Case number: 26024712018

# EMPLOYMENT TRIBUNALS

**BETWEEN:**

| **Claimant** | | **Respondent** |
|---|---|---|
| | and | |
| Mr G Taylor | | Nottingham Trent University |

## At a Final Hearing

Held at: Nottingham On: 9 & 10 April 2019.

Before: Employment Judge Clark (Sitting Alone)

**REPRESENTATION**
**For the Claimant**: In Person
**For the Respondent**: Mr McBride, Solicitor

# RESERVED JUDGMENT

1. The claim of unauthorised deduction from wages **succeeds**. The Respondent shall pay to the Claimant the gross sum of £123.66.

2. The claim of unfair dismissal **fails and is dismissed**.

3. The claim of breach of contract **fails and is dismissed**

# REASONS

## 1. Introduction

1.1 This is a claim of unfair and wrongful dismissal. The Claimant also claims he suffered an unlawful deduction from wages in respect of the pay due between the date of the dismissal hearing and him receiving the outcome. The events relate to comments alleged to have been

made by the Claimant relating to an agency colleague and which were said to amount to harassment on racial grounds.

## 2. Issues

2.1 The issues were agreed as follows:-

a) What was the reason for dismissal and was it a potentially fair reason?

b) Did the Respondent act reasonably in relying on that reason as sufficient to dismiss the Claimant in accordance with s.98(4) of the Employment Rights Act 1996?

c) Prior to dismissal, was the Claimant guilty of a repudiatory breach of contract entitling the employer to terminate without notice?

d) Did the Claimant receive the wages that were properly due to him between the dismissal hearing and the effective date of termination?

## 3. Evidence

3.1 For the Claimant, I heard only from Mr Taylor himself. For the Respondent, I heard from Mr Berrington, the dismissing manger and Mr Woolley, the appeal manager. All witnesses adopted a written statement on oath and were questioned.

3.2 I received a bundle running to nearly 900 pages and considered those documents I was referred to.

3.3 Both parties made closing submissions, supplementing their written submissions.

## 4. FACTS

4.1 It is not the function of the tribunal to resolve each and every last dispute of fact between the parties but to make such findings as are necessary to determine the issues and to place them in their proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

*General Background*

4.2 The Respondent is a University. It is a large employer with well developed employment policies and internal HR support. I find that through its policy framework it seeks to promote equality and diversity. That aim is found in three published policy documents.

a) The policy on equality, diversity and inclusion - which sets a vision of creating a working environment characterised by inclusivity, respect and dignity and free from discrimination, harassment and bullying. It seeks to embed equality, diversity and dignity throughout the organisation and setting an obligation on individual members of staff to contribute to a safe and inclusive environment that celebrates diversity.

b) The dignity and respect policy - this sits alongside the equality, diversity and inclusion policy and potentially goes beyond both protected characteristics and the

forms of discrimination found within the Equality Act 2010. It requires employees to be aware of their behaviours and how they may be received by others. It identifies wider barriers to dignity and respect such as lad cultures. It notes how breach of the policy may lead to dismissal.

c) The disciplinary policy and procedure - which contains a list of conduct and behaviours likely to amount to gross misconduct. It includes serious disorderly conduct and serious breach of university policies which, of course, includes the equality and dignity policies. Beyond that, it also explicitly includes deliberate, malicious, unlawful or persistent breach of the Equality, Diversity and Inclusion Policy.

4.3 Since 18 August 2014 the Claimant has been employed by the Respondent as a security guard. He had previously been a police constable. The Respondent requires its staff to undergo training in equality and diversity on appointment. The Claimant underwent his training in October 2014.

4.4 The Respondent uses both directly employed staff and agency workers to provide its security functions. The agency it uses is known as Foremost Security.

4.5 On 11 July 2018, the Claimant attended a disciplinary hearing before Mr Berrington following which he was dismissed summarily. The Respondent treated the effective date of termination as 11 July 2018, although it is common ground that the Claimant was in fact paid on 12 July as well. The decision to dismiss was reserved and later communicated to Mr Taylor by letter dated 13 July 2018. I find he received news of his dismissal when he read the letter on the following morning, 14 July 2018. The reason for dismissal was in respect of the two allegations that had been put to him, namely:-

a) That on 24 March 2018 he breached the equality diversity and inclusion policy and the dignity and respect policy.

b) That he also demonstrated behaviour constituting serious disorderly conduct namely bullying and activing [sic] aggressively towards Leon Stewart, using explicit language

*The Incident*

4.6 On 24 March 2018, at around 5:20pm, there was a shift change handover between two teams of security staff at the Respondent's Brackenhurst Campus.

4.7 The outgoing team was made up of Nick Catton and his co-worker for the day, Leon Stewart. The incoming team was made up of the Claimant and his co-worker Jon Higgins. On the day itself, there had been an open day at Brackenhurst College. Three of the security staff were employees of the Respondent. Mr Stewart was an agency security guard provided by "Foremost". He and Mr Cotton had had a positive day working together well. Mr Stewart was not known to the other security staff before this day. The two teams met in the control room for the handover. It is a small room, small enough for one of the three to have had to remain standing in the doorway. That person was Mr Stewart.

4.8 The directly employed staff are all older, white males. Mr Stewart is a young black male. He was the youngest in the group by some measure. There was some small talk when the two teams met in the course of which, Mr Higgins said something to Mr Stewart along the lines of "do I know you?". Before he could reply, it is common ground that the Claimant made the first of a number of alleged comments that form the basis of this case.

a) According to Mr Stewart, the Claimant said ***"you'll have seen him on Crimewatch a few times".***

b) According to the Claimant, he said ***"probably seen him on Crimewatch Jon"***

4.9 There is a dispute as to whether the Claimant's comment was effectively repeated in a further comment.

a) Mr Stewart alleged he then said that "***Mr Higgins used to work in the prison service, no doubt you'd of ran into him there***".

b) Mr Taylor denies those words but does accept saying ***"that Mr Higgins used to work in the prison service"*** to try and explain his earlier comment.

4.10 It is a fact that Mr Higgins was previously a prison officer. It is also agreed that there was then some further discussion relating to amateur football and the Plainsman Public House in Mapperley, Nottingham. There is a dispute as to whether that topic of conversation led to a further comment from the Claimant to the effect of how expensive that pub was and what else Mr Stewart did to be able to afford to drink there. The inference drawn by Mr Stewart, no doubt informed by his impression of the earlier exchange, was that it was being suggested he must be involved in some sort of illegal activity to have the money to afford to visit that pub.

4.11 It is common ground that Mr Stewart took offence at the Claimant's comments and challenged him. He asked him what he meant by his comment about Crimewatch and alleges that the reply he received from Mr Taylor explicitly referenced a presumption that he would have been in trouble in the past and that he thought it was alright to mention it. Mr Taylor denies this response. It is clear, however, that Mr Stewart had interpreted the comment as a reference to his skin colour and a negative stereotype that a young black male will have been involved in crime or have been in prison.

4.12 There is another area of dispute in respect of whether the Claimant apologised.

a) Mr Stewart's subsequent written complaint says that the Claimant did not apologise. It states, "***instead of apologising.."*** and "I ***was adamant on getting an apology, however…***".

b) Conversely, the Claimant maintains he offered an apology on three occasions. He said that he said to him ***"I didn't mean anything by it, young man, it was an icebreaker type of comment, a joke, if I have offended you I am very very sorry"***. He says he later said, ***"I am sorry and nothing personal or malicious was meant by it"*** and finally, ***"please don't go there with the racist card fella, nothing racist was***

***meant by it, it was a joke and nothing more. With Jon's previous career and him saying do you know him, I jokingly said what I said. I have apologised profusely to you for offending you, I am not making any comments that are adverse towards you. Please don't think that"***. He also explained how he stood up from his seated position when making the last of those comments and extended his arms.

4.13 A final area of dispute is whether within those final exchanges, and in response to the accusation by Mr Stewart, the Claimant behaved in a way that the Respondent's policy identifies as serious disorderly conduct.

a) Mr Stewart's account is that the Claimant turned aggressive, shouting and using explicit language saying can't you take a fucking joke and threatened to end his opportunity to work at the Campus if he couldn't take a fucking joke.

b) Mr Taylor denies this. He does accept speaking over to say ***"if you can't accept my apologies then feel free to complain about me. My name is Garry Taylor"***

4.14 It is agreed that Mr Stewart made clear he would take matters further.

4.15 I will return to the findings made by the Respondent and, indeed, my own findings of what happened at this incident.

*The Subsequent Reporting of the Incident.*

4.16 The first party to raise matters was the Claimant himself. He texted his trade union representative the following day, 25 March. He wrote:-

> ***"hi Gavin….Need your advice on an incident with a black foremost officer yesterday at brackenhurst.***

4.17 On 26 March, Mr Taylor set out his account of the incident in an email to his manager, Colin Storer. [78] That email would become his written statement of his account of the incident.

4.18 At some point between the weekend of 31 March and 1 April 2018, Mr Stewart made his own written statement about the incident to his own employer, Foremost Security. On 4 April, the operations and account director forwarded that statement in an email to the Respondent's head of security, Tim Trafford [65]. There was some criticism raised, both in the internal process and in the hearing before me, that the delay in Mr Stewart reporting his concerns should weigh heavily in the Claimant's favour when resolving any disputes of fact between the two accounts. I did not find that very persuasive as, it seems, neither did the Respondent's managers dealing with it. Firstly, there was little in dispute about the core of the incident, secondly, it is clear that the complainant's complaint was raised with his own employer some time before the email was forwarded to Mr Trafford. In any event, the delay is a matter of days.

*The Respondent's Initial Response*

4.19 The Respondent immediately resolved to investigate the matter. A meeting took place on 6 April with the complainant to explore the account given in his email. The Respondent adopts a process whereby an individual manager takes the lead on deciding whether, and if so how, disciplinary matters proceed. That manager is referred to as the commissioning manager. In this case, the complainant Mr Stewart restated his allegations. The result of that initial interview was that the Respondent's commissioning manager decided this was a matter that should go to a formal disciplinary hearing.

4.20 The question of whether to suspend the Claimant was considered by that manager and HR. The decision to suspend the Claimant was taken by the head of HR operations. He was suspended with effect from 20 April 2018. I find the apparent delay in suspending him is simply because this is the date that the Claimant would otherwise have returned from a period of annual leave. The decision whether to suspend or not seems to have been influenced by the fact that the Claimant was already in the midst of an investigation for another disciplinary matter which would in due course lead to a written warning. I find that other matter did not have any further bearing at all on this matter.

*The Formal Investigation*

4.21 The Respondent's Maintenance and Facilities Manager, Stephen Swift, was appointed to investigate the allegations. His report is detailed and well set out [27-142].

4.22 The commissioning manger set the terms of reference for Mr Swift's investigation. They were:-

a) To establish the relevant facts in relation to what occurred in 24 March 2018 from the perspective of the complainant (Mr Stewart) the Respondent (Mr Taylor) and any relevant witnesses.

b) To establish if the allegations are substantiated.

c) To understand and consider the role of security officer in relation to the allegations.

d) To consider any action that may have been taken prior to this investigation.

e) To conclude whether there is sufficient evidence for the matter to proceed under the University's disciplinary policy.

4.23 Mr Swift set about his investigation. He interviewed the complainant, Mr Stewart on 16 April in which Mr Stewart consistently repeated his account. He interviewed Tim Trafford, the Claimant's manager. The reason for this interview taking place was because Mr Swift had learned of some suggestion there had recently been some prior reason to speak with the Claimant in the context of race and alleged inappropriate comments and language. It seems whatever the concerns raised by others, it was not sufficient to proceed to a disciplinary investigation and was dealt with informally. I have nothing further to substantiate this and both disregard it myself, and find that it was not material to any of the decisions taken thereafter by the employer. Mr Swift spoke with Nicholas Catton, one of the other security guards on duty that day [89] who also provided a follow up email. He confirmed the essence

of the account given by Mr Stewart. In doing so he described an exchange of heated words although couldn't remember if Mr Stewart referred to Mr Taylor being racist. He described feeling shocked when he heard the comments, he described how Mr Taylor became irate, raised his voice and swore at Mr Stewart and threatened his future work at the university. He confirmed Mr Taylor saying the words "if you want to make a fucking complaint my name is Garry Taylor". He could not recall the detail of discussions about the Plainsman Public House nor could he recall Mr Taylor offering an apology to Mr Stewart. The manner in which this interview was conducted would face criticism in the subsequent disciplinary hearing and before me. In short it was that the evidence was elicited by asking leading questions in the nature of "do you recall X being said?". There clearly were some questions posed in that manner. Equally, however, the interview commenced with open questions in which Mr Catton was asked "In your words, tell me what happened when handing over?" in response to which, Mr Catton set out the exchange relating to Mr Stewart being known to Mr Higgins from being in prison.

4.24 Mr Swift interviewed Mr Taylor on 27 April [96]. Mr Taylor dealt with the issue of previous discussions as being inappropriate, he explained the reason for his text to his trade union officer referring to Mr Stewart as "black foremost officer" because it was in the context of his allegation of him being racist. He gave his account of the events by reading from his 26 March email. His case was advanced by his trade union representative, Gavin Holt, who submitted a detailed written submission within which he conceded that as soon as Mr Taylor realised his comments had caused offence he set about an apology and acknowledged his actions were wrong.

4.25 In addition to the interviews undertaken, Mr Swift also had before him Mr Stewart's complaint and Mr Taylor's text and email to his TU representative and his supervisor.

4.26 It can be seen that the investigation interviewed three of the four individuals present in that room on the day. Mr Swift did not contact Jon Higgins. This approach was taken on HR advice because very soon after the incident, Mr Higgins had himself been dismissed for unrelated matters. Nothing more was known to the investigator or the disciplining officer at the time and they simply acted on the advice that he was not available and should not be contacted as his evidence was unreliable. It subsequently became known that the reason for his dismissal was a dishonesty matter which formed the basis of the conclusion that his evidence would be unreliable. The Claimant however did obtain an account from Mr Higgins of his recollection which was eventually made available to the employer and before me. His brief account was that ***"he didn't' remember Mr Taylor swearing but he may have done after the chap left the office"***. He said how ***"he wouldn't say [Mr Taylor] was aggressive annoyed at what the office was suggesting and he tried to apologise at least twice as I remember"***. Otherwise he said how he did not pay much attention to it as it seemed to be a storm in a tea cup. His evidence was given in response to a request to say what happened. His account did not give any evidence at all on the actual comments alleged by Mr Taylor.

4.27 Having gathered the evidence he had, Mr Swift formed his conclusions on what happened. In due course he would find the incident to have happened largely as Mr Stewart reported it. I find he approached his fact finding in a methodical manner, setting out a table

with detailed analysis of the evidence before him as a technique to weigh up any competing accounts or conflicting evidence. He also sought advice on whether the situation breached the Equality, Diversity and Inclusion Policy. In that regard he took advice from a senior HR adviser, Claire Bell, who I find had the organisational lead on equality and diversity and was regarded as the internal expert. She confirmed that such actions as were alleged would be a breach of the policy. In particular, they could amount to harassment related to race.

4.28 Mr Swift concluded that there was sufficient evidence to substantiate the facts of both allegations and that the matter should be referred to a disciplinary hearing.

*Grievance Complaint*

4.29 Prior to the disciplinary hearing, Mr Taylor raised a series of questions about the investigation report which were considered as part of Mr Berrington's disciplinary hearing. On 26 June, Mr Taylor raised a cross complaint against Mr Stewart alleging he had been guilty of racial harassment in his own complaint. In particular, Mr Taylor said how he found it offensive that Mr Stewart's complaint had made reference to Mr Higgins as a "Scouse Gentleman". Mr Trafford, the Head of Security was appointed to investigate it. He concluded on 2 July that there was no case and dismissed the grievance. He concluded that the phrase appeared once in the sentence "I was standing there and there was a Scouse Gentleman with Garry, he said I looked slightly familiar". He concluded this was in lieu of knowing the names of all of those present and was in the context of identifying the parties as he described the events within a formal complaint. He found there were no grounds for it reasonably causing any offence and dismissed Mr Taylor's complaint.

*Disciplinary Hearing*

4.30 The Claimant was formally invited to a disciplinary hearing conducted by Mr Berrington. He was a senior manager without any line management responsibility for the Claimant. The hearing was eventually held on 11 July 2018 after the initial date of 25 June was postponed at the Claimant's request. The Claimant was again represented by his trade union representative, Mr Holt. Mr Swift attended to be questioned on his investigation report.

4.31 I find Mr Berrington explored with the Claimant the allegations in detail and considered the accounts given in the investigation report by the various witnesses. He received and considered detailed written submissions from Mr Holt including a number of ACAS and similar guidance publications and an updated version of Mr Swift's table analysing the evidence. A substantial part of the submission was in asserting where findings of fact either could not be made or ought to be made in the Claimant's favour.

4.32 I find Mr Berrington dismissed from his consideration any of the previous concerns hinted at in respect of any previous incidents concerning Mr Taylor and focused on the evidence of the incident on 24 March 2018. One area of focus in the hearing was whether the allegations were capable of amounting to harassment. I am satisfied Mr Berrington concerned himself with the internal guidance on what constituted harassment in reaching his own conclusions independent of those arrived at by Mr Swift.

4.33 I find Mr Berrington considered and weighed the difference in timing of the competing contemporaneous accounts between Mr Taylor and Mr Stewart and concluded that the delay in Mr Stewart's complaint being received did not diminish his account. Similarly, I find he considered the fairness of the interview with Mr Catton and how his answers had been elicited. He concluded the process was conducted fairly.

4.34 He declined to take into account case law on the legal definition of harassment as was advanced by Mr Holt as new areas of the Claimant's case. In short, it was a contention that what was being alleged did not meet the legal definition of harassment because there was no intention on Mr Taylor's part to cause offence.

4.35 Mr Berrington found both allegations were made out. He found the Claimant did not apologise. In reaching his conclusions he was aware of the brief evidence from Mr Higgins but did not give this any weight due to the circumstances of him no longer being employed by the Respondent.

4.36 Mr Berrington reserved his decision to consider the notes and evidence and reflect on the issues. His conclusion was that the allegations were made out and that this warranted a sanction of summary dismissal. He reached that conclusion based on the facts of this incident as he found them, and not based on totting up any other disciplinary sanctions. The outcome was set out in a letter dated 13 July 2018. The letter gave the Claimant a right of appeal.

*Appeal*

4.37 The Claimant lodged an appeal. His grounds were summarised at the start of the appeal hearing as being:-

a) That the allegations did not satisfy the definition of harassment under s.26 of the Equality Act 2010, that no facts found showing the intention of the Claimant, that it was a one off incident and did not create an environment, that it was not reasonable for it to have the proscribed effect.

b) The delay in Mr Stewart's complaint.

c) That it was not reasonable to conclude the disorderly conduct was made out, that in any event, the challenge by Mr Stewart implied Mr Taylor was racist and this would be a trigger to put him on the defensive and change his behaviour. Mr Taylor's response was a natural reaction to a damaging, unwarranted accusation. Both parties seemed to give as good as they got.

4.38 The Appeal was heard on 8 August 2018 by another senior manager, Mr Wolley. He was independent of the security team and had no line management or other responsibility for the Claimant or the individuals concerned. He adopted an appeal which was in the nature of a review. In other words, he was not concerned with reaching his own conclusions on the underlying evidence, although he naturally formed some views, but with whether the decision of Berrington was itself reasonably open to him. That was in the context of the appeal

process which was, in a formal sense, based on three areas of challenge in respect of procedure, a disproportionate penalty and an unreasonable decision being reached.

4.39 In respect of all three grounds, Mr Wooley concluded the decisions of Mr Berrington were reasonably open to him. He was satisfied the procedure was fair. In particular, there was some concession from Mr Holt in respect of not using the evidence of Mr Higgins although Mr Holt thought it would have been helpful. Mr Wooley concluded that it was not for him to retry the sanction, but to consider whether the sanction of summary dismissal was properly available or was disproportionate. He concluded it was not a disproportionate sanction in view of the allegations being made out. Finally, looking at whether the decision was unreasonable in all the circumstances, he reviewed the facts as found, he was satisfied that the complainant's interpretation was itself reasonable and not an oversensitive reaction. He reviewed the issue with Mr Higgins' evidence being disregarded a felt that was reasonable, He reviewed the stance adopted in respect of the legal test of harassment, in respect of which he concluded the allegations did breach the Respondent's policy. Overall, he did not uphold the appeal which was dismissed in an outcome letter dated 14 August 2018.

*Findings in respect of the incident itself*

4.40 So far, my findings have focused on the chronology and conclusions reached by the employer. For the purpose of the breach of contract claim and, if appropriate, any compensatory adjustments that might arise to any award of compensation, I must reach my own principal findings on the events of 24 March 2018.

4.41 The starting point, as with any allegation of harassment, is context. I find the following factors to be relevant to the context:-

a) It is common ground that a comment was made that made reference to Crimewatch. It was made in a very small room where all could hear what the others said.

b) There was a lack of any past relationship between Mr Taylor and Mr Stewart.

c) The Claimant's initial comment and subsequent exchanges were triggered by a question from Mr Higgins to the effect of "do I know you?". Mr Taylor's comment was a response to that question.

d) It was readily apparent that Mr Stewart was both the only black person in the room, and clearly the youngest of the four. In that respect, I firmly reject Mr Taylor's contention that he "could not know his race as he had never met him before".

4.42 Whatever the actual words used in the initial comment, both versions have no explicit or overt reference to race and I must consider the factors that point towards the inference drawn by Mr Stewart and those that point towards the innocent explanation advanced by the Claimant. I remind myself that I have not heard from Mr Stewart or the other's present, but I am able to reach a conclusion for two reasons. One is that the accounts differ only in the finer detail. The other is that the nature of the innocent explanation advanced by the

Claimant has changed and evolved over time. I regret to have to say that I found that changing explanation undermined the credibility of Mr Taylor's account for the following reasons:-

a) One explanation was that he had said what he said as if they were Mr Stewart's words spoken in answer to Mr Higgins' question and thereby to suggest it was Mr Higgins who might have been seen on Crimewatch due to his past career as a prison officer. That simply did not make sense. It does not fit with the words Mr Taylor accepts he used, it contains a state of knowledge that Mr Stewart could not have known about Mr Higgins being a past prison officer and, in any event, Mr Taylor accepted Mr Higgins had not in fact been on Crimewatch. He had not even appeared on television. If that was an attempt at a light hearted joke, it would have failed to make sense on many levels.

b) A further, different, explanation was given in an attempt to distance the implications of the comment from the inference that the only people on Crimewatch were criminals when in fact the programme included victims. I found this was clearly an after the event attempt to innocently explain the comment. There was absolutely no basis for anyone in the room believing any other had been a victim of crime and this explanation simply added to the collapse of credibility. It, too, would have failed to be understood for the same reasons as set out in the previous account.

c) Finally, it was suggested what was said was not said *to* Mr Stewart but was some sort of private conversation between the Claimant and Mr Higgins. Mr Taylor put great emphasis on the fact his comment was in the vocative, ending with "Jon" and it was, therefore, not for Mr Stewart's ears. Yet this was entirely at odds with his account that what he said was a light-hearted ice breaker. Further, I find that any comment made in that small room would inevitably have been heard by the others present and this meant any comment that was made in a way to exclude one of those others present, but which would inevitably be heard by him, would only serve to aggravate the likely hurt and offence that would be caused.

4.43 I find Mr Higgins' past occupation as a prison officer is likely to have been the prompt for Mr Taylor's comments, although that was a fact known only to Mr Taylor, Mr Higgins and possibly Mr Catton but not Mr Stewart. I am satisfied Mr Taylor felt the comments were a legitimate light-hearted joke and made them deliberately in that way. It may well be that he meant no offence by it and that it genuinely was felt by him to be in the nature of any personal "leg pulling" as might be said about someone's dress sense or the football team they support. But what was said was not at all analogous to that. I am satisfied that Mr Taylor did not think through the implications of his initial comments but it remains my conclusion that these comments would not have been said had Mr Stewart been white. I do accept that there exists in some a stereotype view of young black males and criminal activity. I am entirely satisfied that the only facts Mr Taylor knew about Mr Stewart at the moment of the initial comment was that he was a young black male, Mr Higgins used to be a prison officer and the negative stereotype was firmly at play in his "joke". However much he may have intended his comments to be in gest, it was a joke between him and Mr Hoggins and not only was it at Mr

Stewart's expense but the only reasonable inference to draw is that it related to his protected characteristic of his race.

4.44 Those conclusions then set the scene for what then followed. Against those initial findings I am satisfied Mr Taylor did also say, as the complainant's complaint alleged, that he will have seen him in prison. Mr Taylor sometimes denied this and sometimes accepted something like this was said in order to explain his initial comment. Again, such a comment does not make any sense unless there is some context in which the two might have met in prison. I don't accept there was anything known by Mr Taylor or Mr Higgins to lead either to reasonably conclude the Claimant had ***actually*** been in prison, or even that he had previously worked in prisons. Of course, if that had been the case, Mr Taylor would not have described the comment as a light hearted joke as it would have been factual information to answer Mr Higgins' question "do I know you". In the absence of any factual explanation and for the comment to be a "joke", the only viable explanation is the fact that Mr Stewart met the conditions of the stereotype Mr Taylor was using as the foundation of the joke. Again, I am satisfied that this comment would not have been said if the agency had provided a white worker that day.

4.45 I am satisfied that the later comments alleged of Mr Taylor were in fact made as by then the conversation had moved on. I am satisfied that the account given by Mr Stewart is accurate save to the extent that I do not regard Mr Taylor's reference to the expense of drinking in the Plainsman Pub as being an implicit reference to Mr Stewart having funds from illegal activities but, against his earlier comments, it is perhaps understandable why Mr Stewart interpreted something more into the comment when he reflected on what had happened to him and wrote out his complaint.

4.46 It is common ground that Mr Stewart then challenged Mr Taylor. I am satisfied that Mr Taylor was in fact annoyed by the accusation he had been racially offensive to Mr Stewart. I find it more likely than not that he did raise his voice and stand up in a situation that would be interpreted as aggressive and confrontational, rather than apologetic and conciliatory. I am satisfied that the words "I am sorry" were in fact used by Mr Taylor but the nature and tone of the exchange in which they were used was not an apology. I am satisfied that what was said by Mr Taylor was in the nature of "sorry you feel like that" in the course of him raising his voice and using offensive language which form the disorderly conduct. I note Mr Holt defended this behaviour on the basis that anyone would react angrily to being accused of being racist. I am satisfied that Mr Taylor did challenge Mr Stewart's reaction in terms of "don't play the race card" which itself suggests there was no true apology and serves to undermine hurt that Mr Stewart felt. I am also satisfied that reference was made to Mr Stewart undermining his future opportunities of working at the Brackenhurst campus.

## 5. Discussion and Conclusions on the Issues

*Unfair Dismissal*

5.1 Section 98 of the **Employment Rights Act 1996** ("the 1996 Act") states, so far as relevant:

> ***"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—***
>
> ***(a) the reason (or, if more than one, the principal reason) for the dismissal, and***
>
> ***(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.***
>
> ***(2) A reason falls within this subsection if it—***
>
> ***(b) relates to the conduct of the employee,***
>
> ***(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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."***

5.2 As to how that test is to be applied generally, I have had regard to the observations of Browne-Wilkinson P in **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** and Mummery LJ in **Post Office v Foley [2000] IRLR 827**

5.3 The approach to be adopted by the tribunal where an employee is dismissed on the ground that the employer had entertained a suspicion or belief of misconduct by the employee was explained in **British Home Stores Ltd v Burchell [1978] IRLR 314**. In summary, what is needed is a genuine belief in the misconduct; reasonable grounds upon which to sustain that belief and that it was based on having carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

5.4 In **Sainsbury's Supermarkets Ltd v Mr P J Hitt [2002] EWCA Civ 1588** Mummery LJ made clear that it is necessary to apply the objective range of reasonable responses test not only to the decisions reached, but also the steps taken to reach those decisions.

5.5 In considering the relevant law, I should add that much of the attack on the allegations during the internal process and, indeed, before me was to focus on whether the matters alleged against the Claimant were capable of amounting to discriminatory harassment as found in s.26 of the Equality Act 2010. In the course of the hearing I repeatedly stated how, whilst that might be informative, it was not the legal test I had to apply. In any event, whilst the Respondent's internal policies replicated the bulk of the statutory definition of harassment, they did not include the reasonableness test found in s.26(4) of the 2010 Act. Ultimately, the issue remains whether the Respondent had reasonable grounds for believing the Claimant was guilty of conduct it had previously made clear was not to be tolerated in its workplace. It does not matter for those purposes whether the legal test of discriminatory harassment is made out although for what it adds, I would conclude that it does, and that whilst the

prohibited environment was not intended, it was reasonable that the unwanted conduct it had the prohibited effect on Mr Stewart.

The Reason for Dismissal

5.6 I am satisfied that there were no ulterior motives behind the dismissal. The reason was exclusively the finding that the facts of the two allegations were made out and genuinely believed by Mr Berrington. In terms of the legal test, those factual reasons do clearly amount to "conduct" as a potentially fair reason for dismissal. To that extent the Respondent has discharged its burden under s.98(1) of the 1996 Act.

Reasonableness

5.7 Any reasonable employer is entitled treat a complaint received from an employee of a partner organisation as seriously as one from its own employees. This is particularly so where the matter appeared to be something which, if established, was significantly out of line with its own internal policy aims on equality, inclusion and dignity and a serious breach of discipline.

5.8 Its decision to investigate in the first place was within the range of reasonable responses as was the appointment of an independent investigator. Mr Swift's report is, in my judgment, thorough and he reached his initial conclusions on a reasoned basis having regard to the evidence before him. Before concluding whether this approach and his conclusions were within, or outside, the range of reasonable responses I need to consider three aspects of his investigation that are challenged.

a) The first is the form of questioning used by Mr swift when interviewing Nick Catton. The challenge is that he was not asked open questions and was led to give the evidence he did. I have found that leading questions were used by Mr Swift but I am equally satisfied that such an approach does not take the investigation outside the range of reasonable responses for two reasons. Firstly, there is no rule of law that prevents such questions being put in that form in the context of an employer's own internal enquiry but it is a factor to consider in its context. At its highest, the answers obtained through leading questions may not carry the same weight as if they had been freely given. In an extreme case, it might be something which took a case outside the range of reasonable responses but I am not at all convinced this is such a case. The second factor is that by the time any closed questions were asked, Mr Catton had already responded to open questions in which he freely gave a summary of the account which was itself consistent with Mr Stewarts complaint and what would then become the matters put in closed questioning. Those questions seem to have done no more than clarify the detail of the evidence already given.

b) The second is in not interviewing Mr Higgins. This was not Mr Swift's decision but that of an HR adviser but, of course, he adopted that approach. Mr Swift accepted that advice and proceeded without knowing either what Mr Higgins might have said or why such evidence would be unreliable. It was only afterwards that those involved in the disciplinary learned that Mr Higgins had been dismissed for dishonesty which was

known to the HR adviser who made the decision. I do not know the detail of Mr Higgins dishonesty but I note that the Claimant's representative acknowledged the logic of that at the time his evidence was rejected. In the event, although the investigator did not pursue the witness, the evidence of the witness was available before the disciplinary. The issue is whether the decision not to pursue an ex-employee was within or without the range of reasonable responses. I am satisfied this was a step open to a reasonable employer. Even then, the evidence of Mr Higgins was available by the time of the disciplinary hearing and disregarded. I find its substance to be limited. It is supportive of an apology being made and does not suggest an aggressive response. Conversely, it seems to support some annoyance and may support the allegation of swearing. Significantly, it says nothing about the actual comments between Mr Taylor and Mr Stewart themselves. If I have concluded that not obtaining or taking into account this evidence was material to a procedural unfairness, it would also be my conclusion that having it in before the decision maker would not have made any difference to the outcome.

c) The third was exploring with Mr Trafford the suggestion that there had been a previous occasion when he had had to speak to Mr Trafford about comments he had made which could have been construed as racist. I am satisfied that enquiry came to nothing and was not taken into account by Mr Berrington when he reached his own conclusions. However, the fact that there was such a suggestion that came to the attention of the investigator clearly meant this was a relevant line of enquiry for the investigation to take. I am satisfied any reasonable employer in that situation would act reasonably in investigating it further.

5.9 I have also considered the effect of the investigator reaching his own conclusions on the disputed facts. This is not an area that was challenged by Mr Taylor's representative during the hearings nor is it explicitly something he advances when representing himself before me but I have considered whether there is material unfairness in this approach as it could deprive an employee of the opportunity to influence the findings of fact. Having identified the potential, I have concluded it does not lead to an unfairness. I remind myself it is for the employer to determine its own procedure and, in organisations such as this, that will usually be in consultation with the staff side. The process does charge the investigator with fact finding which could be more than simply "gathering" the facts, but in resolving disputes of fact. If that were the be all and end all of the fact finding process, it means those disputes of fact are resolved at a stage before the procedural safeguards of the disciplinary hearing are engaged. However, I am satisfied that this is not what happened in practice. It is necessary to reach initial conclusions in order to decide whether an investigation should proceed to a disciplinary or not. To deny the investigator of some role in reaching initial conclusions would be to deny an innocent employee from being exculpated at that stage. Further, the investigator set out in detail the evidence for and against each disputed point which was available for the disciplinary decision maker to consider and reach his own conclusions. There clearly remained a stage at the disciplinary hearing where it was open to Mr Berrington to reach different conclusions. His role was not simply to receive Mr Swift's findings, but to decide whether to accept them or not in the face of the employee's submissions and any other

evidence put before him. Those submissions explicitly challenge the findings of fact and the basis of any findings and I am satisfied it was a live issue for Mr Berrington to determine whether he accepted the evidence gathered in the investigation. It was not a rubber stamp of the swift conclusions. The process did not fall outside the range of reasonable responses of a reasonable employer.

5.10 Overall, I have concluded that the investigation, and therefore the basis for the belief in misconduct, remains within the range of reasonableness.

5.11 The final area of consideration is whether Mr Berrington's decision to dismiss fell within the range of reasonable responses. A significant factor in this issue is the extent of the employer's stated policy provisions and basic training to staff. All employers are required to implement the law so far as it affects the interactions between employees and between its employees and others. An employer without a structured policy may be in difficulties in how it responds to issues of harassment in the workplace unless the issue is clear cut. In this case, the employer has adopted a very clear and detailed policy approach to how it expects its employees to behave with each other, students and third parties. It goes further than the strict requirements of the Equality Act 2010 and engages with dignity and inclusion, with factors that might not be protected characteristics and with behaviours which might be disruptive to the policy objective, even though they may not necessarily engage statutory torts. It supports the implementation of the policy by training all members of staff and enforces it through explicit reference in its disciplinary policy. Against that background, a reasonable employer is entitled to take a strict approach to breaches. I am satisfied that when Mr Berrington weighed his options of what he was satisfied had happened against that policy expectation, he acted within the range of reasonable responses available to a reasonable employer when he decided that the Claimant was guilty of gross misconduct and his employment should terminate summarily.

5.12 If I am wrong in my conclusions of procedural fairness, and there is unfairness arising in any of these matters, there would have to be consideration of what effect it has on the outcome had they not occurred. I cannot see that these would have made any difference at all. The employer was still faced with the evidence of corroboration from Mr Catton and had the limited admissions by the Claimant. I cannot conclude that interviewing Mr Trafford added to the findings made against the Claimant any more than not exploring the evidence of Mr Higgins would have led to a different conclusion. I cannot see any realistic scope for the conclusions being materially different. The only possible difference is whether there could have been a different conclusion in respect of whether the Claimant apologised and even then I am not satisfied that would have made any difference to the course matters in fact took and would not have resulted in a different outcome. Consequently, if there was procedural failure in any of the areas I have rejected, I would conclude that the prospects of a different outcome were nil. A 100% reduction would therefore apply.

5.13 In any event, in the case of any finding of unfair dismissal, I would have to consider the Claimant's own contributory conduct generally, and to the extent it contributed to the dismissal. There is a substantial overlap between my conclusions in respect of wrongful dismissal and contributory conduct. Both are based on my own conclusions of what

happened, as opposed to those of the employer. Contributory conduct falls to be considered in two statutory provisions. They are section 126(6) of the 1996 Act in respect of compensatory award where the conduct must cause or contribute to the dismissal. The other is s.122(2), in respect of any basic award. The tests are subtly different although it will be rare when the approach to each results in a different outcome. This is a case where the culpability of the Claimant's actions give rise to a legitimate finding of contributory conduct. I do not regard the subtle nature of the racial slur to mitigate the seriousness. It was a joke at Mr Stewarts expense and related to his race. The fact it did not use racially derogatory terms did not mean the racial slur was not clear. The response to being challenged only served to aggravate the offence. The seriousness of the conduct led to dismissal and there was next to no option on the part of the Respondent not to dismiss. I am satisfied a reduction of 100% would have applied to both awards had there been any unfairness found.

*Wrongful Dismissal*

5.14 There is no dispute that the contract of employment entitled the Claimant to a period of notice of termination. In his case, the Claimant was dismissed summarily. That dismissal is therefore prima facie in breach of the contractual term as to notice unless that dismissal was itself in response to the Claimant's own repudiatory breach of contract. The legal burden therefore falls to the Respondent to show that there was a repudiatory breach of contract by the Claimant in order to avoid liability for what would otherwise be a breach of contract.

5.15 The only question before me, therefore, is whether the Respondent was entitled to dismiss without notice. If I am satisfied on the balance of probabilities that the Claimant was guilty of a repudiatory breach, his claim fails. It does not matter whether or not that misconduct, or the full nature or extent of it, was known to the Respondent at the time of dismissal (Boston Deep Sea Fishing And Ice Co V Ansell (1888) 39 ChD 339) as a result of which, I assess the conduct on the basis of the findings I made in the hearing before me, although in this case there is little to distinguish the evidence I have heard and that which the employer heard. If the Respondent fails to satisfy me of that breach, then the breach of contract claim succeeds in full.

5.16 The necessary conduct entitling the employer to dismiss summarily is usually conduct said to amount to gross misconduct. The classic statement of what constitutes gross misconduct is that of Lord Jauncey in Neary v Dean of Westminster [1999] IRLR 288 where it was said that the conduct in question: -

> ***'must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment'.***

5.17 It is therefore a matter for me to assess whether the allegations against the Claimant are, firstly, made out in fact such that I accept the conduct happened on the balance of probabilities (that is in contrast to whether the Respondent had a genuine and reasonable belief) and, where it is made out, that the nature and gravity is such as to fall within the ambit and meaning of gross misconduct.

5.18 In respect of the first of those two elements, it follows from my findings of fact that I am satisfied that the Claimant was guilty of the conduct as alleged. In particular, I am satisfied on the balance of probabilities that he did make comments aimed at Mr Stewart which were related to his race and had the effect of breaching the employer's own standards of equality and dignity in the workplace. I am further satisfied that his reaction to being challenged about those comments then led to a series of further comments which amounted to the disorderly conduct that the Respondent's disciplinary policy seeks to prohibit.

5.19 Turning to the second question, I have to determine whether this conduct was of a nature and gravity to amount to a fundamental breach on his part. The factors pointing against that conclusion are that at one level this was an ill-considered attempt at a joke, albeit a joke at Mr Stewart's expense and related to his race. It was not explicitly racially offensive and did not use offensive racial terms. The factors pointing towards that conclusion is that any offensive unwanted conduct relating to a person's race is a serious matter. That is all the more so as employers are expected to recognise their obligations in law and this employer has done that in the equality and dignity policy standards it has put in place, the means of enforcing those standards and the training given to all employees including the Claimant. Mr Taylor deliberately made the comments. Whilst it may not initially have been considered fully, it was not an inadvertent reference to race for which it may not have been reasonable for the recipient to take offence. In this case it was reasonable that Mr Stewart took offence. I have also considered where the issue of Mr Taylor's apology fits. An immediate apology ought to mitigate the effects event of such ill-judged comments as these but such apology as there was in this case was lost within an aggressive response to being challenged by Mr Stewart such that I do not accept it amounted to an apology at all. The nature of Mr Taylor's response to that challenge was to aggravate, rather than mitigate, his earlier comments.

5.20 This is not the most serious example one can imagine of the types of conduct that would breach the Respondent's equality policy but that is not the issue. It is not a trivial example either. The issue is whether the nature and gravity of the conduct as found is itself such that the employer should no longer be expected to retain the employee. In my judgment it is the presence of the clear policy aims which renders this conduct of a type that an employer "should no longer be expected to retain the employee". The fact it may not sit at the most serious end of the scale is negated by the underlying purpose of imposing these policy standards as a means of maintaining a minimum standard of behaviour and respect. For those reasons, I am satisfied that this does amount to conduct which amounts to a fundamental breach and which entitled the employer to terminate without notice. The claim for wrongful dismissal therefore fails.

*The Unauthorised Deduction from Wages*

5.21 The arrears of pay claim relates solely to the fact that the Respondent purported to terminate the Claimant's employment with effect from the date of the disciplinary hearing, 11 July 2018 although it seems he was in fact paid for 12 July as well. The parties agreed that his claim was for 2 days' pay. The decision to dismiss was not reached on the date of the hearing and was not communicated to him verbally at the time. The communication of that decision was by letter which I found the Claimant read on 14 July. The effective date of

termination under statute, and for that matter the date of termination at common law, is therefore 14 July 2018. The Claimant has not been paid his normal wages that were otherwise properly due for the intervening period. The shortfall is, in effect conceded by the Respondent and agreed by all to be 2 days. The gross wages that were otherwise due amount to £123.66 (based on an annual salary of £23,000 equating to a monthly gross salary of £1916.67 divided by 31 days in the month in which termination occurred)

EMPLOYMENT JUDGE R Clark

DATE 24 June 2019

JUDGMENT SENT TO THE PARTIES ON

……...……..

AND ENTERED IN THE REGISTER

……...……..
FOR SECRETARY OF THE TRIBUNALS