EMPLOYMENT TRIBUNALS

Claimant: Mr D Hill

Respondent: Caterplus Limited

HELD AT: Manchester **ON:** 5 June 2017
12 July 2017
(in Chambers)

BEFORE: Employment Judge Whittaker

REPRESENTATION:

Claimant: Mr D Flood, Counsel
Respondent: Mr E Aston, Solicitor

JUDGMENT

The judgment of the Tribunal is that the claimant's claim of unfair dismissal is dismissed.

REASONS

1. By a claim form received at the Employment Tribunal on 8 February 2017 the claimant brought a single claim of unfair dismissal. It was agreed between the parties that the claimant was dismissed for gross misconduct on 9 November 2016 and that that was the effective date of termination of his employment.

2. The conduct alleged against the claimant by the respondent was set out in the letter of dismissal dated 14 November 2016. That letter appeared in the bundle of documents presented to the Tribunal at pages 140-144. Those allegations were:-

(a) A racist comment made to Gwen Nelson on 29 June 2016;

(b) A discriminatory comment made to Szilvia Kun regarding her religion on 30 July 2016; and

(c) Intimidatory behaviour towards Gwen Nelson regarding the ordering of a food probe.

3. The respondent concluded that these allegations amounted to gross misconduct and dismissed the claimant summarily without notice.

4. Pursuant to section 98 of the Employment Rights Act 1996, the respondent identified and relied upon the permitted ground of conduct for dismissing the claimant. This was not disputed.

5. The claimant denied that he had behaved in the way alleged against him by the respondent. The issues for the Tribunal to decide were whether at the time of dismissal the respondent honestly believed, on reasonable grounds and after a proper enquiry and investigation, that the claimant had behaved in the manner alleged. If the Tribunal was to conclude that the respondent could be satisfied that the claimant had behaved in a way which constituted gross misconduct, the issue for the Tribunal was to decide whether or not the decision to dismiss the claimant for gross misconduct, without notice, was a decision which fell within the band of reasonable responses available to a reasonable employer. The Tribunal was required to consider and apply the language of section 98(4) of the Employment Rights Act 1996. In deciding whether the dismissal of the claimant was fair or unfair, having regard to the reason of conduct which was relied upon by the respondent, depended on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating conduct as a sufficient reason for dismissing the claimant, and the decision of the Tribunal had to be determined in accordance with equity and the substantial merits of the case.

6. The Tribunal was presented with a joint bundle of documents by the parties comprising of 176 pages. A number of those documents towards the end of the bundle, however, were not relevant to the issues considered by the Tribunal on 5 June 2017 as they related to a potential remedy.

7. The claimant gave evidence on oath by reference to a written witness statement and gave replies under cross examination. The witness for the respondent was Miss Hayley Aldread. She took the decision to dismiss the claimant. She also gave evidence on oath by reference to a written witness statement and answered questions under cross examination.

Findings of Fact

8. After considering the relevant documents in the bundle and having heard evidence from the two witnesses the Tribunal made the following findings of fact:-

(a) The claimant began employment with the respondent on 28 June 2013. He was employed as a catering manager until his dismissal on 9 November 2016. The claimant was employed to provide services as a chef and a manager in connection with outsourced catering facilities provided by the respondent company to various clients of the respondent company in different locations.

(b) As already indicated, the claimant was dismissed for making a racist comment to Gwen Nelson on 29 June 2016. The claimant first came across Gwen Nelson in or about October 2015 when she became the manager of one of the premises of a client of the respondent company. She was the house manager at Hurst Meadow Assisted Living in Ashton-under-Lyne in Greater Manchester. It was agreed between the parties that Gwen Nelson was of Afro Caribbean background and was approximately 28/29 years of age. For the avoidance of any doubt, Gwen Nelson was not employed by the respondent company. The respondent company was simply providing outsourced catering facilities to the premises that Gwen Nelson was herself managing.

(c) On 9 May 2016, as shown in emails at pages 38 and 41 in the bundle, Gwen Nelson and Samplay Jasvir, the manager of Gwen Nelson, wrote to David Hartley, a manager with the respondent company, to raise complaints about the conduct of the claimant. Specifically Gwen Nelson complained at page 41 about the manner in which the claimant had spoken to her about ordering a food temperature probe. He had told Gwen Nelson that the probe had to be ordered and that it had to be delivered the next day. Gwen Nelson had pointed out to the claimant that there were procedures of her employer to follow and that it was not possible for her to do as he asked. The day after that conversation, on a Thursday morning, the claimant had again spoken to Gwen Nelson about the probe and had told her to “get on the phone”. Gwen Nelson felt that the claimant had spoken to her “in a commanding way”.

(d) There was at the same time a discussion between the claimant and Gwen Nelson about delays in connection with arranging repairs to an automatic potato peeler. Gwen Nelson said in her email at page 44 that the manner in which she was being addressed by the claimant left her feeling as if she wanted to leave and that she could not understand why the claimant was talking to her in the way that he was. Samplay Jasvir overheard the discussion between the claimant and Gwen Nelson in respect of the probe and she included that in her own report to her manager on 9 May 2016 at page 38 in the bundle. She reported the claimant as “demanding a particular type of probe” and indicating that he would not have it any other way. Samplay Jasvir reported in her email that she had confirmed to Mr Hill that neither she nor Gwen Nelson were simply able to order equipment in the way that was being demanded of them by the claimant. There were procedures to follow, and in particular any equipment ordered had to be from a pre-approved list which was issued by the employers of Mrs Jasvir and Gwen Nelson.

(e) In a further email, again dated 9 May 2016 at 11:56 (page 40) Mrs Jasvir indicated to a manager of her own employer that she was “so uncomfortable” with the claimant about his manner towards female staff.

(f) In an email dated 29 June 2016 – page 44 of the bundle – Mrs Jasvir sent an email to herself to record the fact that she had had a conversation with Gwen Nelson during her monthly meeting with her and that during that

monthly meeting Gwen Nelson had told her that the claimant had made an unacceptable remark and that he had remarked that the previous chef had ordered quite a lot of meat, "enough to feed whole of Africa – but no disrespect". That had been said by the claimant to Ms Nelson. She recorded in that email, to herself, that Gwen Nelson was made to feel very uncomfortable and that Gwen Nelson had at that stage asked for nothing to be mentioned. In an email at page 43 in the bundle dated the following day, 30 June 2016, Mrs Jasvir, to her own two managers, reported to them that they needed to be aware of the remark that had been made. Mrs Jasvir reports that she herself is not happy with the remark which had been made by the claimant despite the fact that he had tried "to be apologetic soon after with his second comment, no disrespect". Mrs Jasvir in that same email confirmed that she wanted the claimant to be removed from site as in her opinion he clearly did not value the values of the company that Mrs Jasvir and Gwen Nelson worked for, and indeed Mrs Jasvir went so far as to say in that email that the claimant had some form of underlying issue that needed to be addressed. She asked for a discussion about the issues raised.

(g) The claimant was then employed as a cover chef at a completely different set of premises operated by the company employing Gwen Nelson and Mrs Jasvir. He provided cover at premises at South Dene on 30 July to 1 August 2016. In an email dated 9 August 2016 at page 48 in the bundle Christine Dimbleby, a Service Deliver Manager, reported a third matter relating to the conduct of the claimant. This related to a weekend kitchen assistant, Szilvia. It was reported by Christine Dimbleby that the claimant had made a comment about Szilvia being a Muslim. It was alleged that the claimant had asked her if she wanted some meat and that Szilvia had replied to the claimant by telling him that she was a Muslim. It was then alleged in that email that the claimant had said to Szilvia that "you don't want to be a Muslim, go back to being a Christian and eat meat. Other Muslims cheat and eat meat". By the date of that email the claimant was no longer working at South Dene having been only temporarily engaged between 30 July and 1 August 2016.

(h) Following on from that email dated 9 August 2016 at page 48, an investigation meeting then took place with the claimant on Wednesday 10 August at other premises of the respondent company in Scarborough. Notes of that meeting appeared in the bundle at page 50. The allegation involving Szilvia was put to the claimant on the basis that it was a racist comment. It was explained to the claimant that Szilvia was so upset that she refused to work with the claimant again and that a decision had been taken by the respondent company that the claimant would no longer be engaged on any of the sites which were operated by the company that employed the four people who had now complained about him. That company was Hanover. The claimant in that meeting on 10 August denied using the words and phrases which had been attributed to him. He said that he was aware that Szilvia was Polish and that he had never thought about her being a Muslim.

(i) A written statement in the form of an email was then provided by Szilvia on 10 August 2016. That email appeared at the foot of page 52 in the bundle. Szilvia set out in that email the detail of the words and phrases which had been used towards her by the claimant. She said that the comments which the claimant had made about her religion, being a Muslim, she found "insulting". She said that she was really upset. She concluded the email by saying that she did not ever want to work with the claimant again. In an email dated 15 August 2016, at page 53, in any event Hanover had by then confirmed to the respondent company that the claimant would not be allowed back on any Hanover site. That was confirmed to the claimant in a letter sent to him by the respondent company on 15 August 2016 – page 56.

(j) By a letter dated 24 August 2016 – page 58 – the respondent company wrote to the claimant requiring him to attend an investigation meeting in order to consider allegations of racism and a request which had been made by Hanover for him to be removed and excluded from any of their sites. The investigation meeting was to take place on 30 August 2016. Notes of those meetings were provided to the Tribunal at pages 59-69 inclusive.

(k) The first allegation put to the claimant at that meeting was the allegation made by Gwen Nelson to the effect that the chef had ordered a lot of meat which was "enough to feed whole of Africa". The claimant denied using those words. He alleged that he and Gwen Nelson had "been at loggerheads". He said that he had put in his own complaint about Gwen Nelson. He set out the details of that complaint at page 61 during the course of the investigation meeting. He alleged that Gwen Nelson had been upset by the nature of the complaints which he had raised and by implication suggested that Gwen Nelson had then made up the comment about him. He remained adamant that he had not said what was alleged against him.

(l) There was then a discussion with the claimant about the allegation involving the ordering of a new probe. At page 63 the claimant indicated that he had made it clear to Gwen Nelson that her company should buy one which was more robust, hardwearing and perhaps would cost more. The claimant denied being aggressive to Gwen and indeed went so far as to say – page 64 – that in his opinion he had tried to protect Gwen Nelson if anything. When it was specifically put to the claimant that he had used the phrase "enough meat to feed Africa" the claimant replied by saying, "wouldn't have said that".

(m) The third allegation against the claimant was then discussed involving Szilvia. It was specifically put to the claimant that he had said to her in respect of her being a Muslim, "I hope you are one of the good ones not one of those". The claimant denied using those words. The claimant recalled, however, some discussion with Szilvia about her being a Muslim and about whether the food which was being discussed was "halal". However, the claimant denied being involved in any detailed discussion

about Szilvia's religion as a Muslim or making any comments about a comparison between the behaviour of Muslims and the behaviour of Christians.

(n) At that stage of the investigation it was confirmed, at page 68 of the bundle, that neither Gwen Nelson nor Szilvia had been interviewed.

(o) Further steps were then taken by Matt Keeffe to investigate the allegations against the claimant. On 10 September 2016 Mr Keeffe interviewed Christine Dimbleby. Those notes appeared at pages 70/71 in the bundle. She simply confirmed that she had reported what she knew in an email and raised general dissatisfaction about the behaviour of the claimant. On the same date, 10 September 2016, Mr Keeffe then interviewed Szilvia Kun. The record of that interview appeared in the bundle at pages 72-75. Szilvia did not in that interview supply or confirm the detail of the conduct of the claimant in the same way as had been reported by Christine Dimbleby in her email of 9 August which appeared at page 48 in the bundle. Szilvia made no mention about the claimant allegedly persuading her to go back to being a Christian and to eating meat, or to the fact that Muslims cheat and eat meat. Those specific words were not put to Szilvia to confirm or deny or to explain or to elaborate. Szilvia simply said during the investigation meeting – page 73 – that she had been asked by the claimant why she became a Muslim. Szilvia explained the delay in raising a complaint about the behaviour of the claimant because she felt that he had only been stupid, but she had then thought about it and mentioned it to her boss. At that stage she had decided that she wanted to make a complaint but not to the extent that the claimant lost his job. She confirmed that she had then explained to Christine Dimbleby what had happened and that Christine had then reported it on her behalf as recorded in the email sent by Christine Dimbleby at page 48. Szilvia concluded her interview by confirming that she found it insulting that the claimant had said things about her religion that he did not know about. She equally confirmed that she did not want to work with the claimant again.

(p) Again on 10 September 2016 Mr Keeffe interviewed Joan Makin. Those notes appeared at pages 76-77 in the bundle. Her evidence consisted of generalised complaints about the behaviour of the claimant and was not evidence which related directly to the three incidents which led to his dismissal.

(q) In an email dated 14 October 2016 Mr Hill then raised a complaint/grievance in writing. His email appeared at page 78 in the bundle and the detail of his complaint appeared at pages 80-91.

(r) On 19 September 2016 Matt Keeffe then interviewed Gwen Nelson. She had raised two complaints about the conduct of the claimant: one relating to his attitude in connection with the ordering of kitchen equipment, and the second in connection with a comment relating to the chef having ordered enough meat to feed Africa. In connection with ordering the food temperature probe, Mrs Nelson was trying her best to sort it out. She said

that the claimant was demanding and that he had a bad attitude. Mrs Nelson said that the way the claimant spoke to her made her feel like as if she wanted to go home. The emails at pages 43 and 44 were specifically read from by Mr Keeffe and Mrs Nelson was asked whether or not she had challenged the claimant when he had made the comment about Africa. Mrs Nelson confirmed that she did not have that kind of challenge in her, but she went on to say that she felt offended later on after the meeting and that she had contacted Mrs Jasvir to tell her what had happened. Mrs Jasvir had then recorded what she had said in an email and had in turn reported it to more senior managers. Mrs Nelson went on to allege – page 95 – that the claimant was a bully and that his attitude was bad. Mrs Nelson confirmed that this made her not want to work with the claimant.

(s) Finally, insofar as the food temperature probe was concerned Mrs Nelson confirmed at page 96 that what the claimant was demanding was an expensive piece of equipment which she was not able to authorise herself and which she needed approval for. However, she concluded by saying that the attitude of the claimant was that he was demanding that Gwen Nelson obtain that piece of equipment and that she "get it delivered tomorrow".

(t) Hayley Aldread, an HR Business Partner employed by the respondent company, then wrote to the claimant in a letter dated 28 September 2016 at pages 97 and 98. She required the claimant to attend a disciplinary hearing to answer allegations in respect of an allegedly racist comment made to Gwen Nelson, an allegedly discriminatory comment made to Szilvia Kun and allegedly intimidatory conduct demonstrated by the claimant towards Gwen Nelson in connection with the food temperature probe. The letter confirmed that as a result of his behaviour Hanover had insisted that he be removed from any of their sites with immediate effect. A copy of the disciplinary procedure was enclosed with the letter as was a copy of all documentation which had been gathered as part of the investigation. The claimant was advised that the allegations were being treated as gross misconduct and that one potential outcome of the disciplinary hearing may be his dismissal. The disciplinary hearing was set for 5 October 2016. The claimant had been told that the investigation by Mr Keeffe had been concluded and that his case was being referred to Hayley Aldread. The claimant was advised of this in an email sent by Mr Keeffe to the claimant on 26 September 2016 – page 101. The disciplinary hearing was adjourned at the request of the claimant to Wednesday 12 October 2016. The notes of that disciplinary hearing appear in the bundle at pages 106-116 inclusive. The notes were summarised by Hayley Aldread in paragraphs 8-12 of her witness statement.

(u) In a letter dated 1 November 2016 Miss Aldread wrote to the claimant to reconvene the disciplinary hearing on 9 November 2016 having concluded, fairly and properly in the opinion of the Employment Tribunal, that the grievance/complaint which had been raised by the claimant was not related to the allegations of gross misconduct which were being

considered in the disciplinary process. In that letter dated 1 November 2016 Miss Aldread confirmed to the claimant that that was her decision and she invited him to attend a reconvened disciplinary hearing on 9 November 2016. However, by an email dated 8 November 2016 the claimant indicated that he was not going to attend. He made the allegation that in his opinion the judgment about what should happen as a result of the disciplinary process "was made several months ago". He invited Miss Aldread to make a decision in his absence. The company responded by indicating that it would be in the best interests of the claimant to attend and asked him to reconsider. However, by email dated 7 November 2016 the claimant confirmed his position that he would not be attending the reconvened disciplinary hearing, and that he would "let you make your own judgment".

(v) The claimant did not attend the reconvened disciplinary hearing on 9 November 2016 and so in his absence Miss Aldread considered the three allegations and concluded that the claimant should be dismissed immediately for gross misconduct. She confirmed that to the claimant in a letter dated 14 November 2016 and in that letter she sets out, at length, her reasoning and her conclusions. The claimant was told that he could appeal her decision by writing to the HR Director, Jon Goodchild. The claimant, however, never lodged any appeal against his dismissal.

(w) So far as his grievance was concerned, the claimant accepted in cross examination that he was given the opportunity by the company to pursue his grievance and to have it discussed and investigated. However, the claimant never responded to any invitations which were sent out to him by the respondent company to do that and so ultimately no steps were taken by the company to investigate his grievance as the claimant took no steps to pursue it beyond the initial submission of his written allegations.

9. The most detailed account of what the claimant had said to Ms Kun was set out in the email of Christine Dimbleby dated 9 August 2016 at page 48 in the bundle. The Tribunal noted that although the incident in question had occurred over the weekend of 30 July/1 August, the account was set out in writing on 9 August which was only just over a week later. Ms Kun was then interviewed on 10 September 2016 as part of the disciplinary investigation conducted by Mr Keeffe. Notes of that interview appeared in the bundle at pages 72-75. Ms Kun confirmed that her religion as a Muslim had been the subject of discussion with the claimant. She confirmed that the claimant had asked her whether or not she was a good or bad Muslim. She confirmed that the claimant had asked Ms Kun why she had become a Muslim. The Tribunal recognised that the full details of the allegations reported by Christine Dimbleby at page 48 were not discussed with Ms Kun during the course of the interview which took place with her as part of the disciplinary investigation. However, the Tribunal did note that there was specific confirmation from Ms Kun about certain aspects of what had been reported by Christine Dimbleby, in particular the comment made by the claimant that there were good Muslims and bad Muslims and that the claimant had questioned Ms Kun as to why she had become a Muslim.

10. The allegation relating to Ms Kun was discussed with the claimant during the course of a disciplinary investigation meeting which took place on 30 August, the notes of which appeared in the bundle beginning at page 59. At page 65 the claimant specifically denied making any comment about good/bad Muslims. In order to deny that allegation he used the words “not whatsoever”. The claimant was asked whether or not he had made any comparison between the conduct of a Christian and the conduct of the Muslim, and at the top of page 66 he denied that any such discussion had taken place.

11. During the conduct of the disciplinary hearing on 12 October 2016 the allegation relating to Ms Kun was again put to the claimant. That allegation was discussed with the claimant and notes are made about that discussion at page 109. The claimant clearly had preconceived ideas about what a Muslim should wear. He clearly expected Ms Kun to be wearing a particular type of dress associated with the Muslim religion. This is made clear by the claimant at the top of page 110. The claimant also quite obviously struggled to understand how Ms Kun could hold religious views as a Muslim when she was Polish. The claimant at page 110 admits to being taken aback when he was told that she was Muslim and the claimant goes on to confirm that Ms Kun was a “pretty girl who was Polish”. Clearly the claimant had some difficulty in understanding how someone who was pretty and who was Polish could equally adopt the Muslim religion, particularly if she did not dress in a particular way. He went on to say that there was “no indication” that the claimant was a Muslim. The claimant clearly expected Ms Kun to have behaved in a particular manner. The claimant was asked whether or not he had had any other conversation with Ms Kun about her religion. He went on to describe the incident between himself and Ms Kun as something where she was doing all the talking and he was effectively ignoring her and not getting “involved”. The claimant went on to mention the fact that he had a Para Regiment badge and a poppy on his chef’s hat and he went on to make the comment that “Muslims are urinating on poppies”.

12. At the conclusion of the disciplinary hearing the respondent therefore had the email at page 48, the supporting information and comments which had been given by Ms Kun and the comments which had been made by the claimant during the course of the investigation and disciplinary hearings. The Tribunal noted that each specific part of the allegation set out in the email at page 48 had not been put to Ms Kun, neither had it been put, word for word, to the claimant. However, what was clear was that Ms Kun was eventually sufficiently offended to indicate that she was not prepared to work with the claimant. The claimant denied any aspect of the discussions with Ms Kun as amounting to anything which could upset or annoy Ms Kun. Indeed he painted a picture of Ms Kun doing the majority of the talking about her religion and of him effectively being disinterested and not even listening to what Ms Kun was saying.

13. There was, therefore, a significant difference of evidence between that of Ms Kun and that of the claimant. The Tribunal however took into account that Ms Kun had clearly given a clear and detailed account to Christine Dimbleby which she had set out in a detailed email at page 48. Ms Kun had then confirmed the important parts of that email in her interview on 10 September. The claimant had denied doing anything which could have insulted or upset Ms Kun.

14. There was, therefore, a significant dispute of fact between the version of the discussion as presented by Ms Kun and Christine Dimbleby and the version of events as presented by the claimant. Miss Aldread found that she preferred the evidence of Christine Dimbleby and Ms Kun and she found that the claimant had made insulting and derogatory comments to Ms Kun about her religion as a Muslim. The Tribunal found that Miss Aldread had reasonable grounds for coming to that conclusion. It was reasonable in the opinion of the Tribunal to have preferred the evidence of Ms Kun and Christine Dimbleby to the evidence of the claimant. There was no plausible reason put forward by the claimant as to why Ms Kun would have invented or exaggerated upon the nature of the discussion which she had with the claimant and the comments which had been made by the claimant. The explanation that she had made that up because she was upset about him wearing a poppy and a regimental badge on his chef's hat was, in the opinion of the Tribunal, entirely implausible. It did not justify serious consideration. The claimant had suggested that there might be other reasons why Ms Kun had made up the allegation because she was generally upset with the claimant, but the Tribunal found that it was perfectly fair and reasonable for Miss Aldread to dismiss those suggestions as not being reasonable. The Tribunal concluded, therefore, that there had been a reasonable investigation into the allegation involving Ms Kun, and that there were reasonable grounds for Miss Aldread concluding that the claimant had made insulting and unacceptable comments to Ms Kun about her religion as a Muslim.

15. It is important also to emphasise that the Tribunal recognises that Miss Aldread properly and reasonably took into account the content of an email sent by Ms Kun to Christine Dimbleby on 10 August which appeared at page 52 in the bundle. Ms Kun here was making it clear that she had been insulted by the comments which had been made about her religion, and indeed that she was "really upset and insulted". She again had confirmed that a comment had been made by the claimant about good Muslims and bad Muslims and that the Ms Kan had concluded that when referring to bad ones that the claimant had meant "terrorists". In the opinion of the Tribunal it was reasonable for Ms Kun to reach that conclusion bearing in mind the often ill informed publicity surrounding alleged connections between people of a Muslim faith and acts of terrorism, even when established members of the Muslim faith denounced any such connection very publicly and clearly. Ms Kun was in this email, therefore, endorsing and enforcing the events which she had described to Christine Dimbleby and which Christine Dimbleby had in turn reported to her employer in the email at page 48 in the bundle.

16. The Tribunal therefore went on to consider whether there was a reasonable investigation and whether the employer had had reasonable grounds to conclude that there had been racist comments made by the claimant to Gwen Nelson. Before setting out its conclusions the Tribunal believes it is at this stage appropriate to record one of the central arguments which was put forward by counsel on behalf of the claimant. Mr Flood argued that in order for there to be a reasonable investigation of a reasonable employer, and in order for Miss Aldread to have reached conclusions which were conclusions reached on reasonable grounds, that it was absolutely essential that Miss Aldread approached each of the three allegations against the claimant separately and independently. Under cross examination Miss Aldread had openly acknowledged that in respect of the allegation involving Ms Kun and the allegation involving Gwen Nelson relating to a comment made about the

ability to feed the whole of Africa, that she had given weight to each of the conclusions on the basis of her findings about the other. She had felt that each added weight to the other allegation. She had come to that conclusion because Ms Kun and Gwen Nelson had never worked together. They worked in separate geographic locations and indeed there was no evidence to suggest that they had ever had any contact with each other. In the opinion of Miss Aldread each individual was therefore making an individual complaint. However, she believed that it was fair and reasonable to take into account her findings in respect of each of the allegations in support of the other in order to conclude that it was more likely than not that each of the allegations had been made because each had been made separately by employees who had no connection with each other and about whom there were no reasonable grounds to suggest that such serious allegations had been made up by two different individuals in two geographic locations about religion and race.

17. When Miss Aldread confirmed, openly and honestly, that she had reached her conclusions on the basis of one allegation adding support to the other, Mr Flood argued very strongly that that meant that the investigation, and more importantly the conclusions of Miss Aldread, fell outside the reasonable conclusions of a reasonable employer. The Tribunal rejects that assertion made on behalf of Mr Flood. The Tribunal reminded itself that what was required was the reasonable investigation of a reasonable employer. The additional gloss which was urged upon the Tribunal by Mr Flood was in the opinion of the Tribunal not justified. It was essential for the Tribunal to remember the wording of the legal principles and the wording of section 98(4). What was required of Miss Aldread was a reasonable investigation and a requirement that she make any decision on reasonable grounds. What, in the opinion of the Tribunal, was being urged by Mr Flood was a forensic examination which, in the opinion of the Tribunal, it was not appropriate for the Tribunal to impose on the reasonable approach of a reasonable employer. In the opinion of the Tribunal it would be quite unreasonable for the type of forensic independent investigation and severance urged on the Tribunal by Mr Flood to be the standard against which the investigation and conclusions of a reasonable employer should be judged. The Tribunal therefore rejected the approach of Mr Flood and instead proceeded on the basis of the requirement to find whether or not there had been a reasonable investigation of a reasonable employer, and whether or not there had been reasonable grounds for Miss Aldread to come to the conclusions that she had.

18. The Tribunal then turned to the investigation and conclusions of Miss Aldread relating to the allegation made by Mrs Nelson relating to Africa and the fact that the claimant had allegedly said to Mrs Nelson that the chef had ordered enough meat “to feed the whole of Africa”. That allegation had been made very clearly by Mrs Samplay on behalf of Gwen Nelson in an email dated 30 June which appeared at pages 43 and 44. In addition to making the comment about “feeding the whole of Africa” the claimant had immediately followed up that comment by remarking to Gwen Nelson, who was of African/Caribbean descent, that he meant “no disrespect”. In the email at page 44 the manager goes on to inform the employer that Gwen Nelson “was made to feel very uncomfortable”.

19. As part of the disciplinary investigation conducted by Mr Keeffe he interviewed Gwen Nelson on 19 September 2016. The notes of that interview appeared in the bundle at pages 92-96 inclusive. The email which had been sent by Mrs Samplay

reporting the words which had been used towards Mrs Nelson by the claimant was quoted by Mr Keeffe – page 94 – to Mrs Nelson during the course of the interview with her. Mrs Nelson was asked why she had not challenged the claimant about what he had said, but she replied by saying that she did not have that kind of challenge in her. She went on to confirm that she had been puzzled as to why the claimant would say what he had said, and it that it was only after a period of reflection and talking to others that she had then felt offended.

20. The claimant was interviewed about that allegation during the course of the disciplinary investigation interview on 30 August 2016 – page 60. The claimant's response was that he "did not say that". He alleged that he and Mrs Nelson had been "at loggerheads" and indeed he indicated that he had submitted his own complaint about Gwen Nelson to David Hartley. His complaint related to what he perceived to be failures on the part of Mrs Nelson to promptly order and secure the delivery of certain kitchen equipment. As is already recorded in this judgment, Mrs Nelson and others had to follow policies and protocol relating to the ordering of equipment but the claimant had, in their opinion, bullied them by demanding that issues were resolved quickly and in accordance with his own instructions even though he did not work for the same employer as Mrs Nelson and others that he was complaining about.

21. The claimant was then interviewed about this allegation during the course of the disciplinary hearing. At page 107 he said that he denied the allegation "wholeheartedly". Bizarrely, in the opinion of the Tribunal, the claimant sought to explain that Mrs Nelson had made this comment about him because the home in which she worked was racist and bigoted. He was asked whether or not that was a comment about the staff that he was working with, but even more bizarrely the claimant indicated that it was in fact a comment about the attitudes of the residents not the staff, including Mrs Nelson. In the opinion of the Tribunal Miss Aldread concluded fairly and reasonably that this explanation held no merit and indeed in the opinion of the Tribunal it was impossible for the Tribunal to indicate what the thought processes of the claimant were to come to the conclusion that Mrs Nelson would in effect make up a comment such as was alleged against the claimant because of the attitudes of the residents that Mrs Nelson was responsible for. The explanation was rejected by Miss Aldread and in the opinion of the Tribunal it was an explanation which was without any merit and did not really deserve any serious consideration as part of the disciplinary process.

22. Miss Aldread was therefore left with a complete difference of opinion. Indeed the claimant expressed his denial of the allegation against him "wholeheartedly". There was a complete difference of opinion, therefore. Miss Aldread concluded that she preferred the evidence of Mrs Nelson to the evidence of the claimant, and in doing so took into account the bizarre explanation which the claimant had made as to why he felt Mrs Nelson had made up the allegation against him. The Tribunal concluded, therefore, that there had been a reasonable investigation into the allegation which obviously was a short investigation bearing in mind the blank and complete denial which had been made by the claimant. Miss Aldread concluded that the allegation had been made and that it was an allegation which related to the race of Mrs Nelson, particularly bearing in mind that immediately after making the remark about having "enough food to feed Africa" the claimant had made the comment "no

disrespect" in the presence of Mrs Nelson. Counsel for the claimant indicated that that should be taken by the Tribunal as being an apology on the part of the claimant. The claimant, of course, denied that the comment had been made at all. There was, therefore, no context that the claimant could put on the comment because he denied ever making it. The Tribunal rejected the suggestion made by Mr Flood that the comment should be fairly and reasonably interpreted as an apology. More reasonably it was interpreted by Miss Aldread and indeed by the Tribunal as a recognition that the person who was making the remark about Africa had overstepped the mark, and had overstepped the mark in particular bearing in mind the racial background of Mrs Nelson to whom the remark was addressed. The Tribunal could not accept that the comment could or should be interpreted as an apology.

23. The Tribunal therefore concluded that Miss Aldread had reasonable grounds for believing what Mrs Nelson alleged the claimant had said to her, and that those reasonable grounds followed a reasonable investigation of a reasonable employer. Again the Tribunal felt that it was fair and reasonable for Miss Aldread to add some weight to her conclusions by the fact that when separately considering the allegation involving Ms Kun that she found that allegation proven as well. She believed that it was fair and reasonable to add weight to each of her conclusions bearing in mind that there was no connection between Ms Kun and Mrs Nelson and yet only short periods apart the claimant was alleged to have made one remark on the basis of the religion of Ms Kun and one remark based on the racial background of Mrs Nelson. Equally the explanations offered by the claimant in each case were farfetched and without merit. One related to the alleged bigotry of the residents that Mrs Nelson was responsible for, and the other related to the fact that the claimant wore a military badge and a poppy on his chef's hat. Neither suggestion on the part of the claimant was supported by any evidence at all. It was nothing more than supposition on the part of the claimant, and in the opinion of the Tribunal Miss Aldread was right to reject it.

24. The Tribunal then turned to consider the allegation relating to the food temperature probe. This was part of a more wide-ranging complaint about the demeanour and attitude of the claimant. The Tribunal took into account the fact that the claimant was working in an environment which did not form part of the business of the respondent company. The claimant was in effect performing outsourced catering to the company that employed Mrs Nelson, Ms Kun and others. At least four people, Ms Kun, Mrs Nelson, Mrs Samplay and Christine Dimbleby, complained about the attitude of the claimant. Some complained about his attitude to the extent that they were not prepared to work for him again. The claimant alleged that this strength of feeling on the part of Mrs Nelson in particular was because Mrs Nelson had been the subject of complaints about the claimant. Miss Aldread rejected this and the Tribunal finds that she was right to do so. The Tribunal finds that all that Mrs Nelson was doing was trying to explain to the claimant the limitations on her ability to do what was being demanded of her by the claimant in resolving complaints and ordering specific kitchen equipment, including a food temperature probe. The claimant was insisting that a specific model be purchased and that it be obtained in a specific timescale. That was beyond the abilities of Mrs Nelson who had to follow the policies, procedures and protocols of her own employer.

25. The claimant appears to have been unable and unwilling to accept those limitations. His attitude was found to have been demanding to an extent that it upset at least four members of staff to the extent that they wrote to their own employer indicating that they would no longer be prepared to work with the claimant. That employer, Hanover, concluded that the complaints were justified to the extent that they issued instructions to the respondent company that the claimant would no longer be allowed to work at any of their premises. Representatives of the respondent company contacted Hanover and sought to persuade them to change their mind, but their mind was not for turning. In the opinion of the Tribunal it is unusual for such strongly held views to be expressed by at least four members of staff who worked in two quite independent geographic locations. The allegations were investigated, statements were taken and the claimant was given an opportunity to comment. Ultimately Miss Aldread concluded that the attitude of the claimant was unreasonable and demanding to the extent that it caused such unease on the part of a number of employees that they refused to work with him. The claimant appears to have been unable or unwilling to accept the obvious sensitivities of working in the premises of a client and appears to have been unwilling and/or unable to accept and recognise that there were policies and procedures which had to be followed which inevitably placed limitations on the ability of Mrs Nelson in particular to comply with the demands which were being placed upon her by the claimant.

26. The conclusion of the Tribunal is therefore that the specific incident relating to the conduct of the claimant relating to the ordering of a new food temperature probe was properly investigated and that there were reasonable grounds for reaching the conclusion that the conduct of the claimant had been demanding and overbearing to the extent that employees of Hanover were no longer prepared to work with the claimant.

27. When considering the decision making and thought processes of Miss Aldread and the manner in which she gave evidence and justified her thought processes and conclusions, the Tribunal equally considered the thought processes and justifications demonstrated by the claimant. The Tribunal found the claimant to be an unconvincing witness. The reasons why the Tribunal came to that conclusion were as follows:-

(a) The claimant was willing to argue and to seek to substantiate points which he had no evidence at all to substantiate. The reason why this was important was because during the disciplinary process the claimant had offered implausible explanations for the allegations which had been made against him by Mrs Nelson and by Ms Kun. The claimant had argued that he had never been issued with a contract of employment by the respondent company. The respondent, however, were able to demonstrate that that was not true and they included in the bundle of documents a signed copy of the contract of employment of the claimant which he had signed at page 32. That clearly indicated at page 32 that his employment began on 29 June 2013. The claimant maintained, however, in evidence to the Tribunal that in fact his period of continuous employment began in 2012. He was asked to point to any evidence that he had to substantiate that. The claimant indicated that he had seen a piece of paper with 2012 on it. He confirmed that

that piece of paper was not available to the Tribunal. He was unable to describe what the piece was. He was unable to put it into context. He was unable to provide any evidence other than the fact that he had seen a piece of paper in 2012. When it was put to him that he had signed a contract of employment and that that specified a date in 2013 the claimant refused to acknowledge that as his start date, even though the evidence to demonstrate that it was true was overwhelming. In the opinion of the Tribunal this demonstrated an unreasonable approach on the part of the claimant.

(b) The claimant included no evidence whatsoever in his witness statement about the allegation relating to the ordering of the food temperature probe. During his evidence to the Tribunal he even went so far as to say that that was not even an allegation against him during the course of the disciplinary process. The claimant was then quite properly taken to the letters of invitation which had been sent to him in connection with the investigation meeting and the disciplinary meetings. Again, therefore, the claimant was responsible for making an allegation for which he had no justification at all.

(c) At paragraph 5 of his witness statement the claimant alleged that he was being "set up" for something. When the claimant was questioned about who was setting him up and how they were setting him up and what he was being set up for, the claimant confirmed that he had no evidence at all to give to support such a serious allegation. During the course of giving his evidence on oath to the Tribunal the claimant indicated that none of what was alleged against him by Ms Kun was true. The Tribunal specifically made a written note that the words used by the claimant were that "none of it" was true. However, the claimant was then taken to page 110 of the bundle in which he had indicated that there had indeed been a discussion with Ms Kun about her religion but that his version was different to that which had been presented by Ms Kun. However, the claimant was now saying in evidence that actually nothing of what Ms Kun had alleged had any ring of truth to it. The assertion made by the claimant in cross examination was unsustainable.

(d) Again in cross examination the claimant maintained his assertion that Mrs Nelson had made up her allegations because the residents in her home were bigoted, and that Ms Kun had made up her allegation because he wore a military badge and poppy on his chef's hat. The claimant was challenged when giving evidence to provide any evidence at all in support of those two allegations, but he was unable to provide any such evidence. However, the claimant continued to make those assertions and did not withdraw them despite the fact that he had no evidence at all to support them.

(e) Finally, the claimant complained during cross examination that the company was not listening to his grievance and that they were effectively not interested in it. However, it was pointed out to the

> claimant that the reason why his grievance had never proceeded was because he personally had never responded to invitations to speak to the company and to participate in the grievance process. The claimant, however, continued to maintain that the reason why his grievance had not gone anywhere was because it was the fault of the respondent company. Again the claimant continued to maintain this stance even though all the evidence pointed to the clear conclusion that the reason why his grievance was not investigated was because he refused to participate in it.

28. The Tribunal equally believes that it is relevant to record that the claimant did not participate in the final disciplinary hearing which was held before the decision was taken to dismiss him; neither did he appeal against the decision to dismiss him and as just recorded neither did the claimant participate in or respond to invitations to conclude the written grievance which he submitted. Indeed the claimant indicated during the course of interviews that the decision to dismiss him had been taken "several months ago". Again the claimant was unable to provide any evidence at all to substantiate such a serious allegation, particularly bearing in mind that he was saying that the decision had been taken such a long time ago.

29. The conclusion of the Tribunal therefore was that the claimant was an unconvincing witness and the Tribunal supported the conclusions of Miss Aldread when she indicated that it was fair and reasonable for her to prefer the evidence of the witnesses who were making allegations against the claimant to the evidence of the claimant which he gave in defending himself against those allegations.

30. The Tribunal therefore concluded that the employer had carried out the reasonable investigation of a reasonable employer and that Miss Aldread had reasonable grounds for concluding that each of the three allegations of conduct were found proven against the claimant.

31. The final responsibility of the Tribunal, therefore, was to decide whether or not the decision to dismiss the claimant without notice was the reasonable decision of a reasonable employer. The decision of the Tribunal is that it was a fair and reasonable decision. The allegations relating to race and religion were serious. The claimant had not offered any explanation for them. The claimant had denied them and he had offered implausible reasons as to why the allegations had been made up. This was not a situation in which an ill-judged remark had been made for which an apology had then been offered and where potentially the employee could have been given training as to what it was appropriate to say and what it was not appropriate to say during the course of his employment. In respect of one of the allegations the claimant "wholeheartedly" denied that the incident had taken place.

32. The Tribunal accepted that on its own the allegation relating to the conduct of the claimant in respect of the temperature probe would not justified the dismissal of the claimant. However, the claimant was found guilty of three separate allegations and in the opinion of the Tribunal the allegations relating to race and religion amounted to gross misconduct and were serious. They had caused significant upset and offence to each of the people concerned. There had been no apology or acknowledgement of any upset or indeed any wrongdoing on the part of the

claimant. The claimant worked on the premises of clients of the respondent company. He had upset the employees of that client company to the extent that they had indicated they would not work with him, and indeed the company itself had written to the respondent company refusing to allow the claimant on any of its premises. It was fair and reasonable in the opinion of the Tribunal for Miss Aldread to take the reaction of the employees and the reaction of their employer into account when deciding what the appropriate penalty to impose was for the conduct of the claimant.

33. In all the circumstances the Tribunal concluded that the decision to dismiss the claimant without notice was the reasonable decision of a reasonable employer. It was a decision which met the specific wording and requirements of section 98(4) of the Employment Rights Act 1996.

34. The decision of the Tribunal is that the claimant was fairly dismissed and that his claim of unfair dismissal is rejected. It is appropriate to record that Miss Aldread gave thought to the previously unblemished record of the claimant and indeed to his length of service, but that was limited to three years. This was not an employee who had years and years of unblemished service. However, having given credit for those elements of the claimant's performance the Tribunal was still of the opinion that the decision to summarily dismiss the claimant was a reasonable decision in all the circumstances.

_____

Employment Judge Whittaker

Date_____

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
31 July 2017

FOR THE TRIBUNAL OFFICE