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EMPLOYMENT TRIBUNALS

Claimant: **Mr S Bridges**

Respondent: **Free Trade Wharf Management Company Limited**

Heard at: **East London Hearing Centre**

On: **9 & 10 February 2017**

Before: **Employment Judge Brown**

Representation

Claimant: Mr P McLean
Respondent: Miss L Bell (Counsel)

JUDGMENT

The judgment of the Tribunal is that:-

1. **The Respondent unfairly dismissed the Claimant.**

2. **The Claimant would have been fairly dismissed, following the appeal hearing.**

3. **The Claimant contributed to his dismissal and it is just and equitable to reduce his award by 25% accordingly.**

4. **The Respondent wrongfully dismissed the Claimant.**

5. **The Respondent made unlawful deductions from the Claimant's wages when it failed to pay him for 3 days from 31 March 2016 to 2 April 2016.**

6. **The Tribunal does not make an order, either for reinstatement under *s114 Employment Rights Act 1996*, or for reengagement under *s115 Employment Rights Act 1996*.**

7. **The Respondent shall pay the Claimant the following compensation to the Claimant for unfair dismissal (after applying a 25% deduction for contributory fault):**

A grand total of £4,743.12. The basic award is £4,443.12. The compensatory award is £300. The prescribed element is zero.

8. The Respondent shall also pay the Claimant £3,949.44 in compensation for wrongful dismissal.

9. The Respondent shall pay the Claimant £ 215.43 for unlawful deductions from wages.

REASONS

Preliminary

1 The Claimant brought complaints of unfair dismissal, wrongful dismissal and unlawful deductions from wages against the Respondent, his former employer.

2 At the start of the hearing, the parties agreed the issues to be determined. They were:

Unfair Dismissal

2.1 Has the Respondent shown the reason for dismissal and that it was a potentially fair reason? The Respondent contended that the reason for dismissal for misconduct, in using racially motivated derogatory language. The Claimant did not agree that that was the reason for dismissal.

2.2 If the Respondent has shown the reason for dismissal and that it was a potentially fair reason, did the Respondent act fairly, under *s98(4) Employment Rights Act 1996,* in dismissing the Claimant for that reason (applying a neutral burden of proof)? In particular, when it made the decision to dismiss, did the Respondent have

2.2.1 Reasonable evidence of the misconduct

2.2.2 Following a reasonable investigation

and was dismissal a reasonable sanction?

2.2.3 The Claimant contended, with regard to evidence and the investigation, that:

2.2.3.1 Mr Ahmed, who initiated the complaint against the Claimant, was motivated against the Claimant, and that the Respondent did not sufficiently investigate this.

2.2.3.2 The roles of the individuals making up the investigation panel

changed during the process.

2.2.3.3 There were two versions of an investigation interview with Ricky Tuffin and Ricky Tuffin was interviewed with Adam Somers (another witness) present.

2.2.3.4 The investigation report from Kinleigh, Folkark and Hayward to Free Trade Wharf Management Company Limited stated that four of the six individuals who were interviewed as part of the investigation process corroborated the initial complaint against the Claimant, when only three statements supported the allegations and Adam Somers said that he had not personally witnessed any racist comments.

2.2.3.5 The selection of individuals to be interviewed was unfair. The Respondent's investigation report stated that four individuals had been identified as being those who worked with the Claimant most regularly, when this was not correct.

2.2.3.6 The Respondent did not take into account Ricky Tuffin's statement because the Respondent said that Ricky Tuffin had not given his permission for the evidence to be used, but Mr Tuffin's statement made no mention of wishing to withhold it.

2.2.3.7 The Respondent's disciplinary report said that Mr Tuffin's statement neither supported nor refuted the allegations made against the Claimant, when the statement did refute the allegations.

2.2.3.8 The Respondent decided to convene a disciplinary hearing before any disciplinary interview had been conducted with the Claimant and before an investigatory report had been completed.

2.2.3.9 On 16 March 2016 Maggie Forbes told one of the investigators to proceed with the next step of a formal disciplinary for gross misconduct.

2.2.3.10 The Claimant was not provided with all the witness statements before the disciplinary interview.

2.2.3.11 The Claimant provided a possible reason for Mr Ahmed having made a complaint against the Claimant, but the Respondent dismissed this and did not investigate it.

2.2.3.12 The disciplinary outcome letter did not engage with the issues identified in the invitation to the disciplinary hearing.

2.2.3.13 Disciplinary appeal process was a sham.

2.2.3.14 On 6 May 2016 Alice Duggan sent an email to the directors of the Respondent saying, "..the outcome will not be affected and we can look at new staffing."

2.2.3.15 There were documentation errors. There was no indication in the Board's decision on 29 March 2016 of how the Board had come to their decision.

2.3 If the Respondent dismissed the Claimant unfairly, what was the likelihood that the Claimant would have been dismissed fairly, following a fair procedure?

2.4 Did the Claimant cause or contribute to his dismissal and, if he did, by what proportion should any compensation awarded to him be reduced?

Remedy for Unfair Dismissal

2.5 The Claimant was claiming reinstatement and/or re-engagement as well as compensation.

Wrongful Dismissal

2.6 Did the Claimant conduct himself in such a way which seriously undermined the duty of trust and confidence between employer and employee, so as to justify the Respondent dismissing him summarily? The Claimant claimed that he did not, so that he was entitled to 11 weeks notice pay.

Unlawful Deductions from Wages

2.7 The Claimant was dismissed on 30 March 2016. A letter of dismissal was sent on 31 March 2016. Did the Claimant's contract of employment provide that he could only be dismissed in writing? If so, is he entitled to be paid for any additional dates before the date of his dismissal?

3 The Claimant submitted a lengthy document headed "procedural errors" in the Respondent's case, pages 27A – 27G of the Tribunal bundle.

4 I heard evidence from the Claimant and from Matthew Sommerville, for the Claimant. I also heard evidence from Alice Duggan, Investigating Officer; Robert Pearson, Disciplinary Hearing Officer; Margaret Forbes, Dismissing Officer; and Carl Warland, Appeal Officer.

5 There was a bundle of documents. Both parties prepared chronologies. There was a Cast List. Both parties made written and oral submissions. I reserved my decision.

Findings of Fact

6 The Respondent owns the freehold of a residential development called Free Trade

Wharf, London E1. Shares in the Respondent Company are held by the long lease holders of the flats there. The Directors of the Board of the Respondent Company are residents of Free Trade Wharf. They undertake their Directorships on an unpaid, voluntary basis.

7 The Claimant started work with the Respondent on 19 December 2004 as a weekend night porter, working at Free Trade Wharf. In 2006 the Claimant became a full-time porter. The job of a porter (also known as a concierge) involved monitoring security cameras at Free Trade Wharf, being responsible for a key cupboard in which spare keys for the Free Trade Wharf flats are deposited, undertaking security walks around the site, ensuring that doors and gates are secured, receiving parcels for residents and delivering paper notifications to residents that parcels have been received, contacting residents via an intercom system when food deliveries and supermarket deliveries arrive and, generally, operating the reception area at Free Trade Wharf.

8 The Claimant was employed as a porter or concierge until 30 March 2016. At the relevant times, Adam Somers, Building Manager, was the Claimant's Line Manager. Mash Ahmed was head concierge.

9 The Respondent Company employed Kinleigh Folkard & Hayward from 7 May 2014 to carry out management functions for Free Trade Wharf, including handling staff grievances and disciplinary matters, in liaison with the building manager, Adam Somers, who was directly employed by the Respondent.

10 The Respondent had a disciplinary procedure for its employees. This provided for disciplinary sanctions, including warnings and dismissal, in cases of misconduct. The procedure said that the company reserved the right to dismiss without notice in cases of gross misconduct. The procedure gave examples of gross misconduct as including "unacceptable use of obscene or abusive language … harassing or victimising another employee on the grounds of race, colour, ethnic origin, nationality, national origin, religion or belief, sex, sexual orientation, marital status, age and/or disability …" page 31.

11 The Claimant's contract made provision for minimum periods of notice to be given by both employer and employee, to terminate employment. The relevant terms were set out in a paragraph entitled, "Termination of Employment". The contract stated, "This notice must be in writing, " p45.

12 In November 2015 Adam Somers questioned the Claimant about an allegation that the Claimant had described the owner of a flat as, ".. that tight Welsh woman," while he had been showing an estate agent to the owner's flat. The Claimant denied that he had used the words.

13 On 16 December 2015 Mr Somers undertook the Claimant's end of year staff appraisal. In the summary section, Mr Somers said of the Claimant, "Stephen is a valuable asset to FTW but does get caught up like others in office politics which is unnecessary as it does let him down a little, Stephen also has to remember that you don't have to like everyone but you still have to be polite in this circumstances… Overall Steve is a pleasure to have on site, has good knowledge and an asset to the team (sic)."

14 In February 2016 the daughter of the owner of one of the flats asked the Claimant to book her a taxi for the following morning. Mr Ahmed said that he would look after the matter. A few days later, on her return, the Claimant noticed that the daughter appeared unhappy and asked her if anything was wrong. The daughter told the Claimant that the taxi that had been booked for her was not a proper taxi and that the taxi driver said that he had not been working through a taxi office, but was doing a favour for his brother, Mash Ahmed. The Claimant said that she should make a complaint.

15 A few more days later, Mr Ahmed asked the Claimant why he was trying to get him into trouble. The Claimant told Mr Ahmed that he was aware that taxis were required to be insured through taxi offices, as the Claimant had experience of taxi driving. The Claimant told Mr Ahmed that he should not be putting residents' safety at risk.

16 On 3 March 2016 Mr Ahmed emailed Margaret Forbes, Chair of the Respondent's Board of Directors. He said that he wanted to make a complaint against the Claimant, because the Claimant was racist towards Mr Ahmed's and other people's races. Mr Ahmed said of the Claimant,

> "He is an extremely rude and unprofessional person. When he is talking about Rufus to me he referred to him as chalky and when he sees an Asian person he says to me there's one of your mob, or if a man has a religious prayer hat on he says he has a begging bowl on his head. When a Chinese delivery man comes to the building he says look at that kitchen sink. He is always rude to the delivery drivers and acts in an unprofessional way…. He always tries to belittle me in front of residents which I find upsetting, embarrassing and intimidating… If he ever helps a resident and the resident does not give him money he will never help them again and bad mouths them to the staff … I try to do my best to help each member of staff as much as I can and I am always fair. I believe that it's a personal attack on me and he intimidates me as he is not happy with me being the head concierge…"

17 Adam Somers, Building Manager, suspended the Claimant on 3 March 2016. Alice Duggan, Senior Property Manager at Kinleigh Folkark Hayward, Managing Agents, confirmed the Claimant's suspension by letter the same day. She said that a formal investigation into allegations made against the Claimant was being commenced and that the allegations, if proven, could constitute gross misconduct. She said that the Claimant would be invited to attend an investigatory meeting. Ms Duggan said that suspension was being undertaken in order to allow the investigation to be conducted impartially and fairly and was not a form of disciplinary action.

18 Ms Duggan undertook the disciplinary investigation. On 7 March 2016 she interviewed Rufus Esron, concierge, page 62 – 63; Andy Charles, concierge, pages 66 – 67; Mash Ahmed, head concierge, page 70 – 73 and Adam Somers, building manager, page 77 – 78.

19 In his interview, Rufus Esron said that the Claimant became agitated if he helped a resident and was not paid. Mr Esron stated that the Claimant was unprofessional and put his feet up on the desk. He also said,

> "He has names for people of my race (black) he calls cockroaches, he calls me a

cockroach to my face, he calls Asian and Chinese people weevils. He has had a series of clashes with the delivery men … Steve calls Alice a dog and said she isn't good etc. He is not professional and is poison to the workplace …".

20 Andy Charles said in his interview,

"I have spoken to Steve previously about his behaviour. He has no respect for anyone including the management and directors… he thinks everyone is rubbish. He shouts and swears at delivery men and makes comments about Chinese and Eastern European delivery men. There have been so many incidents. An Amazon delivery driver wanted to make a complaint about him… He isn't all bad but only willing to help residents if there is something in it for him such as money or cigarettes… I don't hate him I'm just being straight. He is disrespectful when he is on front desk. He sits on the front desk with his two feet up drinking his coffee… He makes racist comments about people as he is always calling them names such as chalky and making comments about Eastern Europeans… Steve is disruptive and corrosive like acid… I have spoken to him about it so many times but he has not changed in 7 years."

21 In his interview on 7 March, Mr Ahmed said of the Claimant,

"He is rude to delivery drivers. He says they are useless etc in front of their faces. He is very belittling and disrespectful. He belittles me by saying things like, "Don't worry, I'll do your job for you"… He makes racists comments and always uses derogatory phrases to refer to someone of a particular race. In any general conversation with anyone he has a derogatory manner and always makes a racist remark such as commenting on delivery men's religious hats. I am Muslim and I find this offensive and uncomfortable … Steve has a nickname for every one of his colleagues behind their back. Steve calls Rufus chalky. He is taking the mick out of the colour of his skin… There was an incident a few weeks ago when I booked a taxi for a resident's daughter to take her to the airport. Steve went and told the resident that it was an unlicensed taxi and that they should make a complaint about me. It wasn't an unlicensed taxi. Steve always tries to make trouble and undermine me…".

22 In his interview on 7 March 2016, Adam Somers said,

"I have had to pull Steve aside on his behaviour and conduct before. He is rude aggressive and abrupt to staff and residents for no apparent reason. I have been told about the things he says…. If you say hello to him you just get a grunt in response. He will go out of his way for residents who give him money and purposely does not help those who don't tip him. There was an incident where an estate agent was doing a viewing with a potential tenant and Steve called the owner of the flat a "tight Welsh woman" in front of them both. They did not manage to let the flat to her… I haven't personally witnessed racist comments but Andy has told me that he says a lot about Eastern European delivery drivers. The first I heard of racism was the day before Mash sent the email when he told me he was thinking about making a formal complaint…".

23 The Claimant was invited to, and attended, an investigatory meeting, on 10 March

2016. In the meeting Lauren Hammond, Human Resources Officer, asked the Claimant whether he had made derogatory comments regarding race, nationality and religion; such as using insulting names for people of each race, for example, cockroaches and weevils. The Claimant said he totally denied each point. Ms Hammond asked the Claimant about whether he called his called his colleague, Rufus, "chalky" and "cockroach" to his face. The Claimant said that he had worked for the Respondent for nearly 11 years and had had no complaint from Rufus. He said he had never made that comment about Rufus and that it was an owner who had said it. Ms Hammond asked the Claimant about comments about Eastern European delivery drivers. The Claimant responded, "They are not rude comments. It's said in banter. Sometimes I can't hear and understand them when they talk and they have to shout over the road noise".

24 Ms Hammond asked the Claimant about a comment regarding a Welsh property owner. The Claimant replied, "That was banter. Even the estate agent laughed". Ms Hammond asked the Claimant about swearing at delivery drivers. He replied that he had had one argument with one delivery driver recording a lot of wrong numbers on delivery boxes before Christmas. He said that his happened on one occasion and that it was not only the Claimant who had done this.

25 The Claimant was asked about only being willing to help residents who paid him. The Claimant said that he had once been given a bottle of something by a flat owner when he helped her. He said that his colleagues were twisting things because they did not like him. The Claimant said, "If you review CCTV you will see that I am always helping".

26 Lauren Hammond asked the Claimant about him trying to cause trouble by making comments to residents and gave the example of a taxi which had been booked by Mr Ahmed. The Claimant said that a young girl had asked to book a taxi and that Mr Ahmed, who was not on duty, came rushing forward and said that he would deal with it. The Claimant stated that, afterwards, the girl had said that, when she was chatting to the taxi driver, he had told that he worked part-time and not for a cab office. The Claimant said that the girl was not happy about it.

27 The Claimant agreed that he did put two feet up on the front desk. He agreed that that did not give a good impression. The Claimant asked that the investigators speak to two other of his colleagues, Nicky and Ricky, and said he had never been a racist and had black friends, pages 85 – 87.

28 On 15 March 2016 Alice Duggan and Lauren Hammond interviewed Nicky Raja. Mr Raja said that he had not witnessed any inappropriate behaviour, or discriminatory, derogatory, or racist comments from the Claimant. Mr Raja suggested a team meeting to clear the air. He said that the work environment was divided and there were too many examples for people trying to get others into trouble, pages 97 – 98.

29 On 15 March 2016 Ms Duggan interviewed Ricky Tuffin. She told him that there had been serious allegations made against the Claimant regarding the Claimant's conduct. She said that any evidence Mr Tuffin provided would be used as a witness statement and asked whether he was happy about that. Mr Tuffin said he did not want to be involved. Ms Duggan told him that his statement could be anonymous. Mr Tuffin repeated that he did not want to be involved. Ms Duggan asked if Mr Tuffin had witnessed any incidents involving the Claimant. Mr Tuffin replied, "Steve is alright and I have never

had any problems with him and have not witnessed any incidents involving him."

30 Adam Somers was present during Ricky Tuffin's meeting. This fact was not originally recorded on the notes of the meeting which were typed up.

31 The Claimant had suggested that the investigating officers obtain statements from residents. Ms Hammond and Ms Duggan decided that, as the allegations in respect of gross misconduct were not made to, or by, residents, but related to employees and site visitors, it was not necessary to conduct further investigation meetings with residents. They decided that the Claimant wanted the residents to be used as character witnesses, but that the Respondent was not investigating the Claimant's character generally, but specific allegations.

32 Ms Duggan produced an investigation report. In her report, she said that key areas of concern identified throughout the investigation process were derogatory comments, linked to race, nationality and religion, generic derogatory comments made towards staff and residents, inappropriate behaviour being displayed towards colleagues, residents and delivery men, complaints regarding the Claimant's conduct from residents and visitors to the block, disruptive and negative impact on the team and unprofessional behaviour, particularly when on the front desk.

33 Ms Duggan said that four of the six individuals interviewed as part of the investigation process corroborated the initial complaint made against the Claimant. She attached the witness statements to her report.

34 On 16 March 2016 Ms Duggan emailed the Respondent's Directors, attaching her investigation notes. She asked for permission to proceed to a disciplinary hearing. Later the same day, Margaret Forbes said that the Claimant's investigation had been discussed at a Board meeting on 14 March and that the Board had been in agreement with the disciplinary procedure proceeding. Ms Forbes told Ms Duggan to go ahead with a formal disciplinary meeting for gross misconduct.

35 On 17 March 2016 Robert Pearson, Senior Property Manager with Kinleigh Folkark and Hayward, invited the Claimant to a disciplinary hearing, to consider allegations of gross misconduct. He said that the purpose of the meeting was to discuss allegations that the Claimant had directed derogatory racial comments towards both his colleagues and site visitors and had demonstrated unprofessional behaviour in the workplace. Mr Pearson said, "At the meeting I will look to establish the facts on your employer's behalf. On conclusion of the meeting, I will contact your employer with my findings and they will make a decision as to how this matter will proceed". Mr Pearson said that, since the allegations set out in the letter represented gross misconduct, the meeting could result in disciplinary action being taken against the Claimant, up to and including dismissal without notice. Mr Pearson enclosed the disciplinary procedure, a copy of the Claimant's suspension letter and a copy of the investigation report. The Claimant was told of his right to be accompanied, page 107 – 108.

36 The Claimant attended a disciplinary hearing conducted by Mr Pearson on 21 March 2016. Chris Binnie, HR adviser, also attended. The Claimant said that he had received the documentation, but that Ricky Tuffin's witness statement appeared to be missing. Mr Bennie said that Mr Tuffin had not given his permission for the witness

statement to be used as evidence, or to be released. The Claimant asked whether Mr Tuffin could be approached, to seek his consent to the statement being released. In the notes of the meeting, the Respondent recorded that Mr Tuffin had been approached and agreed to the statement being released. The notes of the meeting said, "On review, the statement simply confirmed that (Mr Tuffin) did not want to be involved in the process and did not support or refute the allegations made against SB. This was released to SB via post for his records."

37 The Claimant asked for clarification as to whether Mr Somers had been present in Mr Tuffin's meeting. He said that Mr Somers' presence may have influenced Mr Tuffin's decision not to give a statement.

38 The Claimant queried why only four employees had been interviewed initially. Mr Pearson followed this up after the meeting and recorded in the disciplinary hearing notes that Mr Raja worked night shifts and did not usually work with the Claimant and that Mr Tuffin was also scheduled to work nights. The notes stated that both had been interviewed before the Board decided to proceed to a disciplinary meeting.

39 Mr Pearson asked the Claimant about allegations that he was rude to delivery men, particularly those of ethnic origin, for example referring to Chinese delivery drivers as "kitchen sink". The Claimant denied that he had ever made derogatory comments relating to the ethnic origin of delivery drivers. He also denied referring to prayer hats as "begging bowls". The Claimant said that he felt the allegations were linked to an incident in which Mr Ahmed had arranged for an unlicensed taxi to collect the daughter of a resident. The Claimant said that he made comments in banter with everyone. He could not give an example of banter. The Claimant denied that he had ever referred to Rufus Esron as "chalky". He said that an older resident had once used the comment, about three to four years previously. He said that he had never called Mr Esron a cockroach. The Claimant said that he also worked with Nicky Raja, who was from India. The Claimant said that he had never been racist and that he liked people of ethnic origin. Mr Pearson asked the Claimant about whether he had referred to a resident as a tight Welsh woman. The Claimant responded that this was an incident where the estate agent had the wrong keys he said that he may have referred to the resident as being Welsh and said that there was tight security. The Claimant said that anything he did say was in banter. The Claimant stated that he had a great rapport with residents and that they appreciated what he did. He accepted that residents had given him gifts, but said that he had never demanded these, pages 111 – 114.

40 Mr Pearson prepared a disciplinary meeting outcome report. In it, he said that, in investigatory interviews, three of six individuals interviewed corroborated the initial complaint of derogatory language linked to race, nationality and religion and unprofessional behaviour in the workplace. He said that one of the six individuals interviewed said that they had not witnessed any inappropriate behaviour, or derogatory comments, and a further did not want to be involved in the process and made no comment. He said that the Claimant had denied making derogatory comments, both of a generic and racially motivated nature, and had described any comments as "banter". Mr Pearson said, ".. on the balance of probabilities there is sufficient evidence to support the allegations made against Mr Bridges. As a result the option to dismiss without notice on the grounds of gross misconduct is available in line with the disciplinary procedure … Mr Bridges does have long service… ultimately the decision is for the board of Free Trade

Wharf Limited to make …".

41 In evidence to the Employment Tribunal, Mr Pearson was asked which allegations he had found to have been proven, on the evidence, following the disciplinary meeting. Mr Pearson said that he had found that the Claimant had made a comment about a Welsh property owner, which was corroborated from the Claimant's interview and that the Claimant had made comments about Eastern European drivers. Mr Pearson agreed that there was no specific comment alleged about Eastern European delivery men. Mr Pearson said that he found that the Claimant put his feet up on the desk.

42 It does not appear that Mr Pearson passed those findings of fact on to the Respondent, or to its Board.

43 On 29 March 2016 Ms Forbes, Chair of the Respondent's Board of Directors, and other Board members, received Mr Pearson's case summary regarding the disciplinary outcome, page 115 – 116. Mr Pearson had said that the option to dismiss without notice on the grounds of gross misconduct was available to the Respondent board. The Board of Directors discussed the matter by email and in a telephone meeting on 29 March. No minutes for this meeting were provided to the Employment Tribunal.

44 Ms Forbes told the Tribunal that, in deciding to dismiss the Claimant, the Respondent's Board believed that the Claimant had been rude to residents and had made derogatory comments towards staff and delivery drivers and visitors. She told the Tribunal that it was the racism which was predominant in her mind: "cockroaches, weevils, kitchen sink and tight Welsh woman". Ms Forbes also told the Tribunal that it was clear to her that, while previously, the Claimant may have behaved badly, this time there was racism involved, with people being called, "chalky". She said that reinstating the Claimant would be very difficult in the circumstances because the Respondent had only one place of work and it would not wish to require Rufus Esron, for example, to work with the Claimant again.

45 On 31 March 2016 Robert Pearson wrote to the Claimant, dismissing him. He said that the Claimant's employer concluded that the Claimant was guilty of serious misconduct and that his use of derogatory language, linked to race and ethnic origin of his workplace colleagues and site visitors, was sufficiently serious to warrant summary dismissal. Mr Pearson said that the Claimant would be dismissed without notice and that his last day of service was 30 March 2016. He told the Claimant of his right to appeal.

46 The Claimant received the letter of dismissal on 2 April 2016. He had been told, in a telephone call on 30 March 2016, by Chris Binnie, HR adviser, that he had been summarily dismissed.

47 The Claimant did appeal against his dismissal, by letter of 7 April 2016. He said that there was insufficient consideration of the Claimant's side of the story and the circumstances leading up to his dismissal. The Claimant said that the accusation did not amount to gross misconduct, because it did not meet the criteria in the staff manual or ACAS documents. He said that he had had long service with the Respondent, since 2004, and that this should have been taken into consideration when imposing the penalty. The Claimant said that he had had no previous warnings about his behaviour. The Claimant challenged whether the investigation statements were correct because they

were unsigned and said that he had not been given time to take advice because he was called to the disciplinary meeting with only a few days' notice. He said that dismissal was too harsh a penalty in all the circumstances.

48 The Claimant attended an appeal hearing on 5 May 2016, chaired by Carl Warland, Estate Management Director of Kinleigh Folkark and Hayward. Roanna Blacklock, HR manager, also attended. During the hearing, the Claimant said that the Respondent had been selective about the members of staff it had interviewed. He said that he had asked for residents to be interviewed, but this had not happened. The Claimant also said that it was inappropriate that Mr Somers had sat in on the interview of another member of staff, when Mr Somers had, himself, made a witness statement. The Claimant said that he did not really work with Mash or Andy, who had both been interviewed, and that he worked more often with other staff, including staff of ethnic backgrounds. The Claimant said that he believed that Mash Ahmed had raised a complaint against the Claimant to stop the Claimant whistleblowing about Mr Ahmed's booking of an unlicensed taxi. The Claimant queried why Rufus Esron had not complained about the Claimant previously, when the Claimant had worked with him for five years on the night shift. The Claimant said that dismissal was too harsh; that training could have been provided, or a written or verbal warning. The Claimant said that he had previously had good appraisals and that he looked after many residents.

49 On 6 May 2016 Alice Duggan emailed Margaret Forbes, saying that Mr Warland had held the appeal and had said that there was more work he needed to do before giving a decision. Later the same day, Ms Duggan emailed Ms Forbes again, saying that she had spoken to Mr Warland. She said, "The outcome will not be affected and we can look at new staffing. Carl just needs to formally address some of the points raised before we can report back to you officially," p149.

50 On 12 May 2016 Roanna Blacklock, HR Manager, emailed Ms Duggan, asking for information about the original investigation. She asked why interviews with different individuals had been carried out differently; why Ms Duggan had selected Adam, Rufus and Andy to interview; why other staff had not been interviewed and whether any issues had been raised by residents in relation to an incident with an alleged unlicensed taxi being booked by Mash Ahmed. Ms Duggan replied the same day with her answers. She said that the staff who most commonly worked with the Claimant had been interviewed first; because Nicky and Ricky were typically night staff, Ms Duggan had believed that they were not on shift at the time. Ms Duggan said that she had had not direct complaints from any resident concerning an unlicensed taxi.

51 On 18 May 2016 Mr Warland prepared a case summary for the Respondent, pages 151 – 153. Mr Warland said, with regard to the Claimant's appeal points:

51.1 The allegations had been confirmed by three out of six witnesses, which was sufficient to determine, on the balance of probabilities, that the allegations were true. He said that it would be inappropriate to interview residents as it was an employment issue. He said that no complaint had been raised about the taxi matter; in any case, the allegations had been confirmed by other sources and, therefore, the reason behind the allegation being raised by Mr Ahmed was not relevant. Mr Warland said that the employee handbook was clear that derogatory comments of a

racial or ethnic origin nature were considered to be gross misconduct.

51.2 Mr Warland said that good service could be irrelevant in a gross misconduct case, if the incident was of such a serious nature as to justify dismissal.

51.3 Mr Warland stated that witness statements did not need to be signed. He considered that the evidence gathered had not omitted any information which was relevant. Mr Warland considered that sufficient evidence had been gathered to support the accusation.

51.4 Mr Warland said that the appeal hearing had allowed the Claimant to raise any further points he may not have had the opportunity to raise at the original disciplinary hearing, but that the Claimant had, in any event, not raised any additional points. The Claimant had not asked for the original hearing to be postponed.

51.5 Mr Warland said that derogatory comments based on racial and ethnic origin were unacceptable and gross misconduct and that a lesser penalty would not have been appropriate, given the seriousness of the allegation.

51.6 In summary, Mr Warland said that, based on the evidence from the disciplinary investigation and further evidence gathered through the appeal process, there was sufficient evidence to support the allegations made against the Claimant at the disciplinary hearing. Mr Warland considered that the process had been just and that upholding the decision to dismiss was a reasonable response available to the Respondent.

52 Mr Warland emailed Ms Forbes on 18 May 2016 and asked her to share his summary with the Board. He asked her to confirm that the Board was in agreement with the outcome that he had reached.

53 On 24 May 2016 Ms Forbes emailed Mr Warland, confirming that the appeal should be dismissed, p177-178.

54 On 2 June 2016 Mr Warland wrote to the Claimant, dismissing his appeal. He said, with regard to the Claimant's contention that there had been insufficient consideration of the circumstances leading up to the dismissal, that the Claimant's previous good work history and lack of complaints against him had been considered by the Respondent. Mr Warland said that the Respondent had found that the allegations made against the Claimant fell into the following categories of misconduct: "wilfully causing harm or injury to another employee or resident, physical violence, bullying or grossly offensive indecent or immoral behaviour, unacceptable use of obscene or abusive language, harassing or victimising another employee on the grounds of race, colour, ethnic origin, nationality, national origin, religion or belief. .." Mr Warland said that the ACAS Code on disciplinary and grievance procedures was also clear on gross misconduct and said that it included violence or bullying and unlawful discrimination or harassment. He said that gross misconduct was behaviour that was so bad that it destroyed the employer - employee relationship and merited instant dismissal. He said that, in such

cases, there was often no warning issued.

55 With regard to the Claimant's allegation that there had been insufficient evidence to support the accusations against him, Mr Warland said that three out of the five witness accounts were consistent with the allegations against the Claimant. This evidence had been deemed by the Respondent as sufficient evidence to support the case against him. Mr Warland stated that, where evidence was contradictory, an investigator could decide, on the balance of probability, that they preferred one version over another. He said that the Respondent had concluded that Ms Duggan had conducted the investigation in a fair and consistent manner and that there was sufficient evidence, on the balance of probabilities, to reach the conclusion that the Claimant used racially motivated derogatory language in the workplace.

56 Regarding the Claimant's contention that he had had insufficient time to prepare for the disciplinary hearing, Mr Warland responded that, in the Claimant's appeal meeting, the Claimant had not raised any additional points for consideration which had not been considered in the disciplinary meeting. He said that the Claimant had not raised any concerns about proceeding with the disciplinary meeting at the time.

57 Further, regarding the Claimant's contention that dismissal was too harsh a penalty, Mr Warland said that the Respondent had found the Claimant guilty of gross misconduct and that the penalty for such a sanction was summary dismissal.

58 Mr Warland told the Tribunal that he had accepted that the statement by Mash Ahmed was accurate and that the Claimant had called black people, "chalky", had said of Asian people, "There's one of your mob," had referred to prayer hats as begging bowls, had referred to a Chinese delivery driver as a kitchen sink and had been rude to delivery drivers. He said he accepted Mr Ahmed's statement in its entirety.

59 It was put to Mr Warland, during cross examination, that the email of 6 May 2016, which said that the outcome would not be affected, showed that Mr Warland had decided to dismiss the appeal before he properly investigated the facts and that, therefore, he had had a closed mind. Mr Warland said, in evidence, that, having heard the appeal, he had already decided that no new evidence had been provided by the Claimant. He had already gone through all the evidence of the witness statements and had formed the view that he favoured the evidence of the employees who alleged the Claimant had used racist language. Mr Warland said that he had decided to dismiss the appeal by 6 May 2016, but was gathering detailed answers for some of the Claimant's questions in the subsequent weeks, so that he could provide this information to the Claimant.

60 At the Tribunal hearing, the Claimant denied that he had used racist or derogatory language towards his colleagues, or delivery drivers, or residents.

61 There was an email in the bundle dated 9 July 2016, from a resident. The resident said that Mr Ahmed had organised a taxi for his daughter and that his daughter believed that the car was an unlicensed car. He said that Mr Ahmed had approached his daughter later, and had told her that it was an Uber driver who had been used. He said that his daughter perceived Mr Ahmed to have been threatening. The resident said that he believed the Claimant's intentions were genuine, but that the resident felt he was being brought into a personal matter between concierges.

62 A summary of shifts worked by the Claimant with colleagues between 16 December 2015 and 3 March 2016 was provided to the Tribunal. The Claimant worked 17 shifts with Andy, 11 with Rufus, 15 with Ricky, 3 with Nick, none with Mash.

Relevant Law

63 By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer

64 *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*. Conduct is a potentially fair reason for dismissal.

65 If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

66 In considering whether a conduct dismissal is fair, the Employment Tribunal is guided by the principles set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379, affirmed by the Court of Appeal in *Post Office v Foley* [2000] ICR 1283.

67 Under *Burchell* the Employment Tribunal must consider whether or not the employer had an honest belief in the guilt of the employee of misconduct at the time of dismissal. Second, the Employment Tribunal considers whether the employer, had in its mind, reasonable grounds upon which to sustain that belief. Third, the Employment Tribunal considers whether the employer, at the stage at which he formed the belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

68 The Employment Tribunal also considers whether the employer's decision to dismiss was within a range of reasonable responses to the misconduct.

69 In applying each of these tests the Employment Tribunal allows a broad band of reasonable responses to the employer, *Iceland Frozen Foods v Jones* [1982] IRLR 439

70 The band of reasonable responses test applies as much to the Respondent's investigation as it does to the decision to dismiss: *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23, LJ Mummery, giving the judgment of the Court, para 30.

71 It is not for the Employment Tribunal to substitute its own view for that of the employer, but to consider the employer's decision and whether the employer acted reasonably, *Morgan v Electrolux Ltd* [1991] IRLR 89, CA. This last point was emphasised in *London Ambulance Service NHS Trust v Small* [2009] IRLR 563, CA.

72 The ACAS Code of Practice 1: Disciplinary & Grievance Procedures (2009) came into effect on 6 April 2009. By s207(2) Trade Union and Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued thereunder by ACAS shall be admissible in evidence and any provision of the Code which

appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

73 The ACAS Code provides:

[9] If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct ..to enable the employee to prepare to answer the case at a disciplinary meeting...

[11] The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

[12] .. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses..

[18] After the meeting decide whether or not disciplinary or any other action is justified and inform the employee accordingly in writing".

Procedural Unfairness

74 If an employer has dismissed an employee in a way which is procedurally unfair, the ET can then consider what is the likelihood that the employer would have dismissed the employee fairly, had a fair procedure been adopted – *Polkey v AE Dayton Services Ltd* [1987] 3 All ER 974.

75 In *Gover v Propertycare Limited [2006] ICR 1073*, the Court of Appeal held that Tribunals should consider making a *Polkey* reduction whenever there is evidence to suggest that the employee might have been fairly dismissed, either when the unfair dismissal actually occurred, or at some later date. In making an assessment, Tribunals should apply the following principles set out in *Software 2000 Limited v Andrews* [2007] ICR 825:

"(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case, that requires it to assess for how long the employee would have been employed but for the dismissal.
(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself.
(3) There will, however, be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been

is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
(4) Whether that is the position is a matter of impression and judgment for the tribunal; but in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.
…
(7) Having considered the evidence, the tribunal may determine:
(a) that there was a chance of dismissal ….., in which case compensation should be reduced accordingly;
…….
(c) that employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, or
(d) employment would have continued indefinitely.

76 By *s122(2) ERA,* where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, the Tribunal shall make such a reduction. By *s123(6) ERA*, 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. *Optikinetics Limited v Whooley* [1999] ICR 984: it is obligatory to reduce the compensatory award where there is a finding of contributory fault. The reduction may be 100% - *W Devis & Sons Limited v Atkins* [1977] ICR 662.

77 In *Nelson v BBC (No 2)* [1980] ICR 110, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

(a) The relevant action must be culpable and blameworthy

(b) It must actually have caused or contributed to the dismissal

(c) It must be just and equitable to reduce the award by the proportion specified.

78 It is open to a Tribunal to make deductions both for *Polkey* and contributory fault. The proper approach of Tribunals in these circumstances is first to assess the loss sustained by the employee in accordance with *s123(1) ERA 1996*, which will include any percentage deduction to reflect the chance that he would have been dismissed in any event. The Tribunal should then make the deduction for contributory fault, *Rao v Civil Aviation Authority* [1994] ICR 495. However, in deciding the extent of the employee's contributory conduct and the amount by which it would be just and equitable to reduce the award for that reason under *s123(6)*, the Tribunal should bear in mind that it has already made a deduction under *s123(1) ERA 1996.*

79 In *RSPCA v Crudden [1986] ICR 205* it was held that, in light of the similarity in the

provisions of *ss122(2) & s123(6) ERA 1996,* only in exceptional circumstances would deductions to the compensatory and basic awards differ.

Wrongful Dismissal

80 The degree of misconduct necessary in order for the employee's behaviour to amount to a repudiatory breach is a question of fact for the Tribunal to decide. In *Briscoe v Lubrizol Ltd* [2002] IRLR 607, the Court of Appeal approved the test set out in *Neary v Dean of Westminster* [1999] IRLR 288, ECJ, where the Special Commissioner held that the conduct, "must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment."

Unlawful Deductions from Wages

81 *s13 Employment Rights Act 1996* a worker has the right not to suffer unauthorized deductions from wages.

Reinstatement and Reengagement

82 The law regarding reinstatement and reengagement following a finding of unfair dismissal is set out in *ss113 – 116 Employment Rights Act 1996.* I have also taken account of the cases of *Meridian Ltd v Gomersall* [1977] IRLR 425 and the *Port of London Authority v Payne* [1994] ICR 555.

Discussion and Decision

Unfair Dismissal & Polkey

83 Applying the law to the facts as I found them, I concluded that the Respondent had proved that the reason for dismissal in this case was misconduct: in the Claimant using racially motivated derogatory language. I accepted Ms Forbes' evidence that that was the reason in her mind and in the mind of her fellow Board members when they decided to dismiss the Claimant. In particular, the alleged use by the Claimant of the words, "weevils, cockroaches, kitchen sinks, chalky", to describe people of ethnic origin. I accepted that Ms Forbes and the Directors had seen evidence from the Claimant's colleagues that he used these words. I did not consider that there was any real evidence that there was any other reason in the minds of the Board members when they decided to dismiss the Claimant.

84 I then considered whether, when the Board decided to dismiss, the Respondent had reasonable evidence of the misconduct, following a reasonable investigation.

85 The fact of this case were unusual: Mr Pearson, who had conducted the disciplinary hearing and who had told the Claimant in a letter dated 17 March 2016 that he would establish the facts on the employer's part, came to different factual conclusions to the reasons which the Board members had in their minds when they decided to dismiss.

86 There was evidence, from the statements of the Claimant's colleagues, that the Claimant had used racist and derogatory language towards his colleagues and to visitors, including the words "kitchen sink" to describe Chinese people and the name "chalky" for black people. However, Mr Pearson, who conducted the disciplinary hearing and who heard from the Claimant, found only that the Claimant had used the phrase, "tight Welsh woman" about a resident, had made unspecified comments to Eastern European delivery drivers and had put his feet up on the desk. He did not make these findings clear in his disciplinary meeting report, so it appears that the Board members came to their own findings of fact, based on reading the witness statements and the disciplinary hearing notes. They had not attended the disciplinary hearing themselves.

87 I had to consider whether it was outside the band of reasonable investigations for the people who decided to dismiss not to have, themselves, attended the disciplinary hearing and heard from the employee - but to have come to different conclusions, on the facts, from the person who did conduct the disciplinary hearing and hear from the employee.

88 Holding a disciplinary hearing is one of the requirements of the ACAS Code of Practice. While not stated explicitly in the Code of Practice, I considered that it is implied in the Code that the person who conducts the disciplinary meeting with the employee is the person who makes the decision on the factual outcome of the meeting. The whole point of a meeting is that decision maker does hear from the employee, direct, and can make an assessment as to the employee's credibility. If this were not the case, disciplinary procedures could simply be concluded on paper, with no meeting required, but with the employee merely being given an opportunity to put arguments in writing.

89 I considered that it was outside the band of reasonable responses for the dismissing officers simply to make a decision on the papers, rather than having met with the Claimant. Alternatively, I considered that it was outside the band of reasonable responses for the Respondent to make a decision to dismiss based on different findings of fact to the facts found by the person who conducted the disciplinary hearing.

90 For the disciplinary hearing to have been part of a fair procedure, I considered that the Respondent would have to have made the decision to dismiss on the basis of the factual findings made by Mr Pearson. Those findings were that the Claimant made unspecified derogatory comments to Eastern European delivery drivers, had called a resident a tight Welsh woman and had put his feet up on the desk.

91 I therefore considered what the Respondent, acting fairly pursuant to the procedure it adopted, would have decided on the basis of Mr Pearson's findings of fact.

92 With regard to the comment about the resident; Mr Somers had already spoken to the Claimant about that matter, but Mr Somers had not even given the Claimant a written warning about it. I decided that it was outside the band of reasonable responses to impose a different disciplinary sanction for that matter, many months later, when it had already been investigated and dealt with.

93 With regard to the unspecified comments to Eastern European delivery drivers, I concluded that, while negative comments could be a matter of misconduct, Mr Pearson did not make sufficient findings for those comments to come within the definition of gross

misconduct. The nature of those comments was not known to Mr Pearson. Without more, it would be unreasonable to categorise them as gross misconduct and worthy of dismissal for a first offence.

94 Equally, putting feet up on a desk would be a matter of misconduct, but could not properly be termed, "gross misconduct". It seemed to me that it would be outside the band of reasonable responses to describe it as worthy of dismissal for a first offence.

95 I considered that it would, therefore, have been outside the band of reasonable responses for the Respondent to have dismissed the Claimant for this first disciplinary matter of misconduct, as described by Mr Pearson. The Claimant had not had any previous written warnings - and certainly not a final written warning - before the disciplinary allegations were made against him.

96 However, I considered that Mr Warland's appeal hearing did remedy the unfairness. Mr Warland heard from the Claimant, himself. In evidence to the Tribunal, Mr Warland said that he decided that the statement by Mr Ahmed had been correct and that: the Claimant had been very rude; that he had referred to a fellow colleague as "chalky"; that he had said to Mr Ahmed that people of Asian origin were "one of his mob"; that people with prayer had "begging bowls" on their heads; that Chinese delivery men were "kitchen sinks" and that the Claimant was rude to the delivery drivers in general.

97 Mr Warland heard from the Claimant himself and had read all the supporting documentation; he concluded that the Claimant had made racist comments including "kitchen sink" and "chalky" about people of different ethnic origins.

98 As previously stated, I considered that there was reasonable evidence available to Mr Warland - and to the Respondent - from one of the Claimant's fellow employees, that the Claimant had used these words.

99 I considered, therefore, when Mr Warland came to his factual conclusion, that there was reasonable evidence in his mind. I considered that there also had been a reasonable procedure and that Mr Warland himself had heard from the Claimant before he came to the conclusion that the Claimant had used specific derogatory terms for people based on their colour, ethnic origin and religion.

100 Mr Warland's conclusion was based on the same facts as the Respondent's Board had in its mind when it dismissed the Claimant: that the Claimant had used derogatory terms for people based on their colour, ethnic origin and religion. Mr Warland's decision that this amounted to gross misconduct and warranted summary dismissal was based on the same facts as the Board's decision to summarily dismiss for gross misconduct.

101 I concluded that the Claimant would have been dismissed fairly, therefore, when he received the appeal outcome, sent to him by a letter of 2 June 2016.

102 I did not consider that the Claimant's dismissal was unfair in any other way. The Respondent had ensured that relevant witnesses were interviewed. The Claimant's colleagues with whom he worked, including Nicky Raja and Ricky Tuffin, had been interviewed before the decision to dismiss was made and before the appeal hearing.

103 I considered that it was within the band of reasonable responses not to interview residents, who were not alleged to have heard any of the relevant comments. The allegations concerned racist and derogatory comments made to delivery drivers and fellow employees. The Claimant did not say that the tenant who had allegedly been described as a "tight Welsh woman" had been present, or had heard the comment. It was reasonable for the Respondent to conclude that the residents would not have been able to give evidence about these matters.

104 While I considered that it was potentially unfair for Adam Somers to have been present during Ricky Tuffin's interview, when Mr Somers himself had given evidence, in fact, Ricky Tuffin did give evidence that the Claimant had not caused any problems with him and that Mr Tuffin had not witnessed any incidents involving the Claimant. That was evidence favourable to the Claimant and which was available to the disciplinary and appeal hearing.

105 The Respondent was, nevertheless, still entitled to prefer the evidence of other witnesses to the evidence of Mr Tuffin and Mr Raja (who also said that he had not witnessed any incidents involving the Claimant).

106 I considered that the Respondent did conduct a reasonable investigation into the allegation that Mr Ahmed was motivated against the Claimant because of incident involving the taxi. Mr Ahmed confirmed that he had had a dispute with the Claimant about a potentially unlicensed taxi: the Claimant's evidence in this regard was undisputed - it did not need to be investigated further. In any event, I considered that it was reasonable for the Respondent, as Mr Warland specifically found, to conclude that, whatever Mr Ahmed's motivation, his allegations against the Claimant had been corroborated by at least some other employees and, therefore, it was reasonable to accept Mr Ahmed's evidence and the evidence of the corroborating employees.

107 I considered that it was within the range of reasonable responses to dismiss the Claimant where it had been decided that he used derogatory terms for people of different ethnic and religious backgrounds including "kitchen sink", begging bowls on their head and "chalky". Those words constituted derogatory language linked to race and ethnic origin and religion and would come within the definition of gross misconduct, being offensive to many people.

108 I did not consider that the process was a sham. I did consider, carefully, whether the email of 6 May 2016, stating that the outcome would not be affected, showed that Mr Warland had made a decision without properly investigating the facts and that, therefore, he had a closed mind. Mr Warland said, in evidence, that, having heard the appeal, he decided that no new evidence had been provided by the Claimant. He had already gone through all the evidence of the witness statements and had formed the view that he favoured the evidence of the people making the allegations. I accepted his evidence that he had decided to dismiss the appeal by 6 May 2016, but was gathering detailed answers for some of the Claimant's questions in the subsequent weeks.

109 In summary, the Claimant was dismissed unfairly by the Respondent by letter of 31 March 2016. The procedural defects were cured by Mr Warland's appeal and the Claimant would have been fairly dismissed by the appeal outcome letter sent on 2 June 2016.

Contributory Fault

110 With regard to contributory fault, I have to consider whether there was culpable or blameworthy conduct on behalf of the Claimant; whether that conduct caused or contributed to the dismissal; and whether it is just and equitable to reduce the award. None of the Claimant's colleagues gave evidence at the Tribunal. The Claimant did so. He denied that he had used any racist language.

111 During the disciplinary hearing the Claimant had agreed that he did put his feet up on the desk at work he agreed and that he had had an altercation with a delivery driver around Christmas time. The Claimant had also said that he regularly engaged in banter.

112 It was plain, from the evidence, that there was a large degree of politicking in the workplace. It was also clear that Mr Ahmed had organised a taxi driven by a relative of his, who was not working through a cab firm. Even if, as Mr Ahmed had told the resident, the taxi was an Uber taxi, it could not have been operating as an Uber taxi at the time. It is a matter of common knowledge that Uber taxis are booked through mobile telephone "apps" by individual clients and Uder taxi fares are billed directly to clients' credit cards. It was entirely unclear, therefore, on what basis that taxi driver would have been insured to drive the resident on their taxi journey.

113 It was plain also that Mr Ahmed was very unhappy about the Claimant challenging him about this matter. I considered that there was convincing evidence that Mr Ahmed's complaint about the Claimant arose from the taxi dispute. Certainly, there was a striking coincidence in timing between the taxi argument and Mr Ahmed's emailed complaint about the Claimant.

114 There was evidence about politicking and ill feeling between the concierges, both from the Claimant's appraisal and from Mr Raja's interview.

115 I considered that there was reason to doubt the reliability of the evidence of the concierges who made allegations that the Claimant used racist language. I did not hear from the concierges in evidence and, therefore, could not be satisfied as to those doubts about their reliability.

116 On the evidence that was available to me, on the balance of probabilities, I accepted the Claimant's evidence and did not find that the Claimant made racist comments, or had racist names, for visitors or colleagues.

117 There was evidence, as the Claimant himself admitted, the Claimant had had at least one altercation with the delivery driver, sat with his feet up on the desk and regularly engaged in what he described as "banter". Given that the Claimant was engaged in a "front of house" role, I concluded that none of those behaviours were professional, or consistent with his role. I decided that they were culpable and blameworthy. I considered that they did contribute to the Claimant's dismissal, in that they were part of the allegations against him. They would not have been sufficient to result in dismissal, but they could reasonably have resulted in a warning to him.

118 I considered that it was just and equitable to reduce the Claimant's award by 25%,

on account the Claimant's unprofessional behaviour, which contributed to his dismissal.

Wrongful Dismissal

119 With regard to wrongful dismissal, for the same reasoning, I did not conclude that the Claimant acted in such a way as to destroy or seriously damage the relationship of trust and confidence between the Claimant and his employer. He did not use racist derogatory language. His admitted misconduct was not so as to justify summary dismissal. It would have been worthy of a first written warning. I therefore found the Claimant was wrongfully dismissed when he was dismissed without notice.

Unlawful Deductions from Wages

120 Regarding unlawful deductions from wages, the Claimant received the letter dismissing him on 2 April 2016. He was entitled to written notice to terminate his employment. The Claimant was paid until 30 March 2016. The Respondent failed to pay him for 3 days from 31 March 2016 to 2 April 2016. The Claimant is therefore entitled to 3 days' pay on account of unlawful deductions from wages.

Remedy

Reinstatement / Reengagement

121 The Claimant told the Tribunal that he wanted to be reinstated as a primary remedy, or reengaged. I accepted his evidence that this was his desire. Prior to his dismissal, he had no disciplinary record. The Claimant had been employed since 2004 and had had long service with the Respondent.

122 Mrs Forbes told the Tribunal that Andy Charles had left the Respondent's employment but that additional hours had been given to the remaining 5 members of staff, who were always keen to work extra hours. She said that there was no concierge role available at the Respondent Company and there were no other locations at which the Claimant could work.

123 I reminded myself that reinstatement is the primary remedy for unfair dismissal.

124 Miss Bell, for the Respondent, said it would not be practicable for the Claimant to return to work, given that he would have to work with the employees who had made allegations against him. She said that he had contributed to his dismissal.

125 I considered reinstatement, first, and I considered the matters set out in *s116(1)(a),(b) & (c) ERA 1996*. I considered that the Claimant did wish to be reinstated. With regard to practicability, the Respondent does not have any current vacancies, although the other concierges have increased their hours since the Claimant's dismissal. The Claimant was keen to return; he has long experience and relevant skills.

126 In considering *s116(1)(c),* (whether the Claimant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement); I considered

that it would not be just to order reinstatement in circumstances of this case. The Claimant did cause or contribute to the dismissal. Reinstatement would be to the role of concierge, which is a customer facing role.

127 I have found that the Claimant's behaviour fell below the standards of professionalism expected in such a role. The Claimant's colleagues complained about this lack of professionalism during the disciplinary process. I considered it would not be just to require the Respondent to reemploy an employee whose conduct was unprofessional, particularly where the role was one that involved very significant interaction with the tenants and visitors and, therefore, interpersonal qualities and skills.

128 With regard to reengagement, I did not consider that it was just to reengage, even on different terms, or from a particular date. It would not be appropriate to compel the Respondent to receive an employee whose conduct fell below professional standards required.

Compensation

129 The parties agreed that the Claimant's gross monthly pay was £1,555.84. That equated to an annual gross salary of £18,670.08. The Claimant therefore received a weekly gross salary of £359.04 and a daily gross salary (calculated on a five day week) of £71.81.

130 With regard to the Claimant's basic award for unfair dismissal, the Claimant was employed from 19 December 2004 until 2 April 2016. He was employed for 11 complete years. He was born on 29 December 1955 and was aged 41 or older throughout his employment. The Claimant is entitled to be paid a basic award calculated as 11 x 1.5 x £359.04 = £5924.16. Applying a 25% deduction from that, the Claimant's basic award is £4,443.12.

131 By *s86 ERA* 1996 and pursuant to the Claimant's contract of employment, the Claimant was entitled to 11 weeks' notice of termination of employment.

132 He is entitled to be paid 11 x £359.04 = £3,949.44 for wrongful dismissal, for unpaid notice pay.

133 The Claimant would have been fairly dismissed when he received the outcome of the appeal letter dated 2 June 2016. Assuming that the Claimant would have received that letter, at the latest, on 4 June 2016, the Claimant would have been employed for an extra 9 weeks. However, given that he was entitled to be paid notice pay, his compensatory award would be extinguished by his 11 weeks notice pay. The prescribed element in this case is therefore zero.

134 The Claimant is entitled to an award for loss of statutory rights and I make an award of £400 in that regard. Applying a 25% reduction for contributory fault gives £300 for the non prescribed element.

135 The Respondent shall pay the Claimant a grand total of £4,743.12 for unfair dismissal. The basic award is £4,443.12. The compensatory award is £300. The

prescribed element is zero.

136 The Respondent shall pay the Claimant 3 x £71.81 = £215.43 for unlawful deductions from wages.

_____

Employment Judge Brown

19 April 2017