitting astride him to enable the doctor to administer an injection, had said, "It's been a few months since I have been in this position with a man underneath me" was the subject of disciplinary proceedings six weeks later. She was dismissed for, firstly, using an inappropriate and unacceptable method of restraint and, secondly, the comment made. The employment tribunal found by a majority that her dismissal was unfair. The EAT disagreed. The Court of Appeal, overturned the EAT judgment, see the judgment of Stanley Burnton LJ, paragraph 13. See also Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677.

179. The level of inquiry the employer is required to conduct into the employee's alleged misconduct will depend on the particular circumstances including the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee. "At the one

extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase.", Wood J, President of the EAT, ILEA v Gravett [1988] IRLR 497.

180. Under section 13, Equality Act 2010, direct discrimination is defined:

> "(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."

181. Section 23, EqA provides for a comparison by reference to circumstances in relation to a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

182. Section 136 EqA is the burden of proof provision. It provides:

> "(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 provisions 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."

183. The statutory burden of proof applies in cases of direct and indirect discrimination, victimisation and harassment. It also applies to breaches of an equality clause in an equal pay case.

184. Guidance in applying the statutory burden of proof was given under the old law in the case of Barton v Investec Henderson Crossthwaite Securities Ltd [2003] IRLR 332, EAT. This was approved by the Court of Appeal in the case of Igen Ltd v Wong [2005] IRLR 258. It is applicable to other forms of discrimination where the new burden of proof applies. The Court amended the dicta in Barton. It held, Peter Gibson LJ giving the leading judgment., that:

> "1. Pursuant to Section 63A of the SDA, it is for the Claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful by virtue of Part II or which by virtue of Section 41 or 42 of the SDA is to be treated as having been committed against the Claimant. These are referred to as "such facts".
>
> 2. If the Claimant does not prove such facts he or she will fail.
>
> 3. It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

4. In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.

5. It is important to note the word “could” in s 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

6. In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is adequate explanation for those facts.

7. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)b of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

8. Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take into account in determining, such facts pursuant to s.56(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

9. Where the Claimant has proved facts from which conclusions could be drawn that the Respondent has treated the Claimant less favourably on the ground of sex, then the burden of proof moves to the Respondent.

10. It is then for the Respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

11. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since ‘no discrimination whatsoever’ is compatible with the Burden of Proof Directive.

12. That requires a Tribunal to assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

13. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.”

185. We have also considered the cases of: Laing v Manchester City Council [2005] IRLR 748, EAT; and Madarassy v Nomura International plc [2007IRLR 246, CA. The Court of Appeal in Madarassy approved the dicta in Igen.

186. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal was entitled, under the shifting burden of

proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions have an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.

187. As already stated, in direct discrimination cases involving less favourable treatment, the claimant will need to show that he or she was treated differently when compared with an actual or hypothetical person, the comparator. There must be no material differences in the circumstances of the claimant and the comparator.

188. In the House of Lords case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, it was held that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as he or she was and postponing the less favourable treatment issue until they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? If the former, there will usually be no difficulty in deciding whether the treatment afforded to the claimant on the proscribed ground was less favourable.

189. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

190. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not without more , sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

191. The Court then went on to give this helpful guide, "Could conclude" [now "could decide"] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the

respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant are like with like, and available evidence of the reasons for the differential treatment.

192. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

193. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, race, sex, religion or belief, sexual orientation, pregnancy and gender reassignment.

194. In the case of EB-v-BA [2006] IRLR 471, a judgment of the Court of Appeal, the employment tribunal applied the wrong test to the respondent's case. EB was employed by BA, a worldwide management consultancy firm. She alleged that following her male to female gender reassignment, BA selected her for redundancy, ostensibly on the ground of her low number of billable hours. EB claimed that BA had reduced the amount of billable project work allocated to her and thus her ability to reach billing targets, as a result of her gender reassignment. Her claim was dismissed by the employment tribunal and the Employment Appeal Tribunal. She appealed to the Court of Appeal which accepted her argument that the tribunal had erred in its approach to the burden of proof under what was then section 63A Sex Discrimination Act 1975, now section 136 Equality Act 2010. Although the tribunal had correctly found that EB had raised a prima facie case of discrimination and that the burden of proof had shifted to the employer, it had mistakenly gone on to find that the employer had discharged that burden, since all its explanations were inherently plausible and had not been discredited by EB. In doing so, the tribunal had not in fact placed the burden of proof on the employer because it had wrongly looked at EB to disprove what were the

respondent's explanations. It was not for EB to identify projects to which she should have been assigned. Instead, the employer should have produced documents or schedules setting out all the projects taking place over the relevant period along with reasons why EB was not allocated to any of them. Although the tribunal had commented on the lack of documents or schedules from BA, it failed to appreciate that the consequences of their absence could only be adverse to BA. The Court of Appeal held that the tribunal's approach amounted to requiring EB to prove her case when the burden of proof had shifted to the respondent.

195. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of, B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not to lead to the legal conclusion that the dismissal occurred because she was a woman.

196. The tribunal could bypass the first stage in the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it is not necessary to consider whether the claimant has established a prima facie case particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex. This approached was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords and by Mr Justice Elias in Laing-v-Manchester City Council [2006] ICR 1519, EAT.
Harassment is defined in section 26 EqA as;

"26 Harassment

(1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of-
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B"

197. In deciding whether the conduct has the particular effect, regard must be had to the perception of B; other circumstances of the case; and whether it is reasonable for the conduct to have that effect, section 26(4).

198. In this regard guidance has been given by Underhill P, as he then was, in case of Richmond Pharmacology v Dhaliwal [2009] ICR 724, set out the approach to adopt when considering a harassment claim although it was with reference to section 3A(1) Race Relations Act 1976. The EAT held that the claimant had to show that:

    (1) the respondent had engaged in unwanted conduct;

    (2) the conduct had the purpose or effect of violating his or her dignity or of creating an adverse environment;

    (3) the conduct was on one of the prohibited grounds;

    (4) a respondent might be liable on the basis that the effect of his conduct had produced the proscribed consequences even if that was not his purpose, however, the respondent should not be held liable merely because his conduct had the effect of producing a proscribed consequence, unless it was also reasonable, adopting an objective test, for that consequence to have occurred; and

    (5) it was for the tribunal to make a factual assessment, having regard to all the relevant circumstances, including the context of the conduct in question, as to whether it was reasonable for the claimant to have felt that their dignity had been violated, or an adverse environment created.

199. Whether the conduct relates to disability "will require consideration of the mental processes of the putative harasser", Underhill LJ, GMB v Henderson [2016] EWCA Civ 1049.

200. As regards victimisation, section 27 EqA states;

> "27 Victimisation
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because-
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act-
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act."

201. For there to be unlawful victimisation the protected act must have a significant influence on the employer's decision making, Nagarajan v London Regional Transport [1981] IRLR, Lord Nicholls**.** In determining whether the employee was subjected to a detriment because of doing a protected act, the test is whether the doing of the protected act had a significant influence on the outcome, Underhill J, in Martin v Devonshire Solicitors [2011] ICR EAT, applying the dictum of Lord Nicholls in Nagarajan.

Conclusions

Unfair dismissal

202. In relation to the unfair dismissal claim, paragraphs 4.1 to 4.8 of the List of Issues, what was the reason for the claimant's dismissal? It was her unauthorised absence from work. Mr Pradella wrote to her on 14 February 2017, stating that she was to be reinstated and was required to return to work on 22 December 2016 but she failed to do so. By then Mr Turner had clearly stated to her that his decision was final and that her appeal was closed. Her unauthorised absence was conduct, section 98(2)(b) Employment Rights Act 1996 and not race as she asserted.

203. The respondent held a reasonable belief in her guilt based on reasonable grounds. The claimant was instructed to return to work on 22 December 2016. She was invited to discuss her unauthorised absence but did not attend any of the meetings. She was at the time corresponding in relation to her grievance and did not attend the grievance appeal hearing with Mr Grantham in January 2017. She could have attended the disciplinary hearing to put forward her case to avoid dismissal but chose not to. She was warned about the possibility of dismissal. Mr Pradella proceeded to determine the allegations against her based on the information before him but he did not have her account to consider. We bear in mind that the claimant had at the time secured for herself employment as a Chef which she did not disclose to the respondent as one of the reasons why she could not attend the meetings.

204. Mr Michael Godfrey was employed as a Chef to consider the health and safety aspects of procedures in the kitchen following the Environmental Health Office's report. This was based on his skills and abilities as assessed by Mr Marsh and was a reasonable management decision. The claimant was the subject of the report and could not, therefore, be given that responsibility.

205. We did not find, as the claimant asserted, that Mr Marsh said to her when she raised the issue of more staff being needed in the kitchen, "We don't want people like you." This was denied by him and she did not raise a grievance despite her familiarity with the procedure.

206. She also claimed that she raised issues regarding holiday pay, items she purchased as well as money owed to her for her travel to and from work during Christmas 2014-15, and that by raising these issues they contributed

to her dismissal. There was no evidence that these issues were raised or were prevalent in the minds of Mr Pradella and Mr Turner. The claimant did not produce any documentary evidence in support of her monetary entitlements.

207. We have concluded that Mr Pradella had a genuine belief in the claimant's guilt based on reasonable grounds. He did not demonstrate any ulterior motive for his decision to dismiss her. In fact, the claimant respected him as a manager, particularly the way in which he conducted the disciplinary hearing into the falsification of documents.

208. The appeal hearing was originally listed on 8 March 2017, but the claimant asked that it be rescheduled and it was relisted on 13 March 2017, but she did not attend. In the absence of the claimant's account at the appeal stage, Mr Turner considered the documents before him and dismissed her appeal. He did not demonstrate that he had an ulterior motive for doing so.

209. The claimant's continued absence constituted gross misconduct. She was already on a final written warning. The respondent was satisfied that there were grounds for terminating her employment. Applying the judgment in <u>Newbound, a</u> reasonable employer possessed of the same information was likely to have dismissed. Dismissal fell within the range of reasonable responses. Accordingly, the claimant's unfair dismissal claim is not well-founded and is dismissed.

<u>Harassment related to race</u>

210. In relation to the harassment claim, the claimant alleged that Ms McPhillips, on 4 July 2026, shouted and was very rude to her, paragraph 5.1.1 of the List of Issues. She further claimed that she was spoken to in a slavery manner or like a slave. We did not find as fact that Ms McPhillips behaved in the way alleged. Ms McPhillips heard shouting while in her office and was spoken to by Mr Teixera who said that the claimant was "kicking off". It was the claimant who was angry and was shouting at the time because she was asked by Mr Teixera to mop the kitchen floor and she felt that such a task was beneath her status as a Chef. Ms McPhillips instructed her to stop shouting and said that supervisors and managers were expected to engage in cleaning duties when required. Ms McPhillips did not instruct her to mop the kitchen and clean the floor at the end of the day. The claimant was asked when she was due to finish her shift. It seemed to Ms McPhillips that the claimant had time to clean the kitchen before leaving at the end of her shift. There were no findings upon which we could decide that such conduct was related to the claimant's race.

211. Although not direct race discrimination, even if the claimant was told to mop and clean the kitchen floor, we would conclude that the same would have been said to a Chef who was not white or not of the claimant's race who had time to clean before the end of their shift.

212. In relation to Mr Gorman's alleged behaviour on 2 June 2016, paragraphs 5.1.2 to 5.1.4 of the issues, the incident was the subject of disciplinary

proceedings conducted by Mr Marsh. The claimant made no reference to race when she gave her account of the incident. If race did feature, Mr Marsh said that it would have been dealt with more seriously.

213. The claimant embellished her account of what happened in her amended particulars and in her evidence. We do rely on Mr Marsh's recollection of what was said at the time and not what the claimant stated later, after she presented her claim form to the tribunal.

214. Mr Marsh was, in our view, a credible witness who did not attempt to mislead the tribunal. He issued Mr Gorman with a final written warning as he was satisfied that a serious incident had occurred but was not sure about the details. Mr Gorman was later dismissed for an unrelated matter. It would seem that misconduct issues are dealt with seriously by this respondent.

215. The claimant further alleged that Mr Gorman tried to push her inside the standing oven in the kitchen, paragraph 5.1.5. She and Mr Gorman did not have a good working relationship. Her manner and attitude towards her work colleagues was a cause for concern. Even if she was pushed by Mr Gorman in the manner alleged, we are not satisfied that it was related to her race but was more to do with the poor working relationship she had with him.

216. As for Mr Marsh's alleged South Africa comments, we did not find that such comments were made by him.

217. It follows from the above that the claimant's harassment related to race claims are not well-founded and are dismissed.

<u>Direct discrimination because of race</u>

218. As regards direct race discrimination, it is the claimant's case that she was dismissed because of her race, paragraph 6.1.1. The claimant relied on Mr Gorman, Mr Godfrey, Michael Rooney, Mary Hurley as actual comparators. They are not of the claimant's race. We received no evidence that they were absent from work without authorisation. They are, therefore, not appropriate comparators.

219. As to a hypothetical comparator in similar circumstances to the claimant, we conclude that he or she would not have been treated any differently. They would have been the subject of disciplinary proceedings for unauthorised absence and should they fail to attend a disciplinary hearing after having been warned that the hearing may proceed in their absence, then they were likely to be dismissed as they would be unable to given and account of their unauthorised absence. In that respect the claimant was treated no differently as there would be no less favourable treatment.

220. Even if the claimant was treated less favourably, it was not because of race. She was instructed to return to work after she had been reinstated and did not comply with a lawful management instruction. She also failed to attend

the disciplinary hearing. The "reason why" she was dismissed was because of her unauthorised absence.

221. We have already found that Mr Marsh did not say to the claimant, "We don't want somebody like you.", paragraph 6.1.2.

222. The claimant further alleged that the respondent did not address her grievances against Mr Gorman and Ms McPhillips, paragraph 6.1.3. Mr Marsh did investigate and Mr Gorman was the subject of a final written warning. As regards the claimant's allegations against Ms McPhillips, Mr Haigh invited Ms McPhillips to respond and she set out her account of events which differed from the claimant's. Mr Marsh then met with the claimant on 8 July 2016 and spoke to her about her grievance but was unable to give his decision because of the disciplinary proceedings taken against her arising out of the EHO report. On 6 December 2016, he informed her that her allegations were not substantiated and that Ms McPhillips acted properly as the manager on site at the time.

223. The claimant did not attend the rescheduled grievance appeal hearing on 19 January 2017 and a decision was taken in her absence not upholding her grievance against Ms McPhillips. We did not make findings of fact upon which we could decide that the claimant had been treated less favourably as her grievances were properly investigated.

224. There was no evidence upon which we found that the Supervisor, referred to as Kevin, was less qualified and junior to the claimant, paragraph 6.1.4. In the letter from Mr Marsh dated 15 December 2016, the claimant was instructed to return to work following her reinstatement. Mr Michael Godfrey was appointed the Senior Chef at Kingfisher Court responsible for the implementation of correct health, food hygiene and safety procedures following the damning EHO report. He was to be the claimant's immediate line report with Mr Marsh being her manager. The claimant could not have been given that role as she had been in breach of the food safety procedures. In any event, it was a reasonable management decision to appoint someone in charge of health and food safety in the kitchen to avoid losing a much-valued contract. The claimant did not comply with a reasonable management instruction when she refused to return to Kingfisher Court on terms set out in Mr Marsh's letter.

225. In relation to paragraph 6.1.5, the claimant alleged that the respondent failed to follow employment procedures leading up to her dismissal. In his letter to the claimant dated 18 August 2016, Mr Haigh clarified that a written warning would be given for the EHO incident on 14 July 2016 but taken together with the earlier final written warning meant that she would be dismissed. We were not satisfied that the claimant appealed the final written warning given in August 2015. For the reasons given in respect of the unfair dismissal claim, this allegation is without merit.

226. As regards paragraph 6.1.6, the claimant alleged that untrue information was put in her file from 3 August 2015. She did not show to the tribunal what was in her file and what was untrue. The disciplinary warnings were

properly reached and placed in her file. The basis for them were clearly made out in 2015 and 2016. Her dismissal, we have concluded, was not unfair. There was no evidential support for the claim.

227. In relation to the respondent having failed to pay the claimant for holidays and expenses incurred in the course of her employment, paragraph 6.1.7, there was no evidence presented by her in support of this aspect of her claim.

228. It follows from our findings and conclusions that the claimant's direct race discrimination claim is not well-founded and is dismissed.

Victimisation

229. The reference to "a very slavery" treatment in the claimant's grievance dated 5 July 2016 in respect of the interaction between her and Ms McPhillips in the kitchen, did not expressly mention race nor could it be reasonably construed to refer to section 27(2)(d), Equality Act 2010, namely an allegation of contravention of the Act. Many people, irrespective of their race, when overworked, say they feel as if they have been treated like a slave. The claimant was given the opportunity by Mr Marsh during the grievance meeting on 8 July 2016, to clarify what she meant by the statement and did not refer to race. We have come to the conclusion that there was no protected act either on 5 or 8 July 2016.

230. We do not know the email the claimant was referring to in paragraph 7.1.2 which was sent to Mr Marsh between October and December 2016, and was a protected act. We were, however, taken to her email to him dated 9 January 2017 in which she alleged that the decisions taken against her were racially motivated and aimed at frustrating her. If she was referring to this email, then we conclude that it was a protected act.

231. Did the claimant suffer the detriments alleged in paragraph 7.2? We did not find that Mr Marsh was angry with her during her grievance meeting on 8 July 2016 concerning her complaints against Ms McPhillips, paragraph 7.2.1.

232. In relation to her dismissal in February 2017, it was not significantly influenced by the protected act but solely as a result of her continued unauthorised absence, paragraph 7.2.2.

233. As regards paragraph 7.2.3, we have found that Mr Marsh did not persistently ask for the claimant's passport. When the respondent took over the contract, human resources were chasing managers for employee documentation. This was not in any way significantly influenced by the 9 January 2017 protected act. Quite the contrary, the claimant was not at work after being suspended in July 2016.

234. We have come to the conclusion that the claimant's victimisation claim is not well-founded and is dismissed.

Unauthorised deductions from wages

235. The claimant did not provide evidence in support of her unauthorised deduction from wages claim in relation to her annual leave, paragraph 9.1. We found that she had taken more than her leave entitlement of 22.4 days. This claim is not well-founded and is dismissed.

236. In relation to paragraphs 9.2 to 9.13, the claimant did not adduce any evidence in support of an alleged breach of the Working Time Regulations 1998. We were satisfied that she was paid her holiday entitlement and there was no decision to roll over untaken holiday. This claim is also not well-founded.

<u>Wrongful dismissal</u>

237. The question we have to ask is whether the claimant committed a fundamental breach of contract to justify her summary dismissal without pay. We have to consider what happened and not the issue of fairness. We are satisfied that the claimant secured for herself employment shortly after her suspension in July 2016. She deliberately kept that fact from the respondent until tribunal proceedings. She did not want to return to work on 22 December 2016 or at any other time and provided weak excuses to justify her absence. In the process she benefited from being paid her salary of £4,000 gross while receiving an income from her new employment.

238. She deliberately decided not to return to work flouting reasonable management instructions to do so. She was warned that failure to attend the hearings would lead to a decision taken in her absence, yet she failed to attend the disciplinary and appeal hearings. She fundamentally breached her contract of employment by not complying with a reasonable management instruction to return to work. Consequently, the respondent was entitled to terminate her employment summarily without notice as her behavior constituted gross misconduct. The claimant has not proved this claim and it is dismissed.

239. The respondent is entitled to recover the gross sum of £4,000 paid to the claimant covering the period of her suspension

240. On a separate point, though not argued before us, it could be argued that the claimant, having worked for her current employer since the period of her suspension in July 2016 and did not disclose that fact to the respondent, effectively resigned from her employment.

<u>Other claims</u>

241. In relation to the other alleged debts allegedly incurred by the claimant covering alleged transport costs, the purchase of bread, milk and gluten free meals, paragraphs 10.04 to 10.05, as we have found, she produced no documentary evidence in support. Accordingly, these claims have not been proved and are dismissed.

<u>Out of time</u>

242. We accept that the claimant's claims are against the respondent's management from 2015 to March 2017 at the Kingfisher Court establishment. She alleges racially discriminatory treatment. The acts do form a course of conduct extending over that period and are in time as the appeal outcome is the last act and is in time. However, for the reasons given above, the claimant's Equality Act claims are not well-founded and are dismissed.

Costs hearing

243. The case is listed for a costs hearing on Friday 15 March 2019 with a time estimate of 1 day.

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Employment Judge Bedeau

Date: …23/01/19

Sent to the parties on: .....25/01/19.

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For the Tribunal Office