Case Number: 1403328/2023

EMPLOYMENT TRIBUNALS

Claimant: **Mr Simon Harper**

Respondent: **Brighton & Hove Albion Football Club**

Heard at: Southampton **On:** 18, 19 January 2024

Before: Employment Judge Dawson

Appearances
For the claimant: Mr Adjei, counsel
For the respondent: Ms Dickinson, solicitor

JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. The respondent was in breach of contract in dismissing the claimant without notice.

3. By consent, the question of remedy is adjourned and the claim for remedy will stand dismissed on withdrawal by the claimant on 9 February 2024 unless either party contacts the tribunal prior to that date.

REASONS

Introduction

1. The claimant is a teacher. He works at a primary school in Brighton and Hove for part of the week and, between September 2014 and 24 November 2022, he worked part-time on Fridays as a teacher for Brighton Football Club Academy, part of the respondent's organisation. He was dismissed for gross misconduct

for having used the word "nigger" when addressing a colleague. He claims unfair and wrongful dismissal.

Terminology in this judgment

2. The offensive word for which Mr Harper was dismissed is one which inevitably causes distress to people. Wherever possible, I will substitute the phrase "the offensive term/word" for the actual word used, but in order to properly make findings of fact it is necessary at times to use the actual word; in particular to record the precise evidence which I have heard and to avoid confusion as to whether my findings are that the offensive term itself was used or a substitute such term such as the "n-word".

Issues

3. The parties agreed the issues in a document dated 11 January 2024.

Law

4. Section 98(4) Employment Rights Act 1996 states that "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case".

5. In considering a dismissal for misconduct the tribunal must have regard to the test in *BHS v Burchell* that "First, there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And, third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case"

6. The case of *Sainsbury's Supermarket Ltd v Hitt* [2002] EW CA Civ 1588 makes clear that the range of reasonable responses test applies to all aspects of the dismissal decision (para 29).

7. In *Shrestha v Genesis Housing Association Limited* [2015] EWCA Civ 94, it was held "To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole".

8. In circumstances where it is found that a decision to dismiss was unfair the tribunal must consider how much compensation to award in accordance with sections 122 and 123 the employment rights 1996.

9. In respect of the basic award, section 122 (2) ERA 1996 provides

   "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly"

10. In respect of the compensatory award, s123 ERA 1996 provides

> (1)Subject to the provisions of this section … , the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
>
> ...
>
> (6)Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

11. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd*, Leggatt J gave the following helpful guidance

> *Evidence Based On Recollection*
>
> **[16]** While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
>
> **[17]** Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event.

> (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory)
>
> **…**
>
> **[22]** ... Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

Findings of Fact

Undisputed Facts

12. The following facts are not in dispute.

13. On 30 September 2022, Nathan Marshall, the claimant's line manager, spoke to Mr. Crowe, the respondent's Academy Operations Manager, and told him that the claimant had greeted him that morning using the "n-word"

14. A meeting took place on that day between Mr. Marshall, Mr. Crowe and the claimant in which the claimant denied having used the term and apologised if that is what Mr. Marshall thought he had said.

15. Everyone accepts that, had the claimant used that term, it would have been out of character for him and there had been no similar incidents or concerns during his period of employment.

16. The claimant is qualified as a social worker as well as a teacher and asserts, and it was not disputed, that there was no antiracism education at the club's academy until he took the initiative of his own accord to deliver workshops on antiracism in his first year of being at the club, which have continued annually since.

17. On 3 October 2022, Mr. Marshall wrote an email an account of what had happened. The following are taken from that email account

    a. Mr. Marshall said "I came into the education area on Friday morning (30/9/22) as I entered I could see and Simon Harper (SH) in the open plan education area. As I approached my office door I said good morning. SH responded 'good morning and I heard a word ending in 'ger'. In shock/disbelief and from what I know of SH's character I thought I misheard or was mistaken. I proceeded into my office." His account

goes on to say that a minute or two later Mr. Harper came to his office and asked if he would like a cup of tea.

b. Later in the morning a scholar at the Academy came into his office and said that they had heard something ending in “ger”.

c. Later, Mr. Marshall saw Mr. El-Abd, a teacher of the scholar who said that the scholar had told him that they’d heard a man use the “n-word”.

d. There was a meeting in the afternoon at which point, according to the email, Mr. Marshall told Mr. Harper that he thought he had been referred to as a “nigger” and recalled that Mr. Harper wholeheartedly refuted the claim saying it was a word that he didn’t use but apologised if Mr. Marshall believed it had been heard.

e. Later in the afternoon Mr. Marshall spoke to the scholar and asked for his exact account of what happened and the scholar said he heard Mr. Harper say “good morning my nigger”

18. Mr. Crowe took notes of the events as far as he was aware of them on 30th September, 3 October and 5 of October, as appears at pages 47 and 48 of the bundle. In his evidence before me, which was unchallenged and which I accept, he said that he made the notes at pages 47 and 48 of the bundle on the day that the events happened.

19. According to a document at page 106 of the bundle which formed appendix 7 of documents sent to the claimant in advance of the disciplinary hearing, at 3 PM on 6 October 2022 there was a meeting with Chris Crowe, Joss Albert and the scholar. Appendix 7 is a note of that meeting. The notes record that;

a. the scholar said that the door to the office was open and they heard what they thought was Mr. Harper saying “you alright nigger” to Mr. Marshall;

b. the scholar said that around 10 minutes later they went to speak to Mr. El-Abd and said they had heard someone use the N word;

c. Mr. El-Abd expressed doubt;

d. the scholar said that they had said to Mr. Marshall that they thought the claimant had called him “nigger”,

e. Mr. Crowe asked the scholar if they could remember the exact words and the scholar said “they thought on reflections, it was “good morning my nigger”” (sic)

f. Mr. Crowe asked the scholar if they had time to think about how confident they were that the words had been used and they said about 70% at the time but now they were 90%.

20. On 6 October 2022 Mr. Harper was suspended pending investigation. On 7 October 2022 he was invited to an investigation meeting on 14 October 2022.

21. On 13 October 2022 an investigation meeting took place with Mr. Marshall in which he stated "SH greeted me good morning and I heard good morning and a the word 'ger'" and went on "I questioned myself thinking did her say the n 'word' but as SH wasn't angry so I thought I may have misheard. I was in shock".

22. On the same day Mr. Harper wrote his account of what had happened, it appears at page 99 of the bundle. The account has a second heading "Additional Information" and in his evidence (which was not challenged on this point) he stated that he was not sure when he wrote the second part. The first part is relatively brief but states that he started work at 9:30 and went straight to the education department where he greeted Mr. Marshall in his office and offered to make him a cup of coffee or tea.

23. On 14 October 2022, an investigation meeting took place with Mr. Harper. In the course of that meeting he said that he started work at 9:30, greeted Mr. Marshall in his office and offered to make a cup of tea or coffee. He confirmed that he did not see anyone else around and that Mr. Marshall was in his office and repeated that to his knowledge there was no one else around. He was asked if the Academy area was empty and he said yes. He said that Mr. Marshall was in before he arrived and that asking Mr. Marshall whether he wanted a cup of tea was his first exchange that morning. He was adamant that he had not used the offensive term. In answer to direct questions he confirmed that he thought no one else was there and that he had greeted Mr. Marshall and offered him tea in one exchange.

24. An investigation report was written by Mr. Crowe. In it he set out a number of paragraphs under the heading "Findings of Fact". Those findings of fact simply recounted the different versions of events which had been given. In the section headed "Conclusion" he stated "upon review of the evidence submitted and on the balance of probabilities, it is Chris Crowe's belief that Simon did use offensive language towards Nathan on the morning of 30 September 2022." There is no analysis of the evidence or explanation as to how Mr. Crowe reached that belief.

25. On 21 October 2022 the claimant was invited to a disciplinary meeting. A number of documents were attached to the invitation but not Mr. Crowe's contemporaneous notes.

26. The meeting, in fact, took place on 18 November 2022 and was conducted by Mr. Mullen the respondent's Chief Operating Officer.

27. At the outset Mr. Harper sought to change or correct three parts of his evidence. Firstly, he said that because he drove in on the day in question, he was there before Mr. Marshall, secondly he said that having seen the CCTV he was aware

that a scholar was present in the area and thirdly he said that there were two exchanges, one to greet Mr. Marshall and one to offer him a cup of tea. Mr. Mullen replied that would be captured in the notes.

28. There was some discussion about distances in the office, a plan had been prepared and the claimant said that the distance between him and Mr. Marshall would probably be over 10 m at the time of the first interaction, he was sat in the far corner and Mr. Marshall was in his office. At the time of the second interaction, the distance between them would have been around 4 m since the claimant was standing at Mr. Marshall's doorway when he asked if he would like a cup of tea. I note that on Mr. Marshall's account in his email of 3 October 2022, the offensive comment was made during the first interaction, not when he was asked about a cup of tea.

29. The claimant was then asked where the scholar may have been and the claimant replied "3 or 4 m. I'm not entirely sure where he was…" Mr. Mullen stated "I think we can both confirm that there was acknowledgement by Nathan and yourself from the CCTV but the scholar's actual location was not visible by the CCTV."

30. In his cross examination, Mr. Mullen stated that "based on the information presented, it was still not clear who was where in the vicinity." That part of his evidence was not challenged and I accept that.

31. On 24 November 2022, Mr. Mullen wrote to the claimant stating that on the balance of probabilities he concluded that he did use offensive language towards a colleague. He set out a number of reasons for reaching that conclusion including;

    a. the corroborating evidence of the scholar,

    b. there was no reason for Mr. Marshall to raise a false allegation,

    c. the claimant had not provided an alternative word ending in "er" which he may have used,

    d. Mr. Marshall and the witness were in proximity with each other and with the claimant and would have been able to hear what had been said,

    e. the claimant had provided inconsistent details as to what had happened and was, therefore, dishonest and

    f. given that the use of the "N word" had shocked Mr. Marshall it was acceptable for him to take appropriate time to pause and reflect before reporting the matter to his line manager.

32. On 30 November 2022 the claimant appealed and, amongst other things, asked for photographs of the area in question stating that a clear visual understanding of the space was an integral part of the case.

33. The appeal hearing took place on 6 January 2023 and was heard by Ms Gower, Head of Ticketing and Supporter Services

34. In the course of the hearing the following exchange is recorded:

> LR: I don't want to embarrass Chris by going through details. I don't know what's so funny, Simon has had awful mental health issues. This is totally inappropriate behaviour, we have to take a 5-minute break. Why are you laughing? We'll take a break. You asked me about the relevance of the question.
>
> JG: Yes, can we stick to the appeal process and keep this respectful between all parties?

35. It is apparent that the person who was laughing was Mr. Crowe. Shortly afterwards he stated

> Can I just say in no way me having that laugh was me being disrespectful. I'm not trying to play down anything at all, and I acknowledge that and apologise. I didn't find it funny at all.

36. Earlier in the appeal, Mr. Crowe had spoken about Mr. Marshall coming to speak to him about the events on 30 September. He was asked the question "did you keep any notes or make any record of that meeting?" by the claimant and replied "I didn't take notes, no". The claimant asked "why not", Mr. Crowe replied "that preparation came at a later date."

37. As I have said, in his evidence before me Mr. Crowe said that he made the notes at page 48 of the bundle on the day that the events happened. Thus the evidence which he gave to the appeal must have been incorrect.

38. The claimant presented the plan at the appeal which appears at page 181 of the bundle which has a number of measurements on it and he also attended with a piece of string which was 8 m long.

39. The claimant's appeal was dismissed.

40. In the appeal outcome letter, Ms Gower stated as follows

> I do not have a clear sense from your report of where the Scholar was situated, as you stated you still do not recall seeing the Scholar or even knowing it was a Scholar who was there, in contradiction to that which you stated during your disciplinary hearing. Given your first suggestion with the most extreme distance that the Scholar could be from you (approximately 17 metres) the diagram suggests Mr. Marshall would have been approximately 15 metres away. In this scenario, the Scholar would therefore only be 2 metres further away than Mr. Marshall was. It stands

to reason that you raised your voice to cover the distance, and I do not find 2 metres significant enough to suggest the Scholar could not have heard. Furthermore, in this scenario your back was not to either party. In your second scenario you are around 5 metres away from Mr. Marshall with your back to the Scholar in what you estimate to be 8 metres away. In your own experiment at the appeal hearing, with your back to me, speaking quietly and being 8 metres away I could hear your voice and the words you said clearly.

Other Findings

41. In addition to those findings which I have made based on undisputed evidence, I also make the following findings.

42. In the course of the original disciplinary meeting Mr. Mullen said to the claimant "In terms of how you felt when presented with these allegations. An observation on my part and what we've read here is we've got the impression you've been very calm, very professional throughout these allegations. I guess if it was me and I was alleged something like this I'm surprised there's not more emotion. Any reason you would hold back?"

43. The claimant picked up on that point in his witness statement and in supplemental questions as part of his evidence in chief Mr. Mullen said "I was genuinely surprised that compared to myself there wasn't more emotion, whilst respecting his response, I would have expected more emotion and passion." In cross examination Mr. Mullen denied that he had focused on the lack of emotion because he was looking for reasons to find the claimant guilty, but did not deny that he had focused on the claimant's lack of emotion.

44. I find that the way in which the claimant reacted to the allegations was a factor taken into account by Mr. Mullen in deciding whether he was guilty or not. It was also put to Mr. Mullen that he did not consider a lesser penalty, to which he replied that within the terms of the disciplinary policy the sanction was appropriate for that level of behaviour. I find that he did not consider a lesser penalty. However, I do accept that in so far as he referred to the claimant's career history in the disciplinary outcome letter, he was considering the length of his service and his relationship with his employer.

45. According to the ET3, the respondent is a reasonably large employer, employing 330 people in Great Britain, including 206 at the place where the claimant worked. The respondent appears to have its his own human resources type adviser, at least to the extent that it employs Charlotte Macey who describes herself as "People Services Manager (Talent & Culture)". She appears to have supported the respondent's managers during the investigating and disciplinary process, having regard to emails from her in the bundle and her presence at the investigation meeting.

Conclusions

Unfair dismissal

46. There is no dispute that the reason for Mr. Mullen's dismissal of the claimant was his belief in the claimant's misconduct.

47. Thus the question becomes whether that belief was based on reasonable grounds following a sufficient investigation.

48. In this case, I have found that these two questions merge and I intend to address them together.

49. There are a number of features of the investigation and disciplinary process which concern me.

50. Counsel for the claimant submits that Mr. Crowe was the wrong person to investigate because he had been to the original meeting between the claimant and Mr. Marshall on 3 September. That lack of independence is not ideal but having regard to the fact that Mr. Crowe was not the disciplinary officer, in isolation, I do not consider it would be outside the range of reasonable responses. However, I am troubled by the facts that;

    a. there was no analysis of the evidence by Mr. Crowe in reaching his conclusions in his investigation report,

    b. he told the appeal hearing that he had not taken notes of the meeting on 30 September when he had,

    c. those notes were not sent to the claimant at any time and

    d. he laughed during the appeal process.

51. The combination of those factors leads me to conclude that, on the balance of probabilities, the investigation process was not as robust as it should have been having regard to the size and administrative resources of this respondent.

52. I am also somewhat troubled by the emphasis placed by Mr. Mullen on the claimant's reaction to the allegations. It is well known, and should be well known to employers with the resources of this respondent, that different people react in different ways to serious allegations. Some will become angry and passionate, some will withdraw and shut down. To infer that somebody is guilty because they have not reacted in the same way that the disciplinary officer would have done is, I regret to say, facile. Having said that, this is a failing which, in isolation, I would not have considered takes the process outside the range of reasonable responses of an employer, but it is something that troubles me. Those deciding whether to end someone's career with an employer, should be trained properly and should not be drawing such simplistic conclusions.

53. I am more troubled, however, by the fact that Mr. Mullen's decision was made at a time when he was still not clear who was where in the vicinity of alleged comment. Given that the disciplinary outcome letter expressly stated, as part of the reason for its conclusion that the claimant was guilty of gross misconduct that both Mr. Marshall and the witness were in proximity with each other and with the claimant, it was incumbent on Mr. Mullen to ensure that there was a proper fatual basis for that statement. In answer to my question as to why he did not carry out more investigation on that point, Mr. Mullen stated that he took the information he was provided with by the claimant and what was presented. However given that on his own evidence Mr. Mullen remained unclear, further steps should have been taken to clarify where people were. That would have been relatively easy, somebody could have asked the scholar where he was, somebody could have asked Mr. Marshall where he was, both of those people could have been asked where Mr. Harper was. That failure was, in my judgement, a significant failing.

54. Moreover that failing was not corrected on the appeal. At the appeal stage, Ms Gower considered two scenarios as set out above. In satisfying herself as to the first scenario she simply stated that it stood to reason that Mr. Harper would have raised his voice to cover the distance of 15 m. There was no basis for her making that assumption and she made no finding as to what level Mr. Harper raised his voice. It is difficult to escape the conclusion that having decided that Mr. Marshall and the scholar would have heard the comment, she then made a finding to fit that conclusion. I find that to be a significant failing. Ms Gower then, with Mr. Harper, conducted an experiment and decided that she could hear his voice when he was 8 m away but did not conduct a similar experiment with Mr. Harper being 15 m away. When I asked her why, she stated that was because they were in a room which was too small to do so. It would have been easy to move to the actual room if the experiment was to be relied upon. This was a further failing.

55. I also consider it to be a failing in the process that Mr. Mullen did not consider the application of a lesser sanction to the claimant.

56. I have reminded myself that the respondent is not required to carry out a process which is to the standard of a judicial investigation. The test is the range of reasonable responses. However, taking the above deficiencies in the process into account, I am satisfied that, having regard to the size and administrative resources of this respondent, the process fell outside the range of reasonable responses.

57. Following that finding, because those issues remained unresolved, I do not consider that there were sufficient grounds for the belief of Mr. Mullen that the claimant had said the offensive word.

58. In those circumstances the dismissal was unfair.

59. I must go on to consider whether compensation should be reduced on the basis that the claimant contributed to his dismissal (contributory fault) and/or whether a reduction should be made on the basis that although there were procedural deficiencies, a fair procedure would have resulted in the same outcome (*Polkey*).

Contributory Fault

60. Both representatives agree that in order to consider contributory fault I must decide, for myself, whether the claimant used the offensive term.

61. The respondent has not called either Mr. Marshall or the scholar to give evidence before me.

62. The evidence of Mr. Marshall, in his account on 3 October 2022, appears to be given without any attempt to exaggerate or mislead. In some respects it is given diffidently. He states that he thought he heard “good morning” and a word ending in “ger” but in a shock or disbelief he had thought he had misheard or been mistaken. The claimant’s demeanour did not cause him to probe any further and it remained on his mind until the scholar came to see him.

63. According to Mr. Marshall, the scholar initially thought he heard something ending in “ger”. The record of 3 October 2022, therefore, shows that shortly after the event neither the scholar nor Mr. Marshall were sure that the offensive term had been used.

64. It is right to say, however, that the email also records that when later, Mr. Marshall saw Mr. El-Abd , Mr. El-Abd said that the scholar had reported to him that he had heard a man use the N word. I have not heard from Mr. El-Abd and cannot be sure from that sentence, which amounts to second-hand hearsay, precisely what the scholar said to Mr. El-Abd. Mr. El-Abd may have simply been summarising the gist of what the scholar said rather than giving a verbatim account.

65. It is apparent that thereafter both the scholar and Mr. Marshall became more confident in their beliefs. Mr. Marshall states in the email of 3 October that after hearing “both accounts” he knew that what he had thought earlier in the morning was correct and in the meeting on 6 October 2022 the scholar said that his certainty had moved from 70% to 90%.

66. The scholar’s account changed at times. According to the record of 3 October 2022, although initially the scholar had said to Mr Marshall that he thought he had heard something ending in “ger”, later, in the afternoon, he said to Mr. Marshall that he heard Mr. Harper say “good morning my nigger” and on 6 October 2022 he said he thought he heard Mr. Harper saying “you alright nigger” before changing it to “Good Morning my Nigger”.

67. Given the way in which the scholar's account has developed, I am not satisfied that any of the later statements by them are reliable. Further, given the way his account developed, I am not satisfied that any thoughts which Mr. Marshall had after he had spoken to the scholar are reliable. In reaching those conclusions, I am not saying that either the scholar or Mr Marshall deliberately set out to mislead or to get Mr Harper into trouble, however, in line with *Gestmin,* I consider that the conversations that they had with each other and going over their thoughts themselves has caused changes in their recollection.

68. I am satisfied on the balance of probabilities that both the scholar and Mr. Marshall did hear a word ending in "ger" and that they were both concerned that the word may have been the offensive term. The question is whether I am satisfied that the term used was the offensive term.

69. In making that determination, I consider that I must have regard to the fact that it was considered to be out of character for the claimant to have said such a thing. That somebody is not known for making such comments and has never been accused of such things before is relevant to the question of propensity. If it would not be within the character of the claimant to make such a comment, then the question arises as to why he would have made it on the day in question. There is no answer to that question on the evidence which I have heard. I also take account of the claimant's undisputed involvement in setting up the antiracism workshops in the Academy.

70. I have also heard evidence from the claimant who is adamant that he denies having made such a comment. I must consider whether that evidence is credible having regard to his change of story in the three respects set out above. Those changes do not cause me to doubt the claimant's credibility. If the claimant was innocent of the charge when he said good morning to Mr. Marshall on 30 September 2022, there would be no reason for him to take account of who was around or record precisely who arrived when or how many conversations there were. Although he was suspended on the 6 October 2022, he was not asked about the events until 13 October 2022, some 13 days after the event. I do not consider it at all surprising that he would not, at that point, remember the precise events of the morning of 30 September 2022. Of course, it might be said that when he gave evidence before me his recollection would have changed for the reasons set out in *Gestmin.* While that is true, when he was initially confronted with the allegation he was confident in his denial, and the question remains why he would do something which was so out of character.

71. Taking all of those matters into account, on the balance of probabilities I prefer the claimant's evidence and find that he did not say the offensive word.

72. In those circumstances there is no reduction to the claimant's compensation on the basis that he contributed to his dismissal.

Polkey

73. I turn then to the question of Polkey.

74. Had the respondent not made the procedural failings which I have identified, it would have been faced with the same factual evidence which I have analysed, along with a clearer understanding of where people were situated when the alleged comment was made.

75. I have to allow for the possibility that this employer would have analysed the evidence in a different way to the way which I have. This employer was presented with two accounts of individuals who said they heard a word ending in "ger" and who were concerned that the word used was the racially offensive term. The employer might have concluded that the claimant was standing sufficiently close to Mr. Marshall and the scholar for his voice to be heard clearly and could have analysed the discrepancies in relation to the claimant's evidence differently to the way I have. Although I have concluded, on the balance of probabilities, that the claimant did not make the offensive comment, it is possible that a different person looking at the same facts would reach a different conclusion.

76. It is very difficult to scientifically assess what the chances are that someone would analyse the case differently to me and, doing the best I can, the compensatory award will be reduced by 50% to reflect that possibility.

77. In reaching that conclusion, I reject the submissions of counsel for the claimant that whether the claimant could be dismissed for using the offensive term would depend upon the context in which it was used. Counsel submitted that if it was used in the context of a greeting, rather than as a term of abuse, then dismissal for gross misconduct would be outside the range of reasonable responses. In my judgment, the term is so offensive that even if it was used in a greeting, perhaps in a misguided attempt at lightheartedness or even affection, it would still be well within the range of reasonable responses for an employer to dismiss someone for using the term. Having heard the respondent's witnesses, I have no doubt that they would have considered the claimant should be dismissed for using the term regardless of the context.

Wrongful Dismissal

78. I have not been provided with a copy of the contract of employment in this case. It is not clear to me, therefore, precisely how the relevant contractual provision works in this case. Although both parties agreed that I would need to consider for myself whether the claimant was guilty of using the offensive term, it is possible that the contractual notice provision provided either for a simple period of notice or that it provided for a period of notice unless the claimant was guilty of gross misconduct.

79. The correct analysis is, therefore, either ;

a. that the term simply provided for termination by the employer on notice, and in failing to give such notice the respondent was in breach of contract unless the claimant, himself, was in repudiatory breach which discharged the respondent from its obligations; or

b. the claimant was entitled to notice unless he was guilty of gross misconduct, which I understood to be the position of Ms Dickinson.

80. Either way, it is necessary for me to consider whether the claimant was guilty of using the offensive term. If he was then he would have been in repudiatory breach of contract and he would also have been guilty of gross misconduct (again, regardless of the context in which the word was used).

81. However, for the reasons I have given, I am not satisfied that the claimant was guilty of gross misconduct or in breach of contract since, on the balance of probabilities, I find that he did not make the comment alleged.

82. In those circumstances claim for wrongful dismissal succeeds.

Summary

83. The claimant was unfairly dismissed by the respondent, but the compensatory award will be reduced by 50%. The respondent was in breach of contract when it dismissed the claimant without notice.

Employment Judge Dawson
Date: 22 January 2024

Judgment sent to the Parties: 5 February 2024

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

Recoupment

The recoupment provisions do not apply to this judgment.