THE EMPLOYMENT TRIBUNALS

Claimant : Mr E. Kosumi

Respondent: London United Busways Limited

REASONS FOR THE JUDGMENT

A: BACKGROUND

1. By presentation of a claim form to this Tribunal received on 24 Sept 2018, the Claimant brought a claim for unfair dismissal against the Respondent. The Claimant was employed as a service controller with the Respondent for over 18 years from 15th May 2000 to 25 June 2018.

2. The Respondent operates public transport bus services across central, west and south London.

3. I informed the parties that this hearing would be conducted in line with the overriding objective and their cooperation to further this was sought, which both duly gave, for which I was grateful.

4. Two witnesses gave evidence for and on behalf of the Respondent and also submitted witness statements as their evidence in chief. These were Ms Rahman, an operations manager with the Respondent, who conducted the disciplinary hearing and Mr Small, a general manager with the Respondent, who carried out the appeal hearing. The Claimant also gave evidence and submitted a witness statement as his evidence in chief. All witnesses gave evidence under oath or by making a solemn declaration. I took account of all witnesses' evidence in making my decision.

5. I also took account of the bundle of documentation which comprised 140 pages. In these written reasons, the numbers in brackets below refer to the pages of the bundle.

B: THE ISSUES

The parties had agreed the issues to be determined as follows in relation to unfair dismissal

1. Was there a potentially fair reason for the Claimant's dismissal (the Respondent relies on misconduct)?

1.1 Did the Respondent hold a genuine belief in the Claimant's gross misconduct?

1.2 Did the Respondent have reasonable grounds for that belief?

1.3 Was the Respondent's belief based on a reasonable investigation?

2. Did the Claimant's conduct amount to gross misconduct entitling the Respondent to summarily dismiss the Claimant?

3. Was the Respondent's decision to dismiss the Claimant within the band of reasonable responses available to the Respondent?

4. Did the Respondent follow a fair procedure in taking the decision to dismiss the Claimant? (The Claimant criticises the fact-finding investigation.)

C: FACTS/ FINDINGS OF FACTS

1. As a service controller, the Claimant monitored the frequency of the bus services to ensure maintenance of correct timings. The Claimant was the primary contact for bus drivers through the radios on their buses. The drivers would need to regularly speak to controllers to report problems. As Ms Rahman stated, the relationship between drivers and controllers was therefore important.

2. The Claimant's employment was governed by a contract of employment dated 14th April 2000, which itself was subject to various policies and procedures of the Respondent. The disciplinary policy (28) stated that "(a) no disciplinary action will be taken against an employee unless the case has been fully investigated (b) disciplinary action should be taken without unnecessary delay and (c) at every formal stage in the procedure the employee will be advised and given all relevant details of the complaint.

3. The Respondent had reserved the right (30) to summary dismiss employees for gross misconduct/ gross negligence. Two examples of gross misconduct were "insulting behaviour, conduct violating common decency, assault or attempted assault directed towards company employees" and "sexual or racial harassment."

4 Between January to March 2018, four employees of the Respondent submitted complaints about the Claimant's attitude and demeanour towards them.

5. On 13th April 2018, Mr Nakum filed a report (79) relating to an incident which occurred either on 14th or 15 March 2018. The occurrence report (79) started by referring to an incident which took place 14 days before when due to a black cab

demonstration, everything was running late. Mr Nakum reported that when the Claimant asked why he was running late, Mr Nakum explained that there was a black cab demonstration. The Claimant allegedly responded by saying that this was because of "fucking Indians and paki cab drivers disturbing the traffic." Mr Nakum reported this to another service controller, Barry Cavanagh. Mr Nakum reported in the occurrence report that he had asked Mr Cavanagh to have a word with the Claimant. According to the occurrence report, Mr Cavanagh came back with nothing so Mr Nakum had a word with the Claimant himself. Mr Nakum reported that he informed the Claimant that the comment had disgusted him (80). Mr Nakum stated that he would let this one go this time but, he would report it if this happened again.

6. In the tribunal hearing, this incident which took place towards the end of February/beginning of March was referred to as the "First Incident". It should be noted that the Claimant always denied that the First Incident took place, both during the Respondent's disciplinary procedure and at the tribunal hearing.

7. Mr Nakum's occurrence report went on to refer to an incident which took place on either 14th or 15th March 2018.There was a delay on the 94 bus route due to roadworks. Mr Nakum was explaining this to other drivers. The Claimant then allegedly said that" that must be bloody Indian labourers who put the cones down there." Mr Nakum, of Indian ethnicity, said that he could not sleep that night as a result of the comments made. At the tribunal hearing this incident was referred to as the "Second Incident." It should again be noted that the Claimant denied that the Second Incident took place both during the Respondent's disciplinary procedure and at the tribunal hearing.

8. Mr Nakum said that this made him feel angry and uncomfortable and he therefore had decided to file his occurrence report.

9. Ms Rahman stated that such language which the Claimant had allegedly used was not common acceptable or tolerated by the Respondent.

Investigation

10. A Mr Cooper then carried out an initial investigation. Tis investigation, referred to as a fact-finding interview, took place on 21 May 2018. There was therefore a delay of approximately five weeks since the date of Mr Nakum's occurrence report. Ms Rahman stated that this investigation was not a good one and had been criticised at the disciplinary hearing.

11 It was clear from the notes of the interview (81) that the Claimant was not aware of the reason for the meeting of 21 May 2018. When Mr Cooper read from the occurrence report relating to the First Incident, the Claimant could not recall the incident. He neither could recall any conversation relating to the Second Incident. The notes clearly showed that the Claimant had not been forewarned of this meeting and of the nature of the discussions.

12. In cross-examination of Mr Small, he stated that it was good practice for employees to not suffer unreasonable delay in relation to allegations put to them. He also stated that it was not always the case that an employee would be forewarned of

an investigation meeting. It was not in fact that common, Mr Small stated, for employees to be told.

13. In cross examination of Ms Rahman, she stated that the delay relating to the incidents which allegedly took place between January to March 2018 was unacceptable for which a fact finding investigation was also carried out. She had raised the issue of the delay with the relevant managers and formal action had been taken against them. It is for this reason that she had dismissed these allegations.

14. I make the following findings: –

a. By commencing the investigation meeting approximately five weeks after Mr Nakum had lodged his occurrence report, there was a delay in investigating the First and Second Incidents. This was contrary to the Respondent's own policy which states that disciplinary action should be taken without unnecessary delay.
b. The ACAS code of conduct (in the Introduction) requires employers to deal with issues promptly. A five week delay was not prompt.
c. The Claimant was not informed of the nature of the investigation meeting of 21st May before his attendance.
d. The ACAS code of conduct (paragraphs 5 to 8) on establishing the facts of each case does not expressly state that the employee must be informed beforehand. This process is focusing upon the collation of evidence.
e. As Mr Small stated, it is not always the case that an employee is informed of the reason before a fact finding meeting takes place.

15. A Mr Smullen, who was described by the Claimant in cross examination as unreliable, and who had been given a final written warning for his own conduct, was interviewed on 22 May 2018. Ms Munns interviewed Mr Smullen. Mr Smullen stated that Mr Nakum and the Claimant had a problem that day. They were having a heated debate; then the Claimant "went into racist mode type of thing". Mr Smullen stated that the terms used related to "Indians and pakis" (85). When Ms Munns asked if Mr Smullen was sure that the Claimant had used these terms, Mr Smullen said yes. Mr Smullen also stated that he was aware that Mr Nakum had spoken to Mr Cavanagh about previous incidents and "it seems to be ongoing. It also seems everyone knows about it."

16. As part of the fact finding investigation, Mr Cavanagh was interviewed by Ms Munns on 23 May 2018. Mr Cavanagh said that he was stopped by Mr Nakum who asked him to have a word with Claimant about some remarks and jokes which Mr Nakum did not find funny. Mr Cavanagh stated (87) that he spoke to the Claimant and asking him to stop doing it. The report stated that the Claimant replied with a nonchalant shrug. Mr Nakum saw Mr Cavanagh 10 days later thanking him but said he was expecting an apology from the Claimant which had not been received. On 13 June 2018, Mr Cavanagh's report was amended to delete the reference to a nonchalant shrug as Mr Cavanagh said he had not used this word. Mr Cavanagh stated that the Claimant had acknowledged him, however.

17. In the disciplinary hearing (99) Mr Cavanagh stated that Mr Nakum and himself had had a conversation "on the same night or the next" and Mr Cavanagh told Mr

Nakum that he had passed the message on to the Claimant to which Mr Nakum thanked him for. Mr Nakum had a further conversation with Mr Cavanagh a week or 10 days later.

18. In relation to Mr Nakum, it was not disputed that there was no written record of his allegation other than his occurrence report. In cross examination, Ms Rahman stated that Mr Nakum said that he had been spoken to but there were no written records to reflect this. This is the reason why she invited him to the disciplinary meeting. It was accepted by the Respondent that not interviewing Mr Nakum at this stage was a defect in the investigation process.

19. On 31 May 2018, Mr Holloway was interviewed by Ms Munns. When asked if he had heard the Claimant use the word and Indians, Mr Holloway said that he had not really heard the Claimant say this. Mr Holloway stated that the Claimant was guilty of trying to make a laugh but his command of the English language was not good and sometimes this came across wrong. It was not the type of term that the Claimant would use, however.

20. In relation to the Claimant's command of the English language, it was put to the Claimant in cross examination that the Claimant was not actually saying that he had been misinterpreted but he was saying that the alleged comments were not made by him. Therefore English being his second language was irrelevant. The Claimant accepted this position.

Disciplinary Meeting

21. On 18 June 2018, Ms Munns wrote to the Claimant (90) requiring him to attend a disciplinary hearing. The charges were unsatisfactory conduct to include: –

(a) Inappropriate discriminatory comments to a member of staff (relating to Mr Nakum's grievance); and
(b) An unacceptable attitude and demeanour to other members of staff (Ms Rahman dismissed this charge at the disciplinary hearing because of the delay).

22. The Claimant was informed of his right to be accompanied. He was also informed that if the charge against him were found to be proven, this could result in the termination of his employment. Copies of all the evidence were included with the letter.

23 Prior to the disciplinary hearing, Ms Rahman received the Claimant's personal file, complaints from the other bus drivers for the period between Januarys to March 2018, Mr Nakum's occurrence report and the interviews of the Claimant, Mr Smullen, Mr Cavanagh and Mr Holloway together with the clarification statement of Mr Cavanagh.

24. The disciplinary hearing took place on 19 June 2019. Because of the time lapse, the charge of unsatisfactory conduct for the Claimant's attitude and demeanour towards other members of staff was dropped. Mr Nakum complaint was considered by Ms Rahman on the basis that Mr Nakum had raised this within a month of the allegations occurring and the allegations related to race discrimination which Ms Raman found to be serious and should be addressed notwithstanding the delay. There were no interview notes of Mr Nakum because none had been carried out during the

investigation and this was a point which the Respondent accepted as a deficiency in the investigation process. Ms Rahman adjourned the disciplinary hearing to allow Mr Nakum to attend with his own representative. The meeting was reconvened later that day with Mr Nakum in attendance. Ms Rahman also called Mr Smullen, Mr Holloway and Mr Cavanagh to attend a reconvened disciplinary hearing on 25th June 2018 to enable the Claimant and his representative to ask questions to these witnesses. This was done by Ms Rahman as she explained in giving evidence that she had concerns with the investigation.

25. The delay was partly caused by the delay in Mr Nakum reporting the incidents. The First Incident took place towards the end of February/beginning of March and the Second Incident took place around 14 March. Mr Nakum did not report this until 13 April 2018. In the occurrence report, Mr Nakum explained the reason for the delay as he had first reported this to Mr Cavanagh and had asked to speak to the Claimant. He had expected an apology from the Claimant. When this did not happen, he then spoke to the Claimant informing him that if it happened again he would report the matter. When the Second Incident occurred, he reported the matter.

26. Mr Hanafi explained at the disciplinary hearing (93) that the union elections were also a partial cause for the delay in Mr Nakum submitting his grievance.

27. In relation to Mr Holloway, it was his evidence that he did not hear the alleged comments and had said that he was up and moving around. During cross examination, Ms Rahman drew a distinction between Mr Holloway saying he had not heard the offensive words and him not saying that these words had not been said.

28... During the cross-examination of Ms Rahman, she was cross examined on the Claimant not being suspended given the serious allegations against him. There was no evidence on file in relation to suspension. Ms Rahman stated that this was just one of the issues in relation to the investigation.

29. It was accepted by the Claimant that Mr Nakum had had no motive for him to hold a grudge against the Claimant.

30. I make the following findings –
a. There was a defect in the investigation in that Mr Nakum should have been interviewed during the investigation period carried out by Ms Munn. By Ms Rahman adjourning the disciplinary hearing and then adjourning to enable Mr Nakum to attend, I find that this defect was remedied. In looking at the procedure carried out by an employer during a dismissal, it is necessary to consider whether the procedure was fair overall in spite of any deficiencies at the early stage. An employer may be able to make up for procedural defects during the dismissal stage by remedying an earlier defect. I find that this is what occurred in this case. The defect of not interviewing Mr Nakum was remedied at the disciplinary hearing.

b. There was a prolonged delay between the date of Mr Nakum ‘s occurrence report and the investigations which commenced on 21st May and then the delay in holding the disciplinary meeting on 19th June ; such a delay could not be remedied. I find,

however, that notwithstanding this delay, no great prejudice had been caused to the Claimant as a result. It was the Claimant's position that the First Incident and the Second Incident had never occurred and this position continued throughout the disciplinary hearing. The passage of time had not affected the Claimant's ability to recall his version of events; according to the Claimant , the First Incident and the Second Incident just had not happened.

c. Part of the delay, was due to the late reporting by Mr Nakum and the trade union elections which was not in the Respondent's control.

d. Based upon the evidence of Mr Smullen and Mr Cavanagh, Ms Rahman had a genuine belief that the Claimant was guilty of misconduct on reasonable grounds. Mr Smullen said that he had heard the offensive words. Mr Cavanagh confirmed that Mr Nakum had first asked if Mr Cavanagh could speak to the Claimant as he did not find the jokes funny. Mr Cavanagh then spoke to the Claimant. Mr Nakum then saw Mr Cavanagh a week or 10 days later thanking him but stating that he had expected an apology. At the tribunal hearing, during the cross examination of Ms Rahman, Ms Crew suggested that Mr Nakum did not raise the First Incident with Mr Cavanagh until the Second Incident happened and that Mr Cavanagh was on holiday during the first three weeks of March.

I find that based upon Mr Cavanagh's report (87), on a balance of probabilities Mr Nakum had spoken to him on two occasions. Because Mr Cavanagh was on holiday during the first 2 weeks of March did not mean that this did not happen as Mr Nakum was not specific as to when exactly he had spoken to Mr Cavanagh.

e. Ms Rahman had reasonable grounds upon which to base her belief that the Claimant was guilty of misconduct. These grounds included the evidence of both Mr Smullen and Mr Cavanagh and Mr Nakum's occurrence report.

f. The investigation carried out by Ms Munn was not a reasonable investigation because of the delay, Mr Nakum not being interviewed and both Ms Rahman and Mr Small confirmed that no thought had been given to suspending the Claimant. During cross examination, Ms Rahman was questioned on the reason for the delay. Ms Rahman stated that she did not ask her managers this question but action had been taken against those managers who did investigate. Ms Rahman's actions of inviting Mr Nakum to the disciplinary hearing and inviting other witnesses to the reconvened hearing of 25th June had helped to remedy some (but not all) of the defects caused by Ms Munn in the investigation. I find, however, that the defects in the flawed investigation carried out in May, had been sufficiently remedied so as to convert the flawed investigation into a reasonable investigation as a result of the actions taken by Ms Rahman. All attendees at the disciplinary hearing were given the opportunity to ask questions of all those present.

g. It was not disputed between the parties that prior to the disciplinary hearing, the Claimant had been informed of the disciplinary case to answer in writing in line with the ACAS code of conduct.

31. By letter dated 25th June 2018 (112), Ms Rahman informed the Claimant that he would be summarily dismissed for gross misconduct. She referred to the First Incident. She did not accept the Claimant's point that he could have been misinterpreted n the basis that he had been working for the Respondent for 16 years. In her view, the Claimant would be aware that the insult "Paki" was a racist term and the term "Indian" as used in the context which he allegedly did, would cause offence

32. In cross examination ,Ms Rahman stated that the reason for the dismissal was because of the First Incident. She would not have dismissed for the Second Incident alone. She found the First Incident to constitute gross misconduct. In Ms Rahman's witness statement she referred to the Claimant's long service but stated that his record was not good. He had been previously warned about his attitude and demeanour to staff. At the time of dismissal, however, it was not in dispute that the Claimant had a clean disciplinary record. Ms Rahman stated in cross examination that she had considered his long service and she did look at the Claimant's past record because the Respondent always looked at an employee's record. She stated that her decision to dismiss, however, was because of the alleged racial comments made.

33. I find that Ms Rahman's decision to dismiss based on an allegation of racial comments being used fell within the band of reasonable responses and a response which a reasonable employer would also have taken notwithstanding the long service and the clean disciplinary record. I further find that it fell within the band of reasonable responses to look at the Claimant's past record. Ms Rahman explained and I accepted this explanation that the Claimant's past record was not the reason for her decision to dismiss; it was the First Incident which resulted in the dismissal. This, I found, to be a reasonable response.

The Appeal

34. The Claimant requested an appeal to Ms Rahman's decision on the basis of the disputed evidence on the 27th June 2018 (113).

35. By letter dated 5th July 2018, Mr Small invited the Claimant to an appeal hearing to take place on 13 July 2018 (114). The Claimant was reminded of his right to a trade union representative.

36. During cross examination of Mr Small at the tribunal hearing, Mr Small stated that there were clear failures at the Respondent in relation to delay, not investigating sufficiently by interviewing Mr Nakum and not considering whether or not to suspend the Claimant. It was Mr Small's view, however, that the "comprehensive disciplinary hearing" rectified the errors. Further, the Claimant had exercised his right of appeal. He upheld the dismissal because the earlier failures were not sufficient issues in themselves to overturn the disciplinary decision. Separate, formal corrective action was taken against the managers involved. In cross examination, Mr Small stated that everyone mentioned in the report should have been interviewed at the investigation stage. He also stated that neither the lack of interviews nor the delay were raised by the Claimant in the appeal. It was Mr Small's view that although not acceptable, the delay had not affected judgement.

37. In relation to Mr Smullen, it was put to Mr Small in cross examination that Mr Smullen was unreliable. Mr Small stated that this had not been raised with Mr Small.

He said that it was Mr Smullen's evidence that he had not been listening to most of the conversation but he "zeroed in" when he heard words which were out of place.

38. In Mr Small's appeal letter dated 13th July (130), he commented as follows which is worthy of quoting at length:-

"The fact finding element in this case was far from ideal and certainly did nothing to enhance their reputations of those responsible. Whilst the investigation was initially hindered by the length of time it took Driver Nakum to submit his report it did not excuse the amount of time that it took to carry out the fact finding investigation into such a serious allegation……. I am of the opinion that this allegation should probably have resulted in your suspension pending a full investigation. I have looked at length as to whether the deficiencies of the fact-finding investigation render the investigation as not fit for purpose as it is incumbent of company representatives to ensure that such investigations are thorough. Should an investigation be deemed not fit for purpose, appeal panel is well within its rights to either dismiss the case or send it away to be reheard. After much deliberation I am of the opinion that this case has one saving grace that will prevent me from taking this course of action and that is the disciplinary enquiry itself that took place on 25th June. It is my opinion that Ms Rahman carried out a full and diligent investigation that heard evidence from all individuals implicated; it is my opinion that this investigation both satisfied the required investigation criteria and enabled her to make a balanced and informed decision."

39. In the cross examination of the Claimant, it was put to the Claimant that Mr Small accepted that the delay was unacceptable. Notwithstanding the delay, the delay had not impacted upon the Claimant's evidence as the evidence of the Claimant was that the First and Second Incident did not happen. Mr Nuttman put it the Claimant that the Claimant had not been prejudiced by the delay as a result as the Claimant's position would have been the same namely that the incidents never happened. The Claimant stated that he did not know how he was affected by the delay but that he had been unfairly dismissed.

40. I make the following findings: –
a. Mr Small noted the defects during the investigation stage and found these defects to be far from ideal. Mr Small decided that the steps taken by Ms Rahman at the disciplinary hearing had remedied the defects.

b. It is necessary to look at the disciplinary procedure as a whole, in spite of any deficiencies at the early stage. Notwithstanding the early deficiencies, by Ms Rahman carrying out corrective measures at the disciplinary hearing, a procedure had been carried out which was one which was fair and one which, in the circumstances, a reasonable employer would also have carried out;

c. In applying the test of whether the dismissal is fair or unfair and whether it is one which falls within the band of reasonable responses, the test to be applied is not one which I believe to be reasonable or unreasonable but the test is whether the Respondent acted within the band of reasonable responses. I find that it fell within the band of reasonable responses for Mr Small to conclude that the earlier defects had been remedied by the disciplinary hearing.

d. Mr Small stated that he agreed with Ms Rahman that on a balance of probabilities, it was more likely than not that the Claimant did make the alleged statements. Given the information before Mr Small and the questions raised at the appeal hearing, this decision fell within the band of reasonable responses.

e. As Mr Small stated the delay was not acceptable. However based upon the Claimant's position that the incidents just did not happen, it is difficult to see any great prejudice to the Claimant on the basis that he was consistent throughout the disciplinary hearing from May (namely, the investigation stage) to July (namely, the appeal stage) that the incidents just did not happen.

41. A Mr De Souza, another bus driver, was invited to the hearing by the Claimant as his witness. The Claimant was represented by Mr Leavey of Unite. At the appeal hearing, Mr Leavey questioned Mr De Souza in relation to the occurrence report written by Mr Nakum. At the appeal hearing, Mr De Souza stated (120) that he had seen a draft of the occurrence report. Mr Nakum had spoken to him about it. Mr De Souza said that Mr Nakum had informed him that the Claimant was always using "stiff language like Indians and that." Mr De Souza stated that he asked Mr Nakum to speak to the Claimant or put it in a report. Mr Nakum informed Mr De Souza that he had already spoken to Mr Cavanagh. Mr De Souza informed Mr Nakum that he could have written the report better and so, amendments were made to the report. As a union rep of 16 years, Mr De Souza had helped members write reports if the member had first wrote a draft. It was the Claimant's evidence that at the appeal hearing, Mr De Souza stated that in relation to Mr Nakum's draft report, there was no mention of the words "fucking" or "Paki". The actual occurrence report (79) submitted contained these words .Mr De Souza said that it was highly probable that the report had been re-written by a union representative before being submitted.

42. Mr De Souza further stated at the appeal meeting that Mr Nakum had informed him that the Claimant had done this to him before and he was not going to take it anymore. When asked whether Mr De Souza believed Mr Nakum when he told him what had happened, Mr De Souza stated that knowing the Claimant and the way that he talked to him (Mr De Souza), this was "bus driver" talk. Mr De Souza stated that maybe Mr Nakum had exaggerated a bit.

43. In cross examination, Mr Small stated that what he had taken into account was the occurrence report put before him whether or not this was different to the draft which Mr De Souza had seen.

44. In the cross examination of the Claimant, it was put to the Claimant that Mr De Souza's comment that this is the way the Claimant was and it was "bus driver talk" in effect corroborated the point that the Claimant had used language like this before which reflected Mr Nakum's comment that he was no longer going to take this anymore.

45. When the Claimant was questioned by Mr Small at the appeal hearing, the Claimant stated that he had nothing to apologise for. When asked by Mr Small

whether he accepted that he may have said something that Mr Nakum could have been offended by, the Claimant responded "quite possibly yes".

46. In relation to the decision to dismiss, in cross examination, Mr Small stated that in his opinion dismissal was an appropriate sanction. He had considered the Claimant's long service which was referred to in his witness statement but not in his appeal letter, for which he did not know why. Mr Small acknowledged that the Claimant had a clean record, which again were not referred to in his appeal letter. He explained in cross examination that the Claimant's long service and there being no live sanctions would not have swayed him away from dismissal. He stated that the reason for referring to the historic allegations was because the Claimant had been spoken to in the past and he should have been more wary of his interactions.

47 I make the following findings:-
a. By upholding the decision to dismiss and not being swayed by the long service or no live sanctions but taking into account the matter that the Claimant had been spoken to in the past, fell within the band of reasonable responses.

b. Taking into account the occurrence report of Mr Nakum, the fact that the parties accepted that there had been no previous issue between Mr Nakum and the Claimant, the statements of Mr Smullen and Mr Cavanagh who corroborated the point that something had been said, Mr De Souza's comments that Mr Nakum said that the Claimant had done this before and that he was not going to take it anymore and Mr De Souza's reference to the manner in which the Claimant spoke and this being "bus drivers' talk," I find that, on a balance of probability, some comment had been made. The Respondent, both at the disciplinary hearing and at the appeal hearing, had been presented with the information which pointed to the Claimant making a comment similar to the alleged comments. Therefore responding in the way the Respondent did given the evidence before it, fell within the band of reasonable responses.

D: SUBMISSIONS

I took account of the very helpful submissions of both Ms Crew for the Claimant and Mr Nuttman for the Respondent in coming to my decision and I summarise the key submissions as follows: –

Ms Crew submissions

1. It was accepted that under S 98 (2) ERA, conduct was the potentially fair reason for dismissal.

2. Applying the Burchell test namely, was there a genuine belief based upon reasonable grounds based on a reasonable investigation, there may have been a genuine belief but no reasonable grounds. The Claimant denied that the comments were made.

3. The Respondent does not have reasonable grounds because of the delay. There were 2 periods of delay:-

(1) From when the incident took place to when the occurrence report was lodged, namely from 1st March to 13 April. ;and

(2) Mr. Nakum's delay in reporting this and then this being investigated, namely from 13 April to 21 May.

Then, there was a further a period of delay up to 8th June, namely the date of the letter inviting the Claimant to a disciplinary meeting.

4. There were no reasonable grounds for the following reasons :-

(1) When Mr Nakum said he raised it with Mr Cavanagh, Mr Cavanagh was on leave.

(2) There was no good explanation for the delay.

(3) The delay had affected the witnesses recollection as to what had happened.

(4) It was not two people's words against one as Mr Holloway was also in the room and it was his evidence that he had not heard anything.

(5) Mr Smullen was not a reliable individual. It was not disputed that Mr Smullen had not paid attention to the whole conversation.

(6) The only consistent person was the Claimant. Mr Nakum was not consistent. He presented to Mr. De Souza a different account from the actual occurrence report lodged. The Claimant had been consistent throughout the disciplinary proceedings by always denying that he had made these comments.

For these reasons, Ms Crew submitted that there were no reasonable grounds for the Respondent to sustain its belief that the Claimant was guilty of misconduct.

5. In relation to whether the investigation was reasonable at the time of forming that belief on those grounds, Ms Crew submitted that it was not a reasonable investigation for the following reasons:-

(1): The Respondent's Disciplinary Policy (28) and the ACAS Code of Practice Disciplinary and Grievance Procedures 2015 states that there should be no delay. No fact finding had been carried out with Mr Nakum during the investigation stage.

(2) When the Claimant was called into the investigation meeting, he did not know what this related to. He was thus ambushed at the investigation stage, The Claimant did not know what he was walking into so could not properly respond. This position lasted until 8th June 2018 when he was invited to the disciplinary hearing.

(3)Another procedural issue was the statement of Mr. Cavanagh, which had not been checked. Mr Cavanagh retracted the point that he had said that the Claimant had made a nonchalant hug. He had not made this comment. This was not trivial as a "nonchalant hug" implied that the Claimant did not care.

(4) Mr Small said suspension was not even considered. This showed that the Respondent was not taking these matters seriously.

(5) At the disciplinary hearing, when the defects were remedied, it was too late. The damage had been done and there was no fair procedure.

Therefore, in summary, even though there may have been a genuine belief, there were no reasonable grounds upon which to sustain that belief and at the time of forming that belief on those grounds, it had not carried out as much investigation into the matter as was reasonable in the circumstances.

6. In relation to whether this was a fair dismissal under s 98 (4) ,Employment Rights Act 1996, Ms Crew submitted as follows:-

(1) The Claimant had a clean record. Neither the dismissal nor the appeal letter referred to the long service or the clean record. The dismissal was not reasonable because the historic allegations had been taken into account .The Claimant had a clean disciplinary record but both Ms. Rahman and Mr. Small relied on historic allegations.

(2) In relation to sanctions, the various ones should have been expressly set out. There was no weighing up of these factors

(3) The dismissal was outside the range of reasonable responses: As there was no dispute between the Claimant and Mr Nakum, a lesser sanction should have been considered.

4. On Contributory conduct/Polkey, Ms Crew submitted that there was no contributory conduct. The Claimant had been consistent that no comments had been made by him.

In relation to Ms Crew submissions, I accept that the Respondent had discharged the burden of demonstrating that the reason for the dismissal was conduct, a potentially fair reason. I accepted also that the Respondent had a genuine belief.

I did not accept Ms Crew's submissions that the Respondent did not have reasonable grounds and that the investigation was not reasonable. The Respondent had reasonable grounds on the basis of, inter alia, :-

- Mr Nakum's occurrence report,
- Mr Cavanagh's evidence that he had been spoken to twice (although precisely when this conversation took place were not clear) ,

- Mr Smullen's evidence,
- The evidence before the appeal panel, namely the Claimant, in responding to whether he may have made a comment , he responded by saying " quite possibly yes",
- There being no previous history or grudge between the Claimant and Mr Nakum,
- Mr De Souza telling the appeal panel that this is the way the Claimant spoke which was " bus driver talk",
- Mr Nakum telling Mr D Souza that this had happened before.

In relation to the investigation, there is no doubt that this was deficient at the outset. This had, however, been remedied in the disciplinary hearing and became a reasonable investigation by Ms Rahman giving all the witnesses an opportunity to question and be questioned. At the investigation meeting of 23rd May, it was clear that the Claimant had not been forewarned. By 8th June, however, he was aware of the case against him. This is so before any decision to dismiss had been taken by the Respondent. The Claimant was aware of the situation before 8th June as he had had a meeting with Mrs Munn before the 8th June (76) (although these minutes were unsatisfactory in that these were not dated). This meeting pre dated the 8th June, however as the letter of 8th June (90) referred to the meeting.

Had Ms Rahman not taken the steps which she did took, then the investigation would not have been a reasonable one. She converted an unreasonable one into a reasonable one.

In relation to whether or not dismissal was a reasonable response, I accepted that the reference to the long service and the historic allegations were not referred to in the disciplinary or appeal letters but were referred to in the witness statement of Ms Rahman and Mr Small. Taking into account all the circumstances and in particular the alleged incidents, I do not believe that the Respondent's decision to dismiss fell outside the band of reasonable responses notwithstanding the matter of such issues not being expressly referred to in the dismissal and appeal letters.

Mr Nuttman's Submissions

I summarise these as follows: –

1. The test for reasonable investigation was clarified by the Court of Appeal in **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**, who stated that an employer's investigation and disciplinary procedure is subject to the range of the reasonable responses test. As such, the test is, could it be said that no reasonable employer would have carried out the investigation and disciplinary hearing in the manner in which the Respondent did. This is a high test. The

test is whether no other reasonable employer would have done the same. It was submitted that in all the circumstances of the case, the Respondent's investigation and disciplinary process fell within that reasonable band. The First Incident was investigated in full. The Second Incident prompted Mr Nakum to raise his complaint about the First Incident.

2. If there was a defect in the investigation or the disciplinary hearing (which was not admitted by the Respondent), then it was submitted that the appeal remedied any such defect. In **Taylor v OCS Group Limited [2006] IRLR 613,** the Court of Appeal has held that it is not necessary to decide if an appeal hearing is a review or a rehearing to determine whether a procedural defect in an early disciplinary hearing can be remedied. What is important is that the procedure was fair overall.

3. If the Claimant was unfairly dismissed, then the Respondent contended that the Claimant would still have been dismissed in any event. The test to apply here was to assess the actions of the employer who was before the tribunal on the assumption that the employer would this time have acted fairly.

4. The Claimant contributed to his dismissal such that it would be just and equitable to reduce any compensation.

5. I accepted the submissions of Mr Nuttman that there was a genuine belief based on reasonable grounds and once remedied at the disciplinary hearing, the investigation was reasonable. Applying the case of **Taylor,** I considered whether the procedure as a whole was fair and concluded that once the steps taken by Ms Rahman at the disciplinary hearing were taken, looking at the procedure holistically, this was a fair procedure.

6. If I am wrong in my decision that the dismissal was fair , then having reviewed very carefully all the evidence before me and considering the evidence which was before the disciplinary hearing and the appeal hearing, applying Polky and taking into account contributory fault, any compensation awarded would be reduced by 100%.

E: LAW

1. S 98 (2) (b), Employment Rights Act 1996 ("ERA"): Conduct is a potentially fair reason for dismissal.

2. BHS v Burchell: This Tribunal applied the principles established in the case of **BHS v Burchell ([1980] ICR 303, [1978]** IRLR 379), a case relevant in establishing both the reason for dismissal, but also relevant to the question of whether it was reasonable for the Respondent to treat that reason as a sufficient reason to dismiss in the circumstances under s 98 (4), ERA.

Where the employer suspects misconduct, the **Burchell** test requires an employer to show that:-

(i) It had a genuine belief that the employee was guilty of misconduct;

(ii) It had in mind reasonable grounds upon which to sustain that belief; and

(ii) At the time of forming that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

The Tribunal noted that it is not a matter for an employer to conclusively prove the employee's misconduct; it is a matter for the employer to demonstrate that he had reasonable grounds for believing in the guilt.

3. Section 98 (4) , ERA :The Tribunal applied this section to the relevant findings of fact, namely:-

"*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."*

In making this determination by applying s 98 (4),ERA, the Tribunal had in mind the essence of the test to be applied; namely, it is not what the Tribunal believes to be reasonable or unreasonable, but the test is whether the Respondent acted within the band of reasonable responses: Iceland Frozen Foods v Jones ([1982], IRLR, 439,EAT), London Ambulance Service NHS Trust v Small ([2009] IRLR 563 CA) and Sarkar v West London Mental health NHS Trust ([2010] IRLR 508).

4. ACAS Code of Practice Disciplinary and Grievance Procedures 2015 (the "Code")

Introduction to the Code

Paragraph 4 of the Introduction states that disciplinary and grievance processes require issues to be dealt with fairly. This means (inter-alia) that

- Employers should deal with issues promptly and should not unreasonably delay meetings,
- Employers should carry out necessary investigations to establish the facts of the case
- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.

Paragraphs 5 to 8 relate to the procedure for establishing the facts of each case. Paragraph 5 requires investigations of potential disciplinary matters to be carried out without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigation meeting with the employee before proceeding to any disciplinary hearing. In others the investigation stage will be the collation of evidence by the employer for use at any disciplinary hearing.

Paragraphs nine and 10 relate to informing the employee of the problem. Paragraph 9 states that if it is decided that there is a disciplinary case to answer, then the employee should be notified of this in writing.

F: CONCLUSIONS

1. Was there a potentially fair reason for the Claimant's dismissal (the Respondent relies on misconduct)?

I am satisfied that the Respondent has discharged the burden of showing the reason for the dismissal which is conduct, a potentially fair reason.

1.1 Did the Respondent hold a genuine belief in the Claimant's gross misconduct?

I conclude that the Respondent did hold a genuine belief in the claimant's gross misconduct.

1.2 Did the Respondent have reasonable grounds for that belief?

I conclude that the Respondent did have reasonable grounds for its belief based, inter-alia, on the occurrence report of Mr Nakum, Mr Cavanagh's evidence Mr Smullen's evidence ,comments made by Mr De Souza and the Claimant himself at the appeal

hearing ("quite possibly yes") and there being no previous history or acrimony between the Claimant and Mr Nakum.

1.3 Was the Respondent's belief based on a reasonable investigation?

I conclude that for the reasons I have already outlined, the investigation carried out between May and June by Ms Munn had defects including those revolving around delay, failure to interview Mr Nakum, failure to consider whether or not to suspend the Claimant an error in Mr Cavanagh's witness statement and the non dating of the minutes of the interview with the Claimant. Ms Rahman, however, took the steps at the disciplinary hearing to sufficiently remedy the defects. (Not all the defects could of course be remedied.

A disciplinary procedure needs to be looked at holistically .When considering this disciplinary procedure holistically, it was a reasonable investigation.

2. **Did the Claimant's conduct amount to gross misconduct entitling the Respondent to summarily dismiss the Claimant?**
Yes I conclude that the Respondent was entitled to summary dismiss the Claimant. It was defined as gross misconduct in the Respondent's policies. The alleged comments for which the Respondent had a genuine belief that they had been made , based upon reasonable grounds and eventually a reasonable investigation were serious and offensie.

3. Was the Respondent's decision to dismiss the Claimant within the band of reasonable responses available to the Respondent?

I conclude that the decision to dismiss fell within the band of reasonable responses because inter-alia, of the nature of the alleged incidents which were grave, notwithstanding the long service and clean disciplinary record.

4. **Did the Respondent follow a fair procedure in taking the decision to dismiss the Claimant? (The Claimant criticised the fact-finding investigation.)**

The procedure carried out had its flaws at the beginning as a result of the manner in which the investigation was conducted. When looking at the procedure holistically, and particularly in considering the defects remedied at the disciplinary hearing insofar as they were able to be remedied , a fair procedure had been followed.

It is for all the above reasons that I conclude that the Claimant's dismissal was fair.

EMPLOYMENT JUDGE SHARMA

9 April 2019

REASONS SIGNED BY EMPLOYMENT JUDGE ON

…….
REASONS SENT TO THE PARTIES ON

11 April 2019
.....
FOR SECRETARY OF THE TRIBUNALS