EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111714/2021

Hearing on 9-11 February and 9 March 2022 by CVP

Employment Judge Campbell

Ms J Macleod	Claimant Represented by: Mr D Jaap, Solicitor
HBOS PLC	Respondent Represented by: Mr G Price, Counsel

JUDGMENT

The judgment of the tribunal is that:

1. The claimant was not unfairly dismissed;

2. The claimant was not entitled to notice or payment in lieu upon the termination of her contract; and

3. The claims are therefore dismissed.

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REASONS

PRODUCTION

1. This claim arises out of the claimant's employment with the respondent which ended on 19 June 2021 with her dismissal without notice. The respondent's case is that it dismissed her for a fair reason, namely her conduct, using a reasonable process. The claimant contests the adequacy of the process followed and the fairness of the outcome reached.

2. Evidence was heard from Ms Nicola Quin, Mr Mark Russell and Ms Philippa Clarke on behalf of the respondent. The claimant gave evidence herself and evidence was also heard on her behalf from Mr David Love, a former colleague.

3. Documents were provided in a jointly agreed bundle. Some further agreed documents were compiled in a supplementary bundle. The page numbering of the latter followed on from the former. Where relevant, numbers in square brackets below are the page numbers of documents in one of those bundles. The partied helpfully provided oral submissions at the end of the evidence, supported by skeleton notes which were also considered.

4. it was agreed that the hearing would deal issues of liability only, particularly as the claimant had been a member of a final salary or defined contribution pension scheme. Any questions of remedy which required to be decided would be the subject of a subsequent hearing. It was noted that the only remedy the claimant seeks is compensation.

5. The witnesses were found to be generally credible and reliable in the evidence they gave. There was not a great deal of dispute over the truthfulness of any witness' evidence, with the parties' areas of disagreement being more around the adequacy of the investigation process foiiowed and the sufficiency of evidence on which it was decided to dismiss the claimant. These are dealt with in more detail below.

LEGAL ISSUES

The legal issues to be decided were as follows:

1. Was the claimant's dismissal on 19 June 2021 for a potentially fair reason within the scope of section 98(1) and (2) of the Employment Rights Act 1996 (’ERA')?

2. If so, did the respondent satisfy the requirements of section 98(4) ERA by acting reasonably when treating its reason as sufficient to dismiss the claimant, taking into account its size and administrative resources, equity and the substantial merits of the case?

3. By giving the claimant no notice of dismissal or payment in lieu, did the respondent breach the claimant's contract of employment?

APPLICABLE LAW

1. By virtue of Part X of ERA, an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous sendee and the reason alleged for the dismissal. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA.

2. Where the reason for dismissal is the employee's conduct, principles established by case law have a bearing on how an employment tribunal should assess the employer's approach. Relevant authorities are considered below under the heading 'Discussion and Conclusions*.

3. Should it be able to do so, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual That must be judged by the requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and 4111714/21

administrative resources, as well as equity and the substantia! merits of the case. The onus of proof is neutral in that exercise

4. An employee will be entitled to notice of termination of their employment based on the terms of their contract or the provisions of section 86 ERA,

whichever is the more generous. Unless the employer brings the contract to an immediate end by reason of the employee's material breach, it must make a payment equivalent to the wages it would have paid had the notice period been served. It is settled law that where an employee commits an act of gross misconduct the employer may be able to treat this as a

fundamental breach of contract, and by immediately ending the contract in acceptance of that breach, it is released from the obligation to pay notice.

FINDINGS OF FACT

Ths following findings of fact were made as they are relevant to the issues in the claim.

Background

1. The claimant was employed by the respondent between the dates of 6 August 1991 and 19 June 2021. On the latter date she was dismissed without notice or payment in lieu. The respondent is a national bank.

2. The claimant’s role was Lead Project Manager. As such she headed up a team of workers on a variety of specific projects from time to time. Those tended to deal with rectifying and resolving issues and errors the bank had made with an impact on its customers.

3. The claimant's area of the business relied heavily on external contract workers. The team the claimant oversaw was usually made up of specialists who were provided to the respondent via an agency. They tended therefore to be employees of the agency and not the respondent itself. These individuals were described in the evidence as contractors and that term is repeated in this judgment. In terms of day to day management

their status caused no issues, but if there were particular performance or conduct concerns then the claimant would have limited power to deal with them. More serious matters would have to be referred to the agency which would address them. She could however manage them in a general sense and provide informal feedback on their performance and conduct

4 Contractors would be engaged for individual projects, or for a set period of time as is typical. It was not uncommon for contractors to be engaged continuously for months or even years on back to back projects. The bank would rely on reputation and personal recommendations when engaging
W contractors, and so those who were already known to them would often gain more work when it was available.

5. The claimant's line manager latterly was a Mr Richard Smith. Up until early 2019 it had been a Mr Simon Kucharski.

6. The claimant's team just before the process which led to her dismissal
10 included three contractors named Bijay Kalaria, Lee Hendry and David Love. Mr Kalaria and Mr Hendry were Team Leaders and as such acted as a liaison between the claimant and more junior members of the team. The
claimant held a regular call with the Team Leaders every Monday morning to discuss work-related matters such as planning and progress towards the 20 targets of their various projects.

7. The respondent operates a 'Colleague **Conduct** Policy' [37-41] which sets standards of behaviour for its employees and contains hyperlinks to other related documents, such as a set of disciplinary rules and procedures which will apply to resolve conduct related matters.

25 8 The policy contains a section dealing with 'Integrity' and within that there are rules on 'Professional Integrity*. Paragraph 1 .2 reads as follows:

'12 Colleagues must behave in a professional, responsible and appropriate manner towards other colleagues in the Group. Discrimination, victimisation, harassment (physical, verbal or non-
30 *verbal) and bullying will not be tolerated. All colleagues have an*

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obligation to report such behaviours irrespective of whether they are directly involved.'

9 Within the policy and under the heading 'Personal Integrity' is paragraph 1.7. as follows:

'1 . 7 Colleagues should not place themselves, or allow themselves to be placed, in a position where their personal interests or affairs may conflict with the interests of the Group and/or their duties towards the Group or any of its customers. Colleagues are required to make their line manager a ware of any interest, position or personal circumstance which may give rise to actual or potential conflicts of interest. '

10. The respondent also communicated standards of behaviour to employees via its disciplinary policy and other policies such as a Code of Responsibility.

Suspension and investigation

11. On 18 February 2021 Mr Kalaria met with Mr Smith, the claimant's manager, to express some concerns about the claimant in her rote as his team leader. Mr Smith asked him to put those in writing which he did by an email the same day [42-46], Mr Smith acknowledged the email and said it was an accurate account of the conversation they had had.

12. The email raised a number of complaints about the claimant. Those were summarised as *'the racial slurs, bullying and toxic environment created by [the claimant]'* and they were said to have become too much for Mr Kalaria to bear and to have begun impacting on his mental health. The email provided more detailed allegations on those themes over four pages.

13. in a section of his email titled *'Racial concerns'* Mr Kalaria described a number of situations where he said the claimant had used racially derogatory language or shown bias based on individuals' race. Those were:

a. The claimant telling Mr Kalaria she had a policy of 'No Muslims and no Black Africans' when recruiting for her team, and that this was also known to Mr Hendry;

b. The claimant saying regularly, including at the Christmas party in 201 8, that another manager *'surrounds himself with "thick black Africans, pays them more than I would, just to make himself look smart"'.*
Mr Hendry was also said to be aware of this;

c. That Mr Kalaria and another Team Leader were asked by the claimant to manipulate the scores of candidates interviewed for positions in her team, to ensure the above discriminatory policy was applied. This apparently including ensuring no black African candidates would secure a role, and that the scores of Muslim candidates would be 'fixed' (i.e., revised downwards) to create the impression of a racially diverse set of interviewees, but at the same time ensure they did not secure a role.

14. Mr Kalaria also said that the claimant had used coercion, threatening that getting on the wrong side of her meant that he would be *'black listed from Lloyds'.*

15. Ina different section of his email headed *'Other points'* Mr Kalaria accused the claimant of nepotism, saying that her *'daughter in law, Beth Merry, works for Jennifer in the wider team'* and that he and Mr Hendry were required to 'sacrifice' two members of their team around June 2020 so that she could be retained. He expressed doubts about Ms Merry's ability to do the work she was engaged for but said he felt unable to raise issues about her for fear of bullying by the claimant in response. It is noted here that at the time of Ms Merry's recruitment she was the partner of the claimant's son but not married to him.

16. Mr Smith telephoned Mr Hendry on the morning of 22 February 2021 in light of the accusations made by Mr Kalaria. After the conversation Mr Hendry emailed Mr Smith in relation to the claimant [49],

17. Mr Hendry's email said that he had helped the ciaimant set up one of her long running projects in 2018 before Mr Kalaria took over from him and he moved on to a different project. He said that more recently he and Mr Kalaria had found it difficult to work with the Claimant and had tried to improve matters by asking her if he had done something wrong. He found her response confusing and felt that she was isolating him, which caused further stress. He said he had felt like handing in his notice on a number of occasions but with the support of his wife and Mr Kalaria he carried on.

18. Mr Hendry's email was much less detailed than Mr Kalaria's. It did not contain any reference to the claimant using racially derogatory language, exercising racial bias in the make up of her team, or doing anything untoward in recruiting or retaining Ms Merry. It focussed more on his perception of how the claimant had treated him and how he saw their working relationship deteriorate.

19. Mr Smith suspended the claimant whilst an investigation was undertaken. This was confirmed in a letter dated 22 February 2021 . The allegations were said to be:

- Unfair treatment of colleagues;
- Bullying and racist behaviour;
- Breach of health and safety regulation and related internal rules; and
- Breach of rhe government's Covid-19 restrictions and related internal rules.

20. Those matters were based on the contents of the emails from Mr Kalaria and Mr Hendry. The wording of the four points was the extent of detail given to the claimant about the allegations at this stage.

21. Allegations under the first two of those headings were considered to be "a *breach of the Colleague Conduct Policy, the Group's Values and Behaviours and the Bank's position as a non-racist company'.*

22. The claimant was not permitted to attend work or speak to colleagues during the investigation. She was paid as normal. The letter also said that if she required access to information to prepare her case sne should let Mr Smith know, and likewise if she was aware of documents, witnesses or information which she thought would be relevant to the investigation. Her access to the respondent's IT systems was removed, meaning that she could no longer go into her work email account.

23. Ms Nicola Quin was appointed to investigate the concerns raised about the claimant. She was based in another area of the respondent's operations described as 'Role Design & Competency'. She conducted interviews with the following individuals, and in each case notes were taken and typed up:

a. Mr Kaiaria on 16 March 2021 [50-63];

b. Mr Hendry on 19 March 2021 [64-74];

c. Mr David Love on 22 March 2021 [75-84];

d. Mr Sandip Kumar-Gogna on 22 March 2021 [85-92];

e. Mr Derek Beaton on 22 March 2021 [93-101];

f. Mr Kiranjit Chonkaria on 22 March 2021 [102-1 11];

g. Mr Rishi Verma on 23 March 2021 [112-120];

h. Ms Fiona Adamson on 26 March 2021 [121-127];

i. Ms Helen Garrett-Lang on 30 March 2021 [128-1351;

j. The claimant herself on 8 April 2021 [1 37-1 57]; k Mr Simon Kucharski on 19 April 2021 [164-1661; and

I. Mr Chris Alder on 27 April 2021 [1 67-168],

24. In his interview with Ms Quin. Mr Kaiaria expanded on a number of the matters he had raised in his email to Mr Smith. He also described a team

meeting on 15 February 2021 at which he said the claimant had reduced

him to tears. He had felt that she was looking for faults in his work. He said he apologised to her even though he wasn't sure what he might have done wrong. The note bears to have been electronically signed by Mr Kalaria Ms Quin stated that he had reviewed and approved the notes.

25 When interviewed by Ms Quin, Mr Hendry confirmed that he had worked for the respondent in a variety of roles for around ten years, He described his relationship with the claimant as 'non-existent' when before it had been very good. He believed the relationship began to deteriorate around June 2020 when he sensed she would not accept the legitimacy of work-related issues he and Mr Kalaria were raising with her. He mentioned that he found it *'a bit weird'* that Ms Merry had been retained when other contractor had to be let go for budgetary reasons, because she didn't have bank experience.

26. When asked whether he could recall any instances of the claimant making derogatory comments in relation to gender, ethnicity, sexual orientation or disability Mr Hendry replied that he had. He said that another contractor who had resigned had cited racism on the claimant's part, although could provide no further details. He gave a similar account of the claimant making comments about Mr Smith to that of Mr Kalaria. He also mentioned an occasion when the claimant was supposed to have said to an Indian contractor *'they are typical Indians but not like you.'* This was allegedly done in a way which conveyed she didn't like Indian people. He raised another occasion on a team call when the claimant was said to have referred to a contractor named Humeira as a *'typical Indian'.*

27 . Mr Hendry also recalled the process of recruiting Ms Merry, who he had interviewed along with a colleague. He said she didn't score well as she had insufficient relevant experience and none in banking. She didn't answer the questions well and it was difficult to score her at ail in relation to some of them. He said ths claimant was pushing for her to get the job.

She was the only candidate, which was unusual, and he felt that the interview was to *'tick a box'.* He could not recall any other specific examples of bias in relation to recruitment.

28 Mr Kucharski was asked about the process of recruiting Ms Merry. He told Ms Quin he couldn't recall the claimant having any conversations with him about it. When asked his view on what he would have done if advised that the claimant would effectively be line-managing her daughter in law (again, it is noted that at the time that Ms Merry was her son's partner but not married to him), he said that this would be an obvious conflict of interest and should have been raised as such. He also said the claimant should not have been involved in the interview process. He raised the scenario of the claimant having to decide between losing and retaining staff as an example of when a conflict could arise.

29. As a matter of record, no conflict had been registered in connection with the recruitment of Ms Merry.

30. Before the claimant was interviewed by Ms Quin she was not given any documents in relation to the substance of the allegations against her. such as the emails from Mr Kalaria and Mr Hendry, in the meeting she confirmed that the wording of paragraph 1 .2 of the Colleague Conduct Policy was a reasonable standard to require of employees. She was asked a series of questions designed to elicit her position on the allegations. Each of the alleged examples of racially derogatory language was put to her and she was asked if she had used them. She strongly denied doing so.

31. On 13 April 2021 the claimant emailed Ms Quin to say she had some thoughts after the two had spoken [158-159], She raised that Mr Hendry had had 'an issue* with his previous line manager, Jill Charleston, and his contract was terminated early. She said that Jill Charleston was 'furious' with her on finding out the claimant had re-engaged him. She recalled that Ms Charleston went off work shortly afterwards and speculated that perhaps the claimant had made similar allegations against her, prompting her suspension and possible termination. She believed Mr Love might know more details as he also worked for Ms Charleston at the time. She also considered Mr Love could give a useful account of how Mr Hendry was to work with and how she herself was as a line manager.

32. The claimant also referred in her small to an occasion when she had given feedback to Mr Kalaria about aspects of his work on a particular task. She had explained the details in her interview with Ms Quin. She understood that both Mr Kalaria and Mr Hendry had perceived that they had gained from her suspension, by being retained for longer or being given more responsibility in her absence. She suggested this was a possible moth ? for them making complaints about her.

33. The claimant said that if Ms Quin needed email evidence to back up anything she was saying, she should be given access to her emails. She also listed the names of people who were, or had been, in her team, although she acknowledged that none of them would have participated in Monday morning telephone calls when much of the interaction between the claimant. Mr Kalaria, Mr Hendry and Mr Love would have taken place.

34. Ms Quin spoke to some of the individuals named by the claimant. Some were still working with the respondent but she considered it not necessary to interview them. Some others had left the respondent and she did not pursue them.

35. The claimant sent a further email to Ms Quin on 18 April 2021 [160-163]. Its purpose was to identify emails in the system which she believed would be relevant to the issues under investigation. It was prepared in fight of her receiving the notes of her meeting with Ms Quin and she tried to follow the order in which various matters were raised in the meeting. She listed 21 numbered emails or groups of emails by reference to when they were sent, to or from whom they were sent, and what they were about.

36. The claimant understood that Ms Quin would retrieve and consider those emails, to the extent they could be located, and consider them as part of her investigation. Ms Quin did not retrieve the emails. Her reason was that she did not consider they would add any useful evidence to what she already had. Also, to do so would involve a specific request for access which had to be made to the respondent's IT department. It would normally take up to three months for the request to be granted She balanced the

likely duration of such a delay in her investigation against the possibility of the emails being relevant, and decided not to take that step. She was conscious of the claimant being under suspension at the time, which would be prolonged by the time taken for the emails to be located.

37. In her evidence Ms Quin stated that she considered the emails referred to by the claimant were relevant to matters outside of the ones she decided to recommend go forward as part of a disciplinary case to be answered. In her evidence she commented on each of the 21 emails or groups of emails suggested by the claimant. She saw their relevance to be, variously:

a. To show the claimant had supported Mr Kalaria in other work situations in which he believed he had been spoken to inappropriately by another manager;

b. To prove matters which were not in dispute, such as that the claimant had deservedly given Mr Kalaria and Mr Hendry feedback which could be perceived as negative at certain times, or that Mr Hendry had asked her if there was a problem with her working relationship with him and how she had attempted to be supportive to him;

c. To confirm how the claimant had dealt with holiday requests;

d. To show positive working with other teams, and how the claimant supported her own team in such situations:

e. To show how the claimant had followed government guidance in relation to working during the Covid-19 pandemic; and

f. To show that health and safety rules were followed.

38. The claimant was not notified in the process that it had been decided not to retrieve her list emails. She only realised that they had not ben accessed when that was explained by Ms Quin in the hearing. She accepted in her evidence that none of the emails were suggested in response to the allegations

of using racially derogatory language, because her position was she had simply never done that and so there would never be a record of anyone saying that she had She also accepted that none related to her recruitment of individuals into her team.

39. Ms Quin drew her investigation together in a written report which was undated, but finalised in early May 2021 [169-1851.

Disciplinary hearing

40. The process was taken over by Mr Mark Russell, Product Owner, who decided to convene a disciplinary hearing. By letter dated 18 May 2021 he invited the claimant to a hearing on 26 May. The hearing was to be heard remotely. The invitation letter detailed two allegations.

41 . The first allegation **(’Allegation T)** was being considered **as** potential gross misconduct. This was said to involve possible breaches of the respondent's Colieague Conduct Policy and also its Code of Responsibility (not produced to the tribunal), The details of the allegations were provided.

Those were three specific derogatory comments said to have been made in 2020 or 2021, each referring to a person's race, and a general policy of the claimant racially profiling candidates for contractor roles with the respondent in 2019.

42. The second allegation (’Allegation 2') considered to be potential misconduct, was that the claimant had breached the Colleague Conduct Policy and Code of Responsibility by recruiting her son's partner into a role without informing her manager, thereby preventing a proper assessment of whether there was a conflict of interest to take place.

43. These were the only matters taken forward for the claimant to answer at the disciplinary hearing. The other concerns raised would either be taken no further, or addressed in a less formal way.

44. The letter confirmed that if a finding of gross misconduct was made, a number of possible sanctions could result, one being summary dismissal. 4111714/21

45. The tetter enclosed a listed sei of investigation documents. That comprised the notes of Ms Quin s interviews with the claimant and her colleagues (with the exception it seems of Mr Alder although there was no apparent significance in his statement), the investigation report, the initiating emails from Mr Kalaria and Mr Hendry and the claimant's own email of 13 April 2021.

46. The claimant attended the disciplinary hearing as scheduled, via Teams. She had asked for Mr Smith, her manager, to accompany her as she understood she was unable to approach anyone else within the respondent as part of the conditions of her suspension. He therefore accompanied her, albeit remotely. The meeting lasted for two hours.

47. Notes were taken of the discussion and were produced [192-2071. The claimant was given the option to review them and made changes using tracking. The notes are accepted to be a sufficiently full and accurate record of the meeting.

48. The claimant had prepared an opening statement which she provided to Mr Russell and which he read in advance of the hearing, it was added to the notes of the hearing as 'Appendix B' [209-2111.

49. Mr Russell brought the hearing to a close, and was going to give consideration to the evidence before reaching a decision. He hoped to do so within 1 4 days.

50. After the hearing finished, the claimant emailed Mr Russell with a list of who was in her team at that time, and some further names of people who had been in it previously. This became 'Appendix A' to the meeting notes.

51. Mr Russell sent a copy of the hearing notes to the claimant on 1 June 2021 and she returned them with her amendments later that day.

52. Mr Russell emailed the claimant on 9 June 2021 to say that due to a holiday and the need to carry out further investigation, he would be unable to communicate a decision within the intended 14 day period.

53. The further investigation undertaken was to conduct a search for emails and instant messages between the claimant, Mr Kaiaria and Mr Hendry containing one or more of a set of keywords such as 'race; 'racism* Indian'.

This was to get a sense of the language they used with each other and to see if there was any evidence of collusion in those areas. The search returned too high a number of exchanges to read individually. Mr Russell scanned them but found nothing he believed to be of relevance. He accepted it would have been a 'long shot* if he had unearthed anything pertinent. He recognised that any collusion could have happened verbally,

or using private electronic communication means.

54. Following that Mr Russell completed a document entitled 'Rationale for decision and sanctions' [213-217]. This is a template used within the respondent to record the decision taken by a disciplinary or appeal hearer, it is to be completed by the decision taker and sent to HR.

55. The 'rationale' document sets out clearly enough the conclusions of Mr Russell. In summary:

a. Allegation 1 -

i. The starting point was that two colleagues had made accusations which were consistent. The claimant denied them.

She accepted they would have been inappropriate to say, had she done so. She was upset at being accused of saying them. It was unlikely that she could have said them, or something like them, accidentally.

ii. The claimant believed both individuals had made up the allegations in retaliation for her giving Mr Kaiaria negative feedback in relation to how he had treated Mr Love. The feedback was informal. It was considered insufficient to be likely to cause both to manufacture such serious allegations.

iii. There was no physical evidence of the claimant applying racial

bias to recruitment processes.

iv. Paragraph 1.2 of the Colleague Conduct Policy had been breached.

v. On the balance of probability, the accounts of specific racially derogatory language and bias in relation to recruitment were accepted. Given the seriousness of the conduct in question, it was considered right and proper to dismiss the claimant without notice.

b. **Allegation 2 -**

i. The claimant said she had informed a manager at the time of wishing to recruit Ms Merry. That could not be corroborated as the manager in question had by now left the business. Her current manager and other team members knew of the relationship.

ii. The claimant did not follow proper procedure, i.e. to record a conflict, but was not fully aware of the requirement to do so. She did not hide the existence of the relationship.

iii. Paragraphs 1.2 and 1.7 of the Colleague Conduct Policy had been breached.

iv. No record was made of how seriously this matter would be treated in isolation, although in subsequent correspondence it was confirmed that this was considered an act of misconduct, but not gross misconduct.

56. It is unclear exactly when Mr Russell reached his decision, as his rationale document is dated only a day after he wrote to the claimant about having to extend the process. Given the searching process he described it would likely have been signed off on a later date. He had made his decision by 17 June 2021 and on that day a letter was sent to the claimant explaining it [218-223],

57. Mr Russell's decision letter deals with both allegations separately, as he had done in his rationale document. Under 'Allegation 1' he listed the instances of racially derogatory language that he accepted had been made by the claimant. Those were:

a. 'xxxxx is just another one of them - she is just being lazy just like xxx, that Indian from India';

b. 'xxxxx surrounds himself with "thick Black Africans"': and

c. 'they are typical Indians but not like you xxxx.'

58. Also as part of Allegation 1 , Mr Russell found that:

a. The claimant had said she operated a policy of not recruiting Muslims or Black Africans;

b. She asked a colleague to review applicant names as a means of determining their race; and

c. She had said she would not interview Black African candidates, and would interview Muslims to appear diverse, but not recruit one.

59. Mr Russell also stated that he did not believe that two colleagues would falsify the allegations they made as a result of the claimant providing informal feedback. As he put it in his evidence, he could not see why two colleagues with whom she had a good working relationship would make up an account which realistically would lead to her losing her job.

60. In relation to Allegation 2 Mr Russel explained his decision, which was consistent with his rationale document.

61. The letter concluded by confirming that the allegations were serious enough to amount to gross misconduct. He had considered instead imposing a final written warning but felt that to be inconsistent with the respondent's commitment to create an inclusive environment.

62. The claimant's employment was confirmed as ending on 19 June 2021 and she had a right of appeal against the decision, to be exercised in writing within 14 days.

Appeal

63. The claimant exercised her right of appeal, writing to Mr Russell on 30 June 2021 [224-225], She set out 10 numbered grounds of appeal.

64. The appeal was acknowledged and an appeal hearer was identified. That was Philippa Clarke, Head of Trading Operations within Haiifax Share Dealing Limited, another company within the respondent's group. Ms Clarke sent a hearing invitation to the claimant on 26 July 2021 [227-228],

In addition to providing information about the hearing, Ms Clarke said that *'The hearing will be limited to a review of the original decision on the grounds you raised in your letter dated 30th June 2021.'*

65. An appeal hearing was scheduled for 5 August 2021 . This time the hearing took place by telephone in the light of Covid-1 9 restrictions. Mr Smith again accompanied the claimant remotely. Notes were taken by a fourth individual [229-234].

66. Following the hearing a copy of the notes was sent to the claimant for review. She annotated them by hand and relumed them. They were separately produced [263-268], Ms Clarke did not strongly dispute the claimant's wording, although generally considered that they did not change the original wording sufficiently much to justify amending the note. That is with the exception of one passage discussed immediately below.

67. Unknown to Ms Clarke, the claimant made an audio recording of the meeting. This came to light during the hearing as the claimant wished to challenge the accuracy of a passage in the meeting notes. This was made up of the iast four paragraphs on page 266, in which the claimant was explaining the basis for her recruiting Ms Merry. The wording as amended by the clamant said as follows:

'JM replied JM wanted someone who was ready to get stuck in. and do what I asked liaising with branches succinctly. BM had the educational background and did an excellent job. We were even looking to train her up to be a project manager. '

68. The initially drafted passage recorded the claimant saying *'who was frienc* 1 *and spoke very good English to clients'* instead of *'and do what I asked liaising with branches succinctly. '*

69. By consent between the parties the claimant's audio recording of this passage was listened to and the full wording is noted as follows:

7 *wanted someone who would come in and do what I asked in the way that I asked it, and it was very clear up front that all I wanted was someone to do part of the role in a very sort of straightforward simple logical way and Beth, and content, and be articulate and talk to the branches in an appropriate way, and Beth being an English graduate*

was the perfect person to liaise with branches in a very succinct way that didn't interfere with the branch working and she did an excellent job of this. . . '

70. Upon hearing the recording Ms Clarke accepted the claimant's wording was as in the transcript immediately above. She did not consider that it altered the fundamental nature of the claimant's position or her own conclusions.

71. At the end of the meeting Ms Clarke indicated that she would adjourn and aim to reach a decision which would be communicated within 14 days. She brought the discussion to a close.

72. Ms Clarke prepared a 'Rationale for decision and sanctions' document [235-236]. It is dated 5 August 2021 although the full decision may have been reached later.

73. Ms Clarke found that on the evidence available to him, Mr Russell was entitled to reach his conclusions about the claimant's conduct, and to dismiss her as a result. She also considered that comments by the claimant

in the appeal hearing supported that after the fact. Those were the words originally contained in the last four paragraphs of page 266. Ms Clarke took from them that as the role was essentially administrative and not customerfacing, the claimant was applying a non-essential criterion to the role which would either directly or indirectly exclude people of certain backgrounds. When asked about this view in light of the claimant's correct words being confirmed as transcribed from the recording above, she said that the claimant was still indicating an unnecessary requirement for the role namely being an English graduate - which could exclude certain groups of prospective applicants.

74. Ms Clarke wrote to the claimant on 1 3 August 2021 to confirm her decision [237-239], The letter lists the claimant's appeal grounds and goes on to say *"Your appeal grounds are based on the lack of evidence to support the alleged racist statements and in particular the lack of specific dates and times these were alleged to have been made. '*

75. The rest of the letter sets out the issues Ms Clarke considered to be relevant, and her conclusions in relation to them. In summary those were as follows:

a. **Evidence of bullying behaviour -** there was evidence from other witnesses to the effect that the claimant made them feel uncomfortable. The claimant described her own style as blunt, and if Mr Kalaria or Mr Hendry had an issue with that, they could have left. This was not aligned with the respondent's values.

b. Evidence of inappropriate behaviour - witnesses **reported** working conditions giving them concerns over health and safety.

An apparent lack of consideration of others called the claimant's integrity as a leader into question.

c. A **motive for raising the allegations** (of using racially derogatory terms) - Ms Clarke could not find any evidence of a motive for raising the allegations, other than a genuine one based on true events. The accusers had placed themselves at risk in doing so.

d. Evidence of racist/discriminatory comments - although there was no evidence of the claimant making such comments beyond the statements of her accusers, the claimant's description of the process of recruiting Ms Merry was relevant. The claimant was said to have *'wanted someone who was ready to get stuck in, who was friendly and spoke very good English to clients'* - i.e. the origin; wording of the notes before the claimant amended them and before it was made known that a recording had been made. Ms Clarke regarded that statement as discriminatory and an inappropriate basis for recruiting a candidate. She also said there was no evidence that the claimant followed the correct process for recruitment of Ms Merry. She should have meticulously followed the process, recorded all evidence and made sure a conflict of interest was recorded. By not doing so she had called into question her personal integrity as regards fair recruitment.

e. Evidence of working culture created by you as the lead Ms Clarke found it apparent that the claimant managed her team ruthlessly Those who delivered results without complaint were favoured and those who raised concerns were met with a hostile reaction and not taken seriously. The ciaimant should have been able to adapt her leadership style but did not show she was capable of doing so.

76. The culmination of Ms Clarke's letter was that the original sanction of dismissal would stand. This was the conclusion of the respondent's internal disciplinary procedure.

DISCUSSION AND CONCLUSIONS

The statutory reason for dismissal - section 98(1)(b) ERA

77. The respondent, on whom the onus falls, contends that the claimant was dismissed for the potentially fair reason of her conduct. The claimant did

not appear to agree that the respondent had done enough to establish this, although there was recognition that this was the respondent's position. The claimant did not suggest dismissal was for another reason, although there is no onus on her to do so.

78. It is found that the respondent has established the reason for dismissal to be misconduct. This is based on the oral evidence of each of its witnesses at the key stages - investigation, disciplinary hearing and appeal ~ as well as the content of all of the relevant documents. It is also noted that the claimant's appeal grounds did not allege that the respondent had dismissed her for a reason other than her conduct, and nor was that stated in her claim form or apparent in her evidence before the tribunal.

79. Specifically, the conduct in question was the behaviour falling within Allegation 1. That was the behaviour found by Mr Russell to amount to gross misconduct. Those were the facts or beliefs which led him to decide to dismiss the claimant. His evidence was that on the basis of them alone, dismissal was justified. His finding in relation to Allegation 2 was that it was a lesser form of misconduct and did not warrant dismissal. This is evident from his rationale document and his outcome letter.

General reasonableness of the respondent's process - section 98(4) ERA

80. The parties submitted a jointly drafted note in which they set out some of the legal principles which would apply to this case. Thai included reference to the binding decision of the Employment Appeal T ribunal in ***British Home Stores Ltd v Burchell [1978] IRLR 379.*** That decision requires three things to be established before a conduct-related dismissal can be fair. First, the employer must genuinely believe the employee is guilty of misconduct. Secondly, there must be reasonable grounds for holding that belief. Third, the employer must have carried out as much investigation as was reasonable in the circumstances before reaching that belief.

***Burchell* part** 1

81. In relation to the first part of the *Burchell* test. Mr Russell gave clear evidence to the effect that it was the claimant's conduct which caused him to make the decision to dismiss. That evidence was not challenged in any recognisable way, and is accepted. All of the individual complaints which made up Allegation 1 were with the realms of her conduct, in that they related to actions and behaviours she had consciously chosen io use Whether the evidence of that was sufficient, or the process satisfactory, are separate issues but on this point the position was clear.

Burchell part 2

82. It is next necessary to consider whether the respondent had reasonable grounds for holding the belief that the claimant was guilty of misconduct.

83. Considering the question of whether Mr Russell as dismissing officer had reasonable grounds on which to make a finding of gross misconduct, it is found that there was sufficient evidence to do so.

84. In relation to Allegation 1 there was clear and detailed oral evidence from two different individuals. Some of that evidence was corroborated by both of them and some was not, albeit it was consistent in nature. There was also some evidence tending to go against the veracity of the allegations. At the disciplinary hearing that consisted of the fact that Mr Kalaria and Mr Hendry were friends outside of work and the verba! reprimand the claimant had given Mr Kalaria shortly before he raised his complaint to Mr Smith. Weighing up the evidence on both sides Mr Russell had sufficient grounds to make a finding of misconduct of some type. He was entitled to categorise it as gross misconduct given the self-evidently discriminatory and offensive nature of the language and behaviours in question. It was reasonable for him to conclude that the language used was racially derogatory, and indeed the claimant agreed both before Mr Russell and in the tribunal hearing that its use would have that character.

Burchell part 3

85 The third limb of *Burchell* requires consideration of whether the employer carried out as much investigation as was reasonable in the circumstances in order to

reach its genuine belief in the employee's misconduct. That does not require an employer to uncover every stone., out no obviously relevant Hne of enquiry should be omitted.

86. The legal test, as emphasised in *Sainsbury's Supermarkets Ltd* v *Hitt [2003] IRLR 23* is whether the investigation fell within a band of reasonable approaches, regardless of whether or not the tribunal might have approached any particular aspect differently.

87. On balance, the respondent's investigation is considered to fall within the range of reasonable approaches to the circumstances of this case. A sufficiently thorough investigation was carried out by Ms Quin, supplemented to an extent by Mr Russell.

88. in making this finding it is noted in particular that the initiating complaint of Mr Kalaria contained a number of allegations of different types, not all of which were allegations of misconduct. This is also the case with Mr Hendry's original email. The scope of the investigation at the outset was necessarily wide and there were a number of individuals potentially to interview about the various issues raised. As the investigation developed it became clear to Ms Quin that some allegations were not as serious as she had understood, or had no basis, or were not conduct issues and could be dealt with outside of the disciplinary process she was following. That is not an uncommon situation.

89. By the time she came to interview the claimant at the end of her investigation, Ms Quin had a clearer picture of the issues that her two colleagues had raised. It was following that interview that the claimant sent her a list of emails to retrieve and consider.

90. The decision of Ms Quin not to search for the claimant's emails is considered in this context. She finalised her investigation report shortly after the claimant's request and by that time had narrowed down the disciplinary case to answer into the issues which were referred to as

Allegations 1 and 2. Neither of those were the subject of the emails the claimant wished her to retrieve and review. It was sufficiently clear from the claimant's description of the emails what they would be about, therefore allowing Ms Quin reasonably to draw that conclusion knowing that to request the emails could delay the process by weeks or months.

91. It would have been better had Ms Quin notified the claimant directly that she had not retrieved the emails, but it is equally noted that the claimant was sent all of the material the respondent would be relying on at the disciplinary hearing before it took place, and did not raise the absence of any of the emails at that time.

92. There was no obviously relevant witness who was not interviewed. Ms Quin spoke to a number of individuals close to the claimant and who remained within the business.

The band of reasonable responses

93. In addition to the ***Burchell*** test, the parties recognised that a tribunal must be satisfied that dismissal fell within the band of reasonable responses to the conduct in question which is open to an employer in that situation. The concept has been developed through a line of authorities including ***British Leyland UK Ltd v Swift [1981] IRLR 91*** and ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439.***

94. The principle recognises that in a given disciplinary scenario there may not be a single fair approach, and that provided the employer chooses one of a potentially larger number of fair outcomes that will be lawful even if another employer in similar circumstances would have chosen another fair option which may have had different consequences for the employee. In some cases, a reasonable employer could decide to dismiss while another equally reasonably employer would only issue a final warning, or vice versa.

95. it is also important that it is the assessment of the employer which must be evaluated. Whether an employment tribunal would have decided on a

different outcome is irrelevant to the question of fairness if the employer's own decision fails within the reasonableness range and the requirements of section 98(4) ERA generally. A tribunal must not substitute its own view for the employer's, but rather judge the employer against the above standard. How the employee faced with disciplinary allegations responds to them may also be relevant.

96. Mindful of the above approach which a tribunal must take in dealing with the question of reasonableness, it is found that dismissal of the claimant was within the band of reasonable responses open to the respondent in these circumstances.

97. The claimant submitted that there was inadequate evidence on which to make a finding of gross misconduct. There were three alleged remarks and further allegations about her applying racial bias in recruitment decisions. In number and gravity those were enough. The allegations came from two individuals and were sufficiently clear and detailed.

98. It was suggested on the claimant's behalf that too much emphasis was put on asking her if she could think why Mr Kalaria and Mr Hendry would collude to create false allegations against her. The claimant is right to say that there should not have been an onus on her effectively to prove her own innocence by providing a powerful enough reason why that would happen. However, it is found that the respondent did not do that. The allegations made against the claimant were balanced against any evidence tending to suggest they were unreliable. It was acceptable and relevant for the respondent to ask the claimant as a person with first hand knowledge of her experiences with the other two individuals if she could understand why they would be motivated against her. The fact that she was able to provide a response is supportive of this. She said that she had had to reprimand Mr Kalaria for his manner of communication towards Mr Love and she had also given Mr Hendry critical - but fair - feedback. That evidence was considered By Mr Russell.

99. However, it was ultimately decided that the evidence tending to mitigate against the veracity of the allegations - from the claimant and anywhere else - was

insufficient. That was a decision Mr Russell was entitled to take on the basis of the evidence in this case.

1 00. At the same time it was submitted that not enough was done to explore that question with the accusers themselves. This was put to Ms Quin in her capacity as investigator. Her evidence was that both Mr Kalaria and Mr Hendry came across as credible to her, and having genuinely been upset. It is difficult for the tribunal to gainsay that - see for example *Morgan v Electrolux Limited 1990 ICR 369.* To do so would risk substituting the respondent's view for the tribunal's own.

1 01. It was suggested that the claimant was not given adequate enough details of the alleged use of racially inappropriate language. Because of that, it was argued, she was unable to defend herself properly. Looking at the details which were provided it is found that the level of detail was sufficient. Information about the setting and timing of the alleged acts was given, as well as who had been present and what words were said.

102. It was also correctly asserted that of the numerous individuals interviewed about the claimant, no other person could corroborate the complaints that Mr Kalaria and Mr Hendry made about the claimant which formed Allegation 1 . Further, there was no documentary evidence to support what they alleged. This was recognised by Mr Russell but it was not enough to detract from the fact that two individuals had made consistent complaints which were serious in nature without an apparent reason to hold a malicious motive.

103 . For the claimant it was also submitted that the language allegedly used within Allegation 1 did not amount to 'racial slurs'. That assertion is at best questionable, but in any event is beside the point. Mr Russell did not find that the language attributed to the claimant constituted 'racial slurs'. He found it to be inappropriate and contrary to the respondent's values as an anti-racist organisation. The claimant agreed with Mr Russell in her

disciplinary hearing and in the tribunal itself that those statements, if made by an employee of the respondent, would have warranted dismissal.

104. The claimant also made the point that Ms Clarke went beyond the scope of the claimant's grounds of appeal when reaching her decision. She had said in her invitation letter that the hearing would be limited to a review of the original decision on the grounds raised by the claimant. It was argued that she had instead gone outside of those grounds and made additional findings against the claimant which had not been applied at the previous disciplinary stage. She made findings that the claimant displayed behaviours amounting to, or close to, bullying and applied inappropriate management methods.

105. This criticism is well founded. Mr Clarke should not have made the findings she set out in her outcome letter headed 'Evidence of bullying behaviour', Evidence of inappropriate behaviour' and 'Evidence of working culture created by you as the lead'. Those were not within the scope of the claimant's appeal, and indeed not findings made by Mr Russell at the previous stage. This is not to say that an appeal hearer can never view an employee's conduct more critically than a disciplinary manager before them, and this happens frequently enough. But in this instance Ms Clarke had undertaken not to do so.

106. However, it is considered that this deviation from the agreed approach did not render the dismissal unfair when it had already been implemented fairly by Mr Russell. Essentially this is because Ms Clarke also separately dealt with the substance of the claimant's appeal, and did so correctly and by applying judgment in a way she was entitled to do. Therefore her findings under ’A motive for raising the allegations’ and 'Evidence of Racist/Discriminatory comments' in her outcome letter are sufficiently sound not to be disturbed by her surrounding comments. A further factor is that the claimant was rendered no worse off by Ms Clarke's additional findings. She had already been dismissed and that decision was upheld for sound reasons. No further detriment was caused.

CLAIM FOR NOTICE PAY

107. The claimant filled in the relevant box in her claim form to indicate she was making a claim for notice pay. No specific supporting wording was put in the claim form and the matter was not raised in the claimant's closing submissions. On the basis that the claimant has put forward a separate claim in respect of notice pay the following findings are made. It is assumed that the claim is stated as a breach of contract - the breach being not to pay the equivalent of her salary for her contractual notice period when she was summarily dismissed.

1 08. This complaint has to be evaluated on a different common law basis to the approach taken in the unfair dismissal claim. Not ail of the relevant principles and considerations are common to both.

109. It is found that the respondent was not in breach of the claimant's contract by dismissing her summarily and without notice pay. The claimant fundamentally breached her contract with the respondent by way of the conduct described within Allegation 1. It was an essential term of the contract that she adhered to the respondent's standards of conduct as set out in the Colleague Conduct Policy. The wording of that document makes clear that it applies to aii employees and imposes mandatory requirements on them. On the balance of probability it is found that the claimant breached the standard of professional integrity imposed by paragraph 1.2. She did this by using the racially derogatory language contained in Allegation 1 to two team members. She did not *'behave in a professional, responsible and appropriate manner towards other colleagues'* and she used discrimination. This was a sufficiently material breach to go to the root of the contract, given the nature and gravity of the behaviour. The respondent brought the contract to an end because of it. It was therefore released from the obligation to give notice or payment in lieu.

CONCLUSIONS

110. The claimant will understandably be disappointed to lose her claim. She had a long period of service with the respondent without any documented

conduct issues before the events which led to her dismissal. However, the legal tests which a tribunal must apply to a case of this nature are such that the respondent was entitled to dismiss her in a way which was fair, even if it could also have decided not to do so. The decision taken was one which was open to it and the claim is unsuccessful.

111. For the reasons given above the claimant is found to have been fairly dismissed, and her claim is dismissed. For similar but not identical reasons she was not entitled to notice or payment in lieu of notice when her employment was terminated, and this claim is also dismissed. As a consequence there is no requirement to determine remedy.

Employment Judge: B Campbell
Date of Judgment: 18 March 2022
Entered in register: 18 March 2022 and copied to parties