EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Lamonby	**v**	Solent University (Southampton)

Heard at: **Bristol (by video)** **On: 22 June 2020**

Before: **Employment Judge C H O'Rourke**

Appearances
For the Claimant: **Mr Gloag - counsel**
For the Respondent: **Ms Hollins - solicitor**

RESERVED JUDGMENT

The Claimant's claims of unfair dismissal and breach of contract in respect of notice pay, fail and are dismissed.

REASONS

Background and Issues

1. By a claim form dated 11 September 2019, the Claimant brought claims of unfair dismissal and breach of contract in respect of notice pay. He had been employed for approximately six years as a part-time associate lecturer by the Respondent University. Following allegations against him in late March 2019 that he had made comments of a racist nature, he was subject to disciplinary proceedings and subsequently dismissed, without notice, for gross misconduct, with effect 14 June 2019.

2. The issues in these claims were set out in a case management summary dated 11 May 2019, but I summarise them here, as follows, taking into account some attempt at the broadening of those issues at this hearing.

3. Unfair Dismissal

   3.1. It was not disputed that the reason relied upon by the Respondent was conduct, a potentially fair reason for dismissal.

3.2. The Claimant now contends that there had been failures of investigation, thus affecting whether or not the Respondent could have had a reasonable belief that he had carried out the alleged conduct.

3.3. The fairness of the procedure is also now, belatedly, challenged, in relation to the keeping of minutes of meetings, the calling of a witness and clarity of communication as to the decisions made.

3.4. The Claimant contends that dismissal was outside the range of reasonable responses.

3.5. In the event of a finding of unfair dismissal, the Respondent contends that the Claimant's actions contributed to his dismissal, which the Claimant does not accept.

3.6. The Respondent would also seek to rely on the *Polkey* principle, in the event of a finding of procedural unfairness.

4. Breach of Contract. As set out in the case management summary, this issue hinges on the outcome of the unfair dismissal claim.

5. Nature of Hearing. The parties had agreed, at the telephone case management hearing of 11 May 2020, to this claim being heard by video.

The Law

6. I reminded myself of s.98 of the Employment Rights Act and that when hearing a case of unfair dismissal, a Tribunal's powers are limited, specifically that I am not permitted to substitute my judgment for that of the employer. Rather, it is for me to say whether both the decision to dismiss (**Iceland Frozen Foods –v- Jones [1983] ICR 17 EAT)** and the way in which the investigation was conducted (**J Sainsbury Plc –v- Hitt [2003] ICR111 CA)** fell within the range of responses of the reasonable employer, in the circumstances in which the Respondent found itself. If the dismissal or the conduct of the investigation falls within the range, it is fair, if outside, then it is unfair. In a misconduct case such as this, I am guided by the case of **British Home Stores –v- Burchell [1980] ICR303 EAT** which sets out the well-known three-fold test, where the Tribunal must be satisfied that the employer held a genuine belief in the employee's guilt; that it had carried out a reasonable enquiry and that in consequence of that enquiry, it had reasonable grounds for holding that belief. The burden of proving fairness in this respect is neutral.

The Facts

7. I heard evidence from the Claimant and on his behalf, from Dr Mark Farwell, a former colleague and union representative (albeit that it was clear to me that Dr Farwell's evidence was not as to fact, but merely opinion on his part and I therefore do not consider it further). On behalf of the Respondent, I heard evidence from Professor Julie Hall, Deputy Vice Chancellor, who conducted the

disciplinary hearing and Mr Phil Cotton, the Chair of the Board of Governors, who heard the Claimant's appeal.

8. The Respondent is, self-evidently, a large employer with the appropriate managerial and administrative resources.

9. The Claimant's account of events and his views. Based on the Claimant's contemporaneous correspondence, a summary of what he said at the investigation meeting (but some elements subject to challenge), his claim form and his oral evidence at this hearing (reported here as quotes made without reference to page numbers), the Claimant gave the following account, upon which I comment as I consider appropriate:

   9.1. He had a meeting on 28 March 2019 (all dates hereafter 2019), with his course leader, a Dr Janet Bonar, in the university canteen/restaurant. The purpose of the '*first half'* of the meeting was to discuss the course content [Dr Bonar's email p32, immediately following the meeting, sets out that subject matter and that element of her email was not disputed by the Claimant]. The Claimant said that following that discussion, the conversation branched out into non-course-related matters, which he considered was therefore '*not in the workplace'*, but '*casual, in a public restaurant*'. He said that '*in a uni of course any kind of racist issue cannot be mentioned, however I would expect to be able to say things in a private conversation without you* (Dr Bonar) *taking such offence.'* [Claimant's email in response 32] This assertion of his is, I find, right at the outset, an entirely mistaken one. He was clearly having a professional meeting with his course leader, on university premises and the fact that members of the public may be (as he said) able to access the restaurant was neither here nor there. This was a workplace conversation, with a work colleague.

   9.2. During the 'second half' of the meeting, he and Dr Bonar made the following remarks (as subsequently recorded by him, or expanded on by him in subsequent evidence):

      9.2.1. He made '*comments that were generic in nature concerning* (his) *experience that people from Africa and some Eastern European countries were more likely to be environmentally disadvantaged due to not growing up in an area with engineering content. This was not directed at any individual and was intended as a general observation … in his experience, citizens of certain countries had become good at things due to high exposure, using an example of 'Germans being good at Engineering', as they are exposed to a high level of industry from an early stage in their lives'* [8 – claim form (obvious typos have been corrected)]. '*I have a soft spot for young black males. I do think that they are underprivileged and many without fathers etc. need all the help they can get. I don't agree that it is a level playing field yet* [his email 32]. At the subsequent investigation meeting, on 4 April, the 'working notes' record him as having said '*students from Africa, Lithuania had no basics in engineering. No family involved and no*

practice. In this country you watch your dad mend bike etc. These people need a bit of extra help', which comments he considered to be '*positive racist statement*(s)*'* [44]. It was submitted, at this hearing that these notes were inaccurate and insufficiently detailed [witness statement (ws) 15 & 16]. The Claimant agreed, in cross-examination that he had reviewed these notes, but asserted that he had '*never agreed them, as they were an inaccurate transcript'*. The notes were sent to him on 7 and 8 April [48 & 49], with a request that he confirm whether or not he was happy with them and stating that if he wished to make changes, he should do so using 'track changes', by '*end of the day'* 9 April. His only written response on that subject was to say, in an email of 8 April that (contrary to his assertions in his witness statement) '*the transcript of our conversation is very detailed, was it electronically recorded?'* (it wasn't). He said, in cross-examination that he had sent an email following the meeting to dispute the notes' contents, but the email he refers to was sent the same day as the meeting (4 April), before he had the notes and refers instead to alleged inaccuracies in Dr Bonar's statement [47]. There is no evidence whatsoever that he challenged the contents of the notes at that time and he had the opportunity, had he wished it, to take his own notes, or to have an accompanying companion do so [36, 38 & 43]. Nor did he subsequently challenge the accuracy of the notes in either his own letter of appeal, or in the subsequent further detailed letter of appeal, sent with the assistance of Dr Farwell [60-62], or in his claim form. I have no reason therefore to doubt that the notes are an accurate summary of the discussions at that meeting.

9.2.2. Dr Bonar '*reacted that* (these?) *statements amounted to being racial criticism'* [8].

9.2.3. On her telling him that she had a degree in Physics, he said that, in his '*experience, a capability in physics is a particular gift enjoyed by some Jewish people, Einstein was an example used.* (He) *asked Dr Bonar if she was Jewish'*, to which she '*did not respond well and she shouted that he was racist'* [8]. He stated that '*I believe that the Jewish are the cleverest people in the world. They are much maligned because of it. I asked if you were Jewish because of your ability with maths/physics etc. which is a specialty of theirs'* [32]*,* but '*admitted, in retrospect, that perhaps my informal conversation had been clumsy to enquire* (of) *her ethnicity'* [ws para. 7]. In cross-examination, he said that he '*was excited to think she might be one of them – excited to meet a Jewish physicist, who had been my heroes since boyhood.'* At the investigation meeting he referred to having worked in the film industry '*which is largely Jewish*' [44] and that (in reference to the Manhattan Project) '*they* (Jews) *have a special mind'* [45]. He considered that this and the other topics discussed did not justify him being called a racist, when they were '*something that could be*

discussed on an intellectual basis' [32]. In relation to that issue, he referred at the investigation meeting to '*Eskimos are good at fishing through ice and some people have preference for music. I am asking intellectual questions. Inherent knowledge, passed on by forbears, etc. It's questionable. It's an intellectual argument'* [45].

9.2.4. He '*was shocked by the reaction, as my comments were simply stating that, arising from my lifetime of experience, I have come to believe that certain nationalities have developed a higher level of skill in some areas. This is directly related to the level of exposure to criteria such as industry and education. This is not radical thinking; it is simply a view that reflects environmental privilege in general terms. A rather simple example of this view is an accepted stereotype of Germans being good engineers. This is well accepted in society and even appears in advertisements for German products (such as cars)'* [ws para.6].

9.2.5. *Dr Bonar flew into a rage, threw chairs about, shouting abuse at me and stormed out'* [ws 7]. He was challenged on this account at cross-examination, in particular to the reference to 'throwing chairs about', as he had not alleged this in his subsequent email to Dr Bonar, complaining of her behaviour [32], or at the investigation meeting. He agreed that he had not made such references and when it was put to him that this was an embellishment on his account, he said that '*I did say temper, but didn't mean throwing chairs, but shoving chairs, but don't see that as relevant.'* When further challenged that he had, nonetheless, considered it sufficiently relevant to include in his statement, he said that he had done so '*to illustrate one of her temper tantrums, which she suffers from'*. I find that this comment is a belated embellishment on his evidence (as he had had ample opportunity to make such allegation before), done to attempt to discredit Dr Bonar and which reflects poorly on his credibility.

9.2.6. In cross-examination, he was asked whether he might consider that black people might think it offensive that they might need (in his view) extra help and he said '*no, not just black people, also Lithuanians'* and when further asked whether white students might resent such extra help being given to them, he said '*I also helped Lithuanians'*.

9.2.7. The investigation meeting notes record that when asked about his '*soft spot for black males'*, he acknowledged that he did and that he had '*worked in Africa, Brunei, all over the world with these people. Perhaps it is inappropriate of me to say so but sometimes they need extra help'*. He stated that he '*been clumsy in what I've said. I did not mean to be racist and I admire Dr Bonar and I would like to make a profound apology to her …'* [44].

10. Correspondence following the Discussion of 28 March. As indicated above, Dr Bonar wrote to the Claimant, on the same day, very shortly after the meeting [32]. While the bulk of her email focused on their discussions about the Course, she said, at its conclusion '*Look forward to meeting you again to discuss this unit, on Thursday 4th April. I suggest that we will do more planning of engineering teaching if we do not discuss our wildly different views on race and national characteristics'* [32]. He responded, an hour or so later, stating that he was '*not used to being smacked down like a schoolboy and called a racist about something that should be discussed on an intellectual basis'.* As set out above, he then went on to refer to his '*soft spot for young black males'* and that the '*Jewish are the cleverest people on this world'* and that he considered the conversation private, which therefore obviated any possible offence [32]. When it was suggested that this response, when he knew that Dr Bonar had found his comments offensive and had been upset by them, repeating his views, was antagonistic, he said it was not, as he '*had been giving her my free time and I was very angry she had treated me like this.'* While he subsequently said that he wished to apologise to Dr Bonar, he agreed that this response of his was anything but.

11. Letter of Complaint from Dr Bonar. On the same day, a couple of hours after receiving the Claimant's email, Dr Bonar wrote to her line manager, referring to the earlier meeting, stating that she was '*horrified'* by the Claimant's views on race, which she considered '*abhorrent'*. She said that she felt '*concerned about our students being taught by someone with his entrenched racist views'* [34]. It was suggested by the Claimant, in this hearing that this email was sent purely in response to his earlier email, not the events of the meeting, with the implication, therefore that Dr Bonar was seeking some form of '*spiteful'* 'revenge' on him, rather than being really concerned about the discussions at the meeting. It is, I think, entirely possible that Dr Bonar may not have pursued this complaint had the Claimant not responded in the way he did to her first email. She may have been of the view that she might 'park' the events of the meeting, but perhaps continue to monitor the Claimant's behaviour in this respect, before, potentially, bringing any complaint. However, it is clear to me that the Claimant pre-empted any such thoughts on her part, by his obviously antagonistic response, reiterating his views on race/nationality/ethnicity, despite realising that they upset her. Dr Bonar was therefore perfectly entitled to have genuine concerns about the Claimant's behaviour, particularly as he was willing to commit his views to print and to report them accordingly. The Claimant was suspended from work on 1 April, being withdrawn from a class he was instructing, which he considered humiliating.

12. Investigation Report. On 16 April, following the investigation meeting, the investigating officer provided a report of his conclusions to Professor Hall. He stated that as well as meeting with the Claimant, he had met with Dr Bonar and seen all relevant email correspondence. He reported that the Claimant had not, at the investigation meeting, challenged Dr Bonar's account of the meeting, less the one point that he firmly denied that he had made any reference to 'DNA', as she had stated. (She had said, in her complaint email that the Claimant had '*said he felt sorry for black students, as they didn't have the heritage in their DNA to be able to do engineering'* [34]). The report concluded that the Claimant '*holds values counter to the University which presents a risk to the University, undermines the Solent Values of respect and inclusivity, has caused offence to a colleague and*

has the potential to adversely affect the student experience' and recommending that there was a disciplinary case to answer [51-52].

13. Disciplinary Hearing. The Claimant attended this hearing, accompanied by Dr Farwell, over two days, 28 May and 14 June. No notes were taken of the meeting because, Professor Hall stated, the Respondent's disciplinary procedure did not require it. This is clearly contrary to the advice contained in the relevant ACAS Code (and common sense) that written records should be kept of any formal meetings. Neither were notes taken by the Claimant or Dr Farwell. Professor Hall said that she had sight of the email correspondence and the investigation notes and report. She said that the Claimant admitted making the comments recorded against him, but denied that they were intended to cause offence and again offered to apologise to Dr Bonar. She said that despite this, he continued to make inappropriate comments during the hearing, referring to ethnic groups as '*they'* and to Jews having '*neurological differences'*. At the reconvened hearing, the Claimant presented documentary evidence, which he considered supported his views about nationality and race and the skills associated with them. Professor Hall said that in reaching her conclusion that the Claimant had committed gross misconduct and that dismissal was appropriate, she considered the following factors:

    13.1. That the Claimant did not fundamentally disagree with Dr Bonar's account of the meeting.

    13.2. He did not deny the reported comments, less the one in reference to DNA.

    13.3. That Dr Bonar had been upset by his comments.

    13.4. That during the investigation and disciplinary meeting the Claimant had not been contrite and while he considered that he had made a mistake, continued to state the '*sweeping generalisations about racial and ethnic groups'* he had previously.

    13.5. She considered that the Claimant did not understand that what he had said was offensive and inappropriate in the workplace and therefore she had no confidence he would not repeat this behaviour.

    13.6. She did not consider it necessary to accede to the Claimant's request to question Dr Bonar, as the principal facts were not in dispute and which constituted '*offensive generalisations and stereotypes'* based on race and nationality.

    13.7. She considered his length of service and '*unblemished'* disciplinary record, but decided that they did not mitigate his misconduct.

14. Professor Hall's Evidence. Professor Hall was questioned on the following matters:

    14.1. She accepted that she could not provide evidence as to whether or not the Claimant had undergone a formal induction, on first being employed by the

Respondent, to include training in equal opportunities and the 'Solent Values' [73]. She did, however, state that such policies were widely broadcast and displayed around the University and discussed at annual appraisals. In any event, in cross-examination of the Claimant, he said that he was aware of these documents existence, as they were well publicised, '*but hadn't read them, as it was a bit like asking a driver if he'd read the Highway Code'.* This indicates, to me, a somewhat arrogant approach by the Claimant to such guidance, when seen in the context of his own, somewhat fixed, views on matters of race and ethnicity.

14.2. She was challenged as to why the Claimant's statements about Germans being good engineers, as opposed to Africans, were unacceptable, when they seemed to be accurate and said that this was a stereotypical view, generalising a whole nation. She queried how the Claimant's comments about Lithuanians could have any basis in fact.

14.3. She was asked why she had not spoken to Dr Bonar and said that it '*was quite normal'* in such circumstances not to do so. When it was suggested therefore that she had simply taken Dr Bonar's complaint email at face value, she said that there had been little dispute about what was said. She also '*starkly'* contrasted the tone of Dr Bonar's initial email to that of the Claimant's response, which she found to be '*dramatic and rude'* (although it was pointed out to her that he had been shouted at by Dr Bonar and called a racist). She was also asked whether she had enquired as to the existence of any minutes or notes of the investigating officer's meeting with Dr Bonar and she said she hadn't, but knew it was not minuted.

14.4. When it was suggested that the Claimant was not being offensive in his comments about Jews, she said that this was, while '*positive stereotyping, still racism and a gross generalisation'*.

14.5. She did not agree that Dr Bonar's complaint arose purely from the Claimant's email to her, but instead '*more from her shock at the initial comments'*. (As noted above, I disagree on this emphasis, but don't consider it significant in any event.)

14.6. She said that the reason for removing the Claimant from his class, to suspend him, was that HR had advised such action, in order to protect Dr Bonar.

14.7. She did not agree that at the investigatory meeting that the Claimant was not being racist and was simply referring to his life experiences, as he accepted that he was describing his comments as clumsy and referred to '*these people'*.

14.8. When challenged that by this point, even though the Claimant wished to apologise, he couldn't, due to the nature of the process and likely criticism he would suffer for approaching Dr Bonas, she said she detected no true sense of contrition on his part.

14.9. When the Claimant's denial of the use of the term DNA and the discrepancy between whether he had referred to maths or physics in relation to Jews [45] was pointed out to her, she said that she didn't think either particularly material to her decision (in fact, the Claimant himself referred to both maths and physics, in this context). Nor did she consider the Claimant's use of the term 'environmental advantage' to be acceptable, again indicating a stereotypical generalisation. The potential use of the term DNA was '*not central'* to her decision, there being other factors to take into account.

14.10. She accepted, in the absence of notes of the disciplinary meeting that the only evidence of what occurred in that meeting was contained in her statement and her decision letter. She denied that that letter did not indicate proper assessment of the evidence, or exhibit intellectual rigour and made no precise findings, based on clear allegations. This issue was a major plank (at this hearing at least) of the Claimant's case. It is clear to me that neither the letter convening the hearing [53], nor the decision letter [56] were as clear as they could have been as to the charges and findings against the Claimant. The former simply said that the Claimant was accused of making '*comments to a colleague, Dr Janet Bonar which were potentially of a racist nature and in breach of the University's Behaviour at Work Policy and Solent Values'*, without specifying what those comments were, or which elements of the relevant policies had been breached. The latter simply repeated that charge and found that '*the comments you made to your colleague about her religious heritage and about student characteristics attributed to their race or country of origin were not appropriate and were in breach* (of the named policies)*, in particular inclusivity… and had the effect of creating an offensive environment for Dr Bonar and did not comply with the need for everyone to be treated at work with dignity and respect.'* It did not, however, set out precisely what comments he had been found to have made and how they breached the policies. This gap may have been filled had there been notes of the hearing, in which questions put to the Claimant and his answers would have been recorded, but there were none. My conclusion in respect of this matter is that regardless, the Claimant knew full well of what he was accused and had ample opportunity to answer those charges and I do so for the following reasons:

14.10.1. The Claimant did not say, in either his appeal or his claim to the Tribunal that he did not know the charges against him, indicating to me that the assertion he now makes is a belated and fabricated one. Instead, the whole tenor and emphasis of those documents is that there was '*no evidence, whatsoever, to substantiate the outrageous (false) allegations made by Janet Bonar against me …'* and that what he had said was not racist, but constituted free speech on intellectual issues.

14.10.2. While no notes were kept of the disciplinary hearing, there existed already notes of the investigation meeting and the contents of the prior email correspondence, setting out what Dr Bonar complained of and what the Claimant's views were on the events and issues in question. Further, I had no reason to doubt

Professor's Hall's evidence as to what was discussed at the disciplinary hearing. She gave clear and straightforward evidence and was willing to admit to either lapses of procedure on her part, or gaps in her knowledge. In contrast, I found the Claimant's evidence to be sometimes evasive, he several times having to be reminded to address directly questions put to him.

15. Appeal. As already mentioned, the Claimant appealed against the decision and that was heard by Mr Cotton, by way of review of the process adopted by Professor Hall. The main points of the appeal [61] could be summarised as follows:

    15.1. That the Claimant was unaware of the relevant policies. (As already found above, this was not the case.)

    15.2. That the investigation was insufficiently thorough and was pre-conceived, providing no evidence to support the false allegations against him.

    15.3. That the accusation of racism stemmed from '*weaponised hurt feelings'* and caused '*more outrage than the so-called racism itself'.*

    15.4. That he was not given the opportunity to '*face my accuser'* to '*challenge her veracity'*.

    15.5. That the sanction was outside the range of reasonable responses test, particularly bearing in mind his past good employment record.

    15.6. That his preferred outcome was to be reinstated and to have the penalty reduced to a written warning '*with a requirement to undertake awareness training'*.

16. The Appeal was heard on 5 August and not upheld [66], for the following reasons:

    16.1. The Claimant's behaviour was in breach of the relevant policies, of which he was aware. The breaches were not considered minor.

    16.2. He had admitted that his behaviour had fallen short of the policies' requirements, particularly in respect of the obligation to treat everyone with dignity and respect at work.

    16.3. He had not apologised to Dr Bonar. (While challenged in cross-examination that it would have been inappropriate for the Claimant to approach Dr Bonar, Mr Cotton said that the Claimant could have apologised at the outset.)

    16.4. Professor Hall had taken into account his '*previous unblemished'* employment record and his work with communities outside the University.

17. Mr Cotton gave (in summary) the following evidence:

    17.1. He saw no reason to have discussions with Professor Hall about her findings, or with Dr Bonar, as he had the complete bundle and had read it.

17.2. He had seen the investigation report and considered that it was not for him to re-open that process.

17.3. He saw no reason not to accept Dr Bonar's evidence as '*fact'*, without hearing from her, as the Claimant did not dispute the content of the conversations ('*his own email at page 32 damning him'*) and her emails were clear as to her concerns.

17.4. When challenged that the Claimant was merely expressing his '*legitimate beliefs … that people have disadvantages, with which he was trying to assist'*, he said that he '*was not sure they were legitimate, but were stereotypical comments, based on race and religion and which were offensive.'* He disagreed that he '*had got the wrong end of the stick'*, or that the Claimant had simply been '*clumsy'*, pointing out that he said, in the investigation meeting that '*I did not mean to be racist'*, suggesting that he knew that that's how he came across.

17.5. He agreed that, at the hearing, one of his co-panel members had enquired as to whether the police had been called and said that that was a matter for Dr Bonar.

17.6. He disagreed that the appeal decision was '*impenetrable, not setting out where you say what he said'* and said that '*it set out the Claimant's failure to comply with the Respondent's values and that he had upset a colleague. He doesn't deny the comments and I had to consider the feelings of students.'*

18. Submissions. Both representatives made oral submissions, which I summarise as follows:

18.1. Claimant:

18.1.1. The contents of the conversation between the Claimant and Dr Bonar had not, at any point, been established.

18.1.2. A central allegation against the Claimant had been the alleged use of the term 'DNA', which he denied and was rebutted, with the Respondent now conveniently jettisoning that allegation.

18.1.3. At worst, his comments were clumsy, with him holding Jews in high regard, many of whom he considered brilliant. Dr Bonar was entitled to take umbrage at it, but however this was a comment taking a few seconds, in a relaxed environment. His references to Germans and the engineering skills they develop by environmental advantage is a widely-held view. He refers to there not being '*a level playing-field'* and wants to level up. The Claimant was making a general point on this basis, but the Respondent closed their eyes to it. While the Respondent chooses to focus on the use of the terms 'they' and 'them', the Claimant was talking about specific students, but nonetheless those terms are used against him.

18.1.4. There was no forensic rigour applied by the Respondent, at any point. Despite his consistent request for the attendance of Dr Bonar that was refused and he was dismissed based on an unminuted discussion the investigating officer had with her. The fact that she alleged the use of the phrase 'DNA', when he had used the word 'environment', but that she was not challenged on that discrepancy, indicates a predetermined decision and bypassed natural justice. The hearings were unminuted and the disciplinary and appeal outcomes were generic and 'catch-all' and not putting allegations directly to him.

18.1.5. Despite there having been no complaints from students, the decision to remove him from his class to suspend him was extraordinary.

18.1.6. The papers are riddled with his complaints about lack of procedure, for example at pages 60-62.

18.1.7. The comment about the police at the appeal hearing was bizarre and it seems that the case against him was established purely by the contents of his email at page 34 and his alleged comment about DNA.

18.1.8. Applying Burchell, the Respondent cannot have had a genuine belief in the Claimant's misconduct, when they did not, inexplicably, test the evidence against him, relying purely on a flawed investigation report.

18.1.9. Neither the application of *Polkey*, nor of contributory conduct is appropriate in this case. He had merely been clumsy in his comments, was willing to apologise and had had six years' exemplary work.

18.2. Respondent:

18.2.1. There is little factual dispute in this case. The Claimant admitted making most of the comments, either as contained in his email, or at the investigation meeting and in the appeal.

18.2.2. The only true issue for the Tribunal to consider in this case is as to whether or not dismissal was within the range of reasonable responses. The Tribunal is reminded that that test is an objective one and that it should not substitute its opinion for that of the employer.

18.2.3. While it is interesting that in this hearing, the Claimant has sought, for the first time, to rely on procedural failings, he did not do so in his claim, even though represented at the time and there has been no application to amend it. These allegations, therefore, do not form part of his pleaded case. It is not accepted, in any event

that there were procedural failings, in the context that the Claimant was admitting most of the allegations against him. In his appeal, he accepted that he had committed misconduct, simply asserting that the sanction was too harsh. He was aware of the Solent Values, but didn't consider, somehow that these would apply in a 'private' conversation [44]. He agrees that racist comments are unacceptable, except in 'private' [32].

18.2.4. In the context of there being very little factual dispute, the investigation was entirely reasonable and it was unnecessary to call Dr Bonas to the disciplinary or appeal hearings.

18.2.5. While the Claimant now seeks to rely on the Respondent's dropping of the reference to DNA, this was just one of several allegations, all of which were considered.

18.2.6. The Claimant accepted that he made generalisations about '*young black males'*, rather than referring to individuals. He asked Dr Bonas if she was Jewish and made other sweeping generalisations and stereotypical comments, based on race and nationality. Such comments have no place in modern society, or in the Respondent's multicultural institution.

18.2.7. His conduct went to the heart of the relationship – he offended a colleague and repeated that offence in an email, instead of taking the opportunity to apologise. A warning was not appropriate in this case, due to the Respondent's loss of confidence in him and his act of gross misconduct. Dismissal was, therefore, a sanction available to the Respondent and within the range of reasonable responses. His previous record had been taken into account, but the Claimant knew the standard expected of him and breached it.

18.2.8. If the Tribunal finds that there were procedural failures, then, applying *Polkey*, following a fair procedure, the outcome would have been the same.

18.2.9. If the Tribunal finds that the dismissal was unfair, there is ample evidence to reach a finding of contributory conduct on his part.

19. Conclusions. I find that the Claimant's dismissal was fair, for the following reasons:

19.1. Reason for Dismissal. It was not in dispute that the sole reason relied upon by the Respondent was misconduct, which is clearly potentially a fair reason. It was common ground that otherwise, the Claimant's skills were well-regarded and that he had had an exemplary record.

19.2. Genuine Belief based on Reasonable Investigation. It is the case, as I have found above that the Claimant did not seek to rely on this head of claim, prior

to his evidence and submissions on his behalf at this hearing, despite there having been a case management hearing over a month ago. No application was made to amend the claim and therefore as this issue does not form part of his pleaded case, I do not, strictly speaking, need to consider it. However, for the sake of completeness, I do so. I find that the Respondent was entitled to have a genuine belief in the Claimant's misconduct, based on as much investigation as was reasonable in the circumstances, for the following reasons:

19.2.1. As set out in my paragraph 9 (above), based purely on the Claimant's own statements, the Respondent was entitled to consider that he had made the vast bulk of the comments (or something similar to them), of which he was accused. Apart from the alleged DNA comment, he did not, at any point (even at this hearing) deny them. As to that alleged comment, I accepted Professor Hall's evidence that it was not central to her conclusions, based as they were on a wide variety of statements by the Claimant.

19.2.2. The investigation meeting simply confirmed his overall lack of denial to be the case and indicated that the Claimant held strong views on the subject of racial/national/ethnic background (and as further indicated by him in his evidence at this hearing).

19.2.3. Dr Bonar had set out her views clearly in her email to her line manager and, as stated, less the DNA reference, the Claimant did not dispute her report of what was said. I concur, therefore that on that basis there was no requirement to call her to be cross-examined by the Claimant or Dr Farwell. It was also clear, from the Claimant's own evidence that he knew that Dr Bonar had been very upset at his comments, so, again, there was no need to test the fact of that reaction at the disciplinary hearing. Indeed, it seems likely to me, based on the Claimant's evidence at this Tribunal hearing that he would simply have reiterated his views to her, seeking to justify them and challenging her as to her alleged '*weaponised hurt feelings'*, thus potentially exacerbating the upset she felt.

19.2.4. I disagree that the notes of the investigation are not an accurate record of the meeting and indeed the Claimant himself, at the time, considered the '*transcript'* as sufficiently detailed to imply that a recording had been made.

19.2.5. Based on the evidence before him, the nature of the allegations and the multicultural composition of the student body, the investigating officer was perfectly entitled to recommend that disciplinary procedures be commenced.

19.2.6. On a very similar basis, Professor Hall was entitled, based on the investigation report and hearing the evidence of the Claimant, to have a genuine belief that he had committed misconduct. The entire tenor of the Claimant's case (until that is

this hearing) was that he was entitled and justified in saying what he did, particularly as the discussion was, he considered, '*in private*' (and on his '*free time'*) and that it was Dr Bonar's inability to engage in '*intellectual*' discussion on such topics and her '*weaponised hurt feelings'* that were at fault for leading to this outcome.

19.2.7. Despite his protestations at appeal and in this hearing that he had not been properly inducted, or was aware of the Respondent's policies, his evidence was, both at the investigation and in this hearing that in fact he was, but was clearly dismissive of them ('*highway code'*) and didn't, and probably still doesn't consider that what he said was in contravention of them. For the avoidance of doubt, I find that it is clearly at least potentially racist to group nationalities, races, ethnic or religious groups, by entire categories and to ascribe certain abilities or talents (or the opposite) to them, when, of course, as with any such group, talents or abilities will vary wildly from individual to individual. The Claimant's supposition about '*young black males'*, as needing extra help, is both discriminatory to them, as individuals (who may feel belittled by it) and potentially also to individual non-black students, who may actually have needed that extra help, but are excluded from it, because of their race. Also, while the Claimant sought to argue that his stereotyping (which it was) was positive, such 'positivity' is nonetheless potentially offensive to the recipient, firstly (using the Jewish example) because a Jew told they are good at physics, because they are a Jew, may well consider that as demeaning their personal intellectual ability/hard work. Secondly, it could also be simply grossly offensive, as the person may not actually be Jewish, but feel some characteristic is being ascribed to them. Thirdly, even if they are Jewish, they may quite properly consider it none of the Claimant's business to refer to the fact and have legitimate concerns about his reasons for doing so. Such comments, for an academic of the Claimant's experience and age (he said that he was 69, although his year of birth in his ET1 is 1946), in a professional working environment, went well beyond the description of 'clumsy'.

19.2.8. In his appeal, the Claimant himself accepted that he had committed misconduct, sufficient to merit a warning, but merely challenged that he should have been dismissed.

19.3. Procedural Fairness. Again, this issue was not part of the pleaded case, but briefly such issues of procedural unfairness as are alleged do not, I consider, render the dismissal unfair. As already found, I agree that the invitation letter to the disciplinary hearing and the dismissal letter are far from ideal, but I don't consider, for a moment, for the reasons already set out that the Claimant did not, in any event, know what he was accused of. The appeal decision is clearer, setting out to address the Claimant's grounds of appeal and apart from disagreeing with the outcome, the Claimant had no real previous complaint with that element of the process. The failure to take notes of such

meetings is not strictly a breach of procedure and if anything, is potentially to an employer's disadvantage in subsequently proving their case. As already found, the decision not to call Dr Bonar to give evidence was reasonable in the circumstances.

19.4. Range of Reasonable Responses. I have no hesitation in finding, applying Iceland Foods that dismissal of the Claimant fell within the range of responses of the reasonable employer, for the following reasons:

19.4.1. The test is a broad, objective one. Simply because one employer, in these circumstances, may not have dismissed, does not mean that another employer, who does, was incorrect to do so.

19.4.2. I cannot substitute my opinion for that of the employer.

19.4.3. The Respondent was entirely correct to conclude that there was little prospect of the Claimant moderating his views or avoiding repetition of them and that therefore a warning, even with re-training, was inappropriate.

19.4.4. The Respondent had a duty, both to its employees, but even more so, to its multi-cultural, no-doubt predominantly young student body, to protect them from potential acts of racism, or discrimination, of which there was, at very least, a risk, in this case.

20. Breach of Contract. Having found that the dismissal was fair and that therefore, on the balance of probabilities, the Claimant committed the misconduct of which he was accused, this claim must fail.

21. Conclusion. For these reasons, therefore the Claimant's claims of unfair dismissal and breach of contract fail and are dismissed.

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Employment Judge O'Rourke

Dated: 25 June 2020