EMPLOYMENT TRIBUNALS

Claimant: **Mr I Stevenson**

Respondent: **London Borough of Redbridge**

Heard at: **East London Hearing Centre (via Cloud Video Platform)**

On: **29 January 2021 and 19 March 2021**

Before: **Employment Judge Noons**

Representation

Claimant: Unrepresented
Respondent: Mr Zovidavi of Counsel

JUDGMENT having been sent to the parties on 23 March 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant, Mr Stevenson was employed by the respondent, London Borough of Redbridge, from 28 November 1988 until his dismissal, without notice, on 27 July 2020. At the time of his dismissal, he was employed as an Applications Support Officer.

2. The claimant claims his dismissal was unfair within section 98 of the Employment Rights Act 1996. The respondent contests the claim. It says that the claimant was fairly dismissed for misconduct in the form of saying the word “Nigger” during an internal training course on 11 February 2020 in breach of its policies, and it was entitled to terminate the claimant’s employment without notice because of his gross misconduct.

3. The claimant represented himself and gave sworn evidence. The respondent was represented by Mr Zovidavi, counsel, who called sworn evidence from Colin Young, Head of Debt Collection, Ola Akinfe, Head of Asset Management and Councillor Kam Rai. I considered documents from an agreed, 366 page bundle of documents which the parties introduced in evidence.

4. I have made my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts. I have not made findings about every matter raised in evidence but only those matters which I found to be relevant to my determination of the issues.

Issues for the Tribunal to Decide

5. I agreed with the parties the issues for me to decide. The issues of re-instatement or re-engagement and contributory conduct only arise if the claimant's complaint of unfair dismissal succeeds.

Unfair Dismissal

5.1 What was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996? The respondent asserted that it was a reason relating to the claimant's conduct.

5.2 If so, was the dismissal fair or unfair within section 98(4), and, in particular, did the respondent in all respects act within the band of reasonable responses? The claimant stated that the dismissal was unfair because the respondent followed an unfair process: no consideration was given to pursuing routes of mediation or informal resolution; the respondent failed to consider his mitigation in that the phrase was said during a training session which he had been told was a "safe space", he had apologised on the day, he was prevented from apologising to the two complainants at the disciplinary hearing and he had a clean disciplinary record for the entirety of his nearly 32 years' service with the respondent.

5.3 The Respondent stated that the dismissal was fair because the claimant deliberately used the N word in full, he had many years' service most of which was in HR, and he had not shown any remorse.

5.4 The focus under section 98(4) is on the reasonableness of the management's decisions and it is immaterial what decision I would myself have made about the claimant's conduct.

Re-instatement and re-engagement

5.5 If the complaint of unfair dismissal is well founded the claimant has indicated that he wishes to be reinstated in accordance with section 114 ERA1996 or re-engaged in accordance with section 115 ERA 1996.

Contributory conduct

5.6 If the tribunal does not order reinstatement or re-engagement then the remedy is compensation by way of a basic award and compensatory award. The Respondent asserts that in deliberately using the N word in full the claimant's blameworthy conduct contributed to his dismissal.

Findings of Fact

6 The claimant attended a 'Prevent' training course on site at the respondent's premised on 11 February 2020. There were 5 other attendees, (including 2

managers more senior than the claimant) as well as the claimant and the facilitator at this training session. This was an internal training course for the respondent's employees. The facilitator of the session had said that the session was a "safe space". Although the course was about radicalisation the claimant's evidence on the first day of this hearing was that he raised the issue of racism, specifically around Jewish jokes, stereotypes and websites.

7 During the course of this session the claimant asked a question of the facilitator around when situations should be reported as racism as sometimes it was unclear. She asked him to give an example and the claimant relayed a situation he had been in in 1985 when a black person had referred to his then girlfriend, who was also black, using the N word. In the course of relating this example the claimant used the N word in full. The claimant accepts that he said the N word in full. The claimant said sorry in the training session after he had used the N word. No one at the session said to the claimant he should not have used the N word in full.

8 There is no definition of what using the phrase "safe space" means within the respondent and there is no universal understanding of what it means or what is allowed when the phrase is used.

9 After the course, an attendee complained about the claimant's use of the N word to a senior manager within the respondent. This individual stated that he did not want the claimant to lose his job. Subsequent to this, another attendee also complained to the same senior manager about the claimant's use of the N word. One of the complainants specifically made clear to the respondent how significant an impact the use of the full word had on him. The claimant accepts in his claim form that these two individuals were right to raise the issue with the respondent.

10 The claimant was made aware of the complaint by way of letter date 27 February 2020 from Ms Thompson, IT Support Manager. This should have included a copy of the disciplinary policy but it did not. The letter did however provide contact details for a HR business consultant who the claimant could contact if he required more information about the disciplinary policy. The claimant did not make contact with the HR business consultant.

11 The claimant had worked to Ms Thompson for about 2 years and in this time he had had a difficult relationship with her. The claimant's evidence was that he believed Ms Thompson had encouraged people to complain about his conduct and that she was heavily involved in formulating the allegation against him as she wanted him to lose his job.

12 The claimant received the disciplinary policy from the respondent in March 2020 after raising it with the investigating officer. In response to the letter of 27 February 2020, the claimant submitted a statement dated 28 February 2020.

13 The respondent instigated a disciplinary investigation which was conducted by Colin Young, Head of Debt Collection. Mr Young worked in an entirely different department to the claimant. The claimant was invited to an investigation hearing by way of letter dated 4 March 2020. The allegation set out in this letter was "*You used racist language in a public training course on the 11 February 2020, held in Lynton House. The word you used on more than one occasion was "Nigger". This constitutes discriminatory language in the workplace and caused offence to staff attending the course*".

14 Mr Young, as investigating manager, was guided by the respondent's disciplinary procedure, in particular pages 26 to 30 of that document. Mr Young was very clear in his evidence to the tribunal that his role in conducting the investigation was to recommend whether or not the allegations should be considered at a disciplinary hearing.

15 Mr Young interviewed the two individuals who had raised complaints. One stated that the claimant had used the N word in full on at least two occasions. The other stated that the claimant had only used the N word in full once. He also interviewed the other attendees (apart from one who had submitted a statement), the claimant and the session facilitator. The facilitator confirmed that she felt the claimant's question which led to him giving the example and using the N word was legitimate. It was a genuine enquiry and she had outlined at the start of the session that everyone should feel free to ask any questions. She had explained to the group that it was a safe space in that they were free to ask questions.

16 Mr Young provided a report dated 29 May 2020 in it he confirms that the claimant admitting using the N word in full and that this has caused harassment as defined in the respondent's Dignity at Work policy and procedure and that formal disciplinary action was warranted. The commissioning manager, decided that a formal disciplinary hearing should be convened. The commissioning manager did not give evidence before the tribunal.

17 The claimant was invited by Ola Akinfe, Head of Asset Management, to a disciplinary hearing on 13 July 2020. Mr Akinfe worked in an entirely separate department to the claimant. Mr Akinfe quite fairly accepts that he personally finds the use of the N word appalling.

18 The invite letter included a copy of the investigation report and all the statements collected as part of the investigation process. This was the first time the claimant was made aware of the names of the individuals who had complained about his use of the N word. The letter also repeated the allegation (as previously set out in paragraph 13 above). The hearing took place on 14 July 2020. Mr Young called the two complainants as witnesses for the disciplinary hearing. The claimant had a chance to question the complainants and the first complainant confirmed that the claimant had said sorry immediately after saying the N word.

19 The claimant had prepared statements he wanted to read out before he asked questions of the two complainants, but Mr Akinfe said he could not read out his statement before the questions. These statements contained an apology from the claimant to the two individuals. These statements were given to Mr Akinfe after the hearing and include the phrase "*I wholeheartedly offer you my sincerest apologies for using the word and causing you offence".*

20 In evidence before this tribunal Mr Akinfe accepted that in accordance with the respondent's policy for conduct of disciplinary hearings the claimant had no opportunity to apologise to the complainants at the disciplinary hearing. In Mr Akinfe's view the respondent's procedures for the conduct of the hearing did not allow for an apology.

21 At the time of the disciplinary hearing Mr Akinfe's understanding was that the claimant had known who the complainants were since the allegation was raised with him in February. However, he did not ask any questions of the claimant or any other person at the disciplinary hearing to verify this belief.

22 During the disciplinary hearing Mr Akinfe asked the claimant what departments he had worked in and the claimant confirmed he had worked in the payroll section then in HR after it merged in 1997 during a restructure of the council and then in 2008 he had moved on to the HR systems team and in 2019 he moved onto the PLACE systems team. Mr Akinfe did not ask the claimant what his role had been in those departments. The claimant had always worked in an IT support role in relation to payroll. The claimant has no HR experience and has never worked in a HR adviser type role.

23 Mr Akinfe also asked the claimant about what Diversity and Inclusion training courses he had been on, the claimant said he would guess it was 3 courses, but he was not sure and that the most recent might have been 2017. Mr Akinfe confirmed he would check when the courses were but in evidence he admitted he had not done so. He also did not check what the content of those courses had been.

24 Mr Akinfe also did not ask the claimant what his understanding was of the phrase "safe space" having been used by the facilitator in relation to the training course.

25 The claimant accepted at the disciplinary hearing that he had reflected on the impact of his language on the individuals and said he felt "terrible". The claimant also accepted that he could have got his message across without using the N word in full. He agreed that he should have used another word. He went on to accept that he should not have said it.

26 The claimant was dismissed by way of letter dated 24 July 2020. This letter again set out the allegation in full. Mr Akinfe concluded that he not been presented with any evidence that the claimant had made any attempts to engage or show remorse to the victims. He mentions specifically that there had been an absence of remorse in the claimant's summing up at the disciplinary hearing even after Mr Young had said that the claimant had shown no remorse.

27 Mr Akinfe concluded that the claimant had only used the N word in full once. This conclusion is not clear on the wording of the letter as that referred to the N word being used on more than one occasion. Mr Akinfe confirmed in evidence to the tribunal that his conclusion was the word was used only once. He also concluded that the claimant had used the word in a public training course.

28 The claimant's appeal against dismissal was heard by the Council's staffing sub-committee and Councillor Kam Rai gave evidence to the tribunal in relation to the appeal hearing and decision. The appeal hearing took place on 23 October 2020. The staffing sub-committee was made up of 5 councillors.

29 The appeal confirmed the dismissal, noting that the claimant's use of the N word fell below the standards of behaviour expected and breached the respondents Dignity at Work policy. The staffing sub committee also took into account that for the majority of his employment the claimant had worked in the HR department.

30 At the appeal hearing Mr Akinfe clarified that he had concluded that the claimant had used the full word only once and that in his view the claimant had shown insufficient remorse. He also confirmed that the course had in fact been an internal training course not a public one.

31 Councillor Rai said that it was critical to the subcommittee in coming to its decision that "the claimant did not apologise to those who had been offended"

and that the claimant had "showed no remorse for his actions". The committee also rejected the claimant's assertion that he did not have the opportunity to show remorse or to regret to those who had attended the course. The claimant for the first time at the appeal stage said that his used of the N word had been accidental.

32 It is important to set out the relevant extracts of the respondent's policies of the respondent's disciplinary policy sets out at paragraph 3.1 *"gross misconduct is misconduct that is so serious that it destroys the relationship of trust and confidence that the Council needs to have in an employee and the dismissal of the employee is a reasonable sanction to impose notwithstanding any lack of history or conduct. A dismissal for gross misconduct is justified at the first offence and depending on the circumstances, the employee may be dismissed without notice (i.e. summary dismissal)".* Included in the list of examples of what could constitute gross misconduct is the following *" Acts of harassment, victimisation, intimidation, incitement or discrimination against any individual or group (e.g. includes colleagues, visitors, pupils and parents*) …

33 The respondent's Dignity at Work Bullying and Harassment Policy and Procedure defines Harassment as "*unwanted conduct affecting the dignity of men and women in the workplace. It may be related to ….race ….and may be persistent or an isolated incident. The key is that the actions or comments are viewed as demeaning and unacceptable to the recipient".*

34 This policy sets out in section 6 that it may be possible to resolve matters via informal action which could include mediation. It also goes on to set out at section 7.9 that where a formal complaint has been made the investigating officer can make recommendations which may include *"attempting to resolve the issue between the parties with their consent…referring the matter to mediation, with agreement of the parties if this has not already been attempted"*.

35 Page 30 of same policy says that the investigating officer can:

"recommend that the case is:
- withdrawn;
- handled informally (which may include management guidance);
- considered at a disciplinary hearing".

36 The Staff code of conduct at section 9 states under the heading Equality and Diversity *"We treat others with respect, fairness, and dignity. We will not allow any kind of discriminatory behaviour, harassment or victimization. If we see anyone behaving this way, we will challenge in a professional manner".*

37 There is one further factual issue to mention, the claimant refers to an email from a HR business partner to Ms Thompson dated 18 June 2020. It says *"you are correct. However, we cannot say to I what the decision is. A letter will be sent to I in due course, for a disciplinary hearing to be convened and Ola will be hearing the case…with regards to the others, no decision has been made, as this is a decision for Gavin to make"*

Relevant Law– Unfair Dismissal

38 Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the respondent under section 95, but in this case the respondent admits that it dismissed the claimant (within 95(1)(a) of the 1996 Act) on 27 July 2020.

39 Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First the employer must show that it had a potentially fair reason for dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal the tribunal must consider whether the respondent acted fairly or unfairly in dismissing for that reason.

40 In this case it is not in dispute that the respondent dismissed the claimant because it believed he was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). The respondent has satisfied the requirements of section 98(2).

41 Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, (having regard to the reason shown by the employer) shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

42 In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions of **Burchell 1978 IRLR 379** and **Post Office v Foley 2000 IRLR 827**. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. If the Tribunal is satisfied of the employer's fair conduct of the dismissal in those respects it must then go on to decide whether the dismissal of the claimant was a reasonable response to the misconduct.

43 In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4) the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods ltd v Jones 1982 IRLR 439, Sainsbury's Supermarkets ltd v Hitt 2003 IRLR 23** and **London Ambulance Service NHS v Small 2009 IRLR 563**).

44 The Claimant and Mr Zovidavi provided me with oral submissions on fairness within section 98(4) which I have considered and refer to where necessary in reaching my conclusions.

45 The claimant says his dismissal was outside the band of reasonable responses open to the respondent as a reasonable employer. His dismissal was unfair because no consideration was given to alternative options such as mediation and the respondent failed to take into account his mitigation in that he had apologised in writing and verbally on the day, the facilitator had said his question was appropriate and asked in "safe space", Mr Akinfe and the appeal panel were mistaken in their belief that he was an experienced HR adviser, and that he had a clean disciplinary record with nearly 32 years' service. He also says the decision to dismiss was pre-determined.

46 Mr Zovidavi says that by its very nature the N-word is a deeply loaded and offensive word with distressing racial connotations. He referred me to two cases **Theresa Georges v Pobl Group ltd 1601213/2018** and **Mann v NSL Ltd 260739/2015**. Whist I have been able to find a copy of the decision in **Pobl**

Group I have not been able to find the full judgment in **Mann** although Mr Zovidavi referred me to a summary. He says that the respondents held a reasonable belief, given the claimant's admission to using the N word in full and that the investigation was reasonable in all the circumstances. He says that dismissal was within the band of reasonable responses notwithstanding the fact that the facilitator had said the session was a "safe space", and that Mr Akinfe took all the claimant's mitigation into account when making his decision.

Reinstatement and Re-engagement

47 In exercising its discretions under section 113 ERA 1996 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account whether the claimant wishes to be reinstated, whether it is practicable for the respondent to comply with an order for reinstatement and where the claimant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

48 If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and if so on what terms. In so doing the tribunal shall take into account any wish expressed by the claimant as to the nature of the order to be made, whether it is practicable for the respondent to comply with an order for re-engagement and where the claimant caused or contributed to some extent to the dismissal whether it would be just to do order re-engagement and if so on what terms.

49 Except in a case where the tribunal takes into account contributory fault it shall if it orders re-engagement do so on terms which are so far as is reasonably practicable as favourable as an order for reinstatement.

50 The tribunal therefore must take into account not only the claimant's wishes in relation to what order should be made but also whether the order is capable of being carried out into effect with success. The issue of the claimant's conduct is also relevant in that this again goes to whether his conduct has diminished the respondent's trust and confidence in him such that it would not be just to order reinstatement or re-engagement.

Contributory fault

51 When considering whether to make a reduction to the basic award on the basis of contributory conduct the issue is whether there was any conduct prior to the claimant's dismissal such that it would be just and equitable to reduce the amount of the basic award to any extent. If there was the tribunal shall reduce the amount accordingly. Section 122(2) ERA1996.

52 When considering whether to make a reduction to any compensatory award if the dismissal was, to any extent, caused or contributed to by any action of the claimant the tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. Section 123 (6) ERA 1996.

Mitigation

53 The compensatory award may also be reduced by a failure on behalf of the claimant to mitigate his losses. Section 123(4) ERA 1996. The test for the tribunal is whether the claimant's conduct in pursuing or refusing to pursue a source of income is reasonable on the facts. The case of **Gardiner Hill v Roland Berger Technics** 1982 IRLR 498 sets out 3 steps in relation to mitigation. These are:

- What steps were reasonable for the claimant to take in order to mitigate his loss;
- Whether the claimant did take reasonable steps; and
- To what extent, if any, the claimant would have actually mitigated his loss had he taken these steps.

The burden of proof in relation to all 3 of these steps is on the respondent. The claimant does not have to prove that he has mitigated his loss. The responsibility for providing relevant information rests with the respondent. They must prove that the claimant acted unreasonable.

Application of Law to the Facts

54 In relation to the investigation, a reasonable employer would have addressed their minds to whether or not action short of a disciplinary hearing would have been appropriate. I had no evidence before me that this was ever considered. By the time the matter got to Mr Young he was clear in his mind that if the facts were made out, he had to recommend it went forward to a disciplinary hearing. This is despite the respondent's own policies allowing for alternative options even after the investigation report. A reasonable employer would have considered prior to the start of the investigation and at the point of the conclusion of the investigation whether the matter could have been dealt with via an informal route, especially in light of the fact that the initial complainant said he did not want the claimant to lose his job and the respondent's own procedures specifically envisage that someone might commit an act of harassment which could then be resolved through informal measures.

55 Mr Young did not address his mind to whether the issue could be handled through a different route. I had no evidence before me that the commissioning manager, considered whether action short of disciplinary hearing, such as mediation was appropriate. In failing to address their mind to this issue the respondent acted outside of the band of reasonable responses.

56 There was a suggestion in the disciplinary hearing that the claimant should have, at an early stage, explored whether mediation was appropriate. However, the claimant did not have a copy of the respondent's disciplinary policies until Mr Young gave them to him as part of his investigation by which point it was too late for the claimant to suggest mediation as Mr Young clearly saw only two possible outcomes to his investigation either no action or formal disciplinary hearing.

57 No reasonable employer would put the onus on the individual accused of misconduct to have to suggest mediation or other alternative resolution. The respondent's own policies do not do this and to suggest it was the claimant's role to raise it early on is outside the band of reasonable responses.

58 I find that the respondent held a genuine belief that the claimant was guilty of misconduct. The Claimant had admitted using the N -word during the training course. This belief in all the circumstances was reasonable. However, I am mindful that the range of reasonable responses test applies to all aspects of what the respondent did and that I must not fall into error in substituting my view for that of the reasonable employer.

59 In moving on to deal with the procedure followed and the sanction applied I find that Mr Akinfe misunderstood what role the claimant had held during his time in the HR department. In his statement to this Tribunal he emphasised that the claimant had worked for 24 years in the HR department. A reasonable employer would have made sure that the disciplining manager had the correct facts about the claimant's service and positions held. This is especially so given the fact of

being a HR adviser was so central to Mr Akinfe's decision to dismiss. He emphasised the fact that the claimant as a HR adviser would have advised others in relation to the respondent's policies.

60 This was not in fact the case, the claimant had throughout been in various IT systems support roles supporting payroll. This misapprehension as to the claimant's role in HR continued into the appeal hearing as well and was therefore not rectified on appeal. The respondent's actions in failing to establish what the claimant's roles had actually been were outside of the band of reasonable responses. Further their reliance on 24 years of HR experience without verifying if this was in fact correct when considering what sanction to apply to the claimant was also outside the band of reasonable responses.

61 In failing to check when the claimant had undertaken Diversity & Inclusion training and what the content of that training had been the respondent actions were outside the band of reasonable responses. Mr Akinfe said he would do so but in fact he did not.

62 Central to Mr Akinfe's decision to dismiss is that the claimant did not attempt to engage or show remorse to the victims. However, the claimant did offer his sincerest apologies and also apologised on the day of the incident. A reasonable employer would have recognised that these statements and the apology on the day showed some level of remorse on behalf of the claimant. The respondent's conclusion that they had no evidence of, and that the claimant had not in fact shown, any remorse was a conclusion that no reasonable employer would have reached.

63 Despite the appeal panel being told by Mr Akinfe that in his view the claimant had shown insufficient remorse, Councillor Rai concluded that the claimant had shown no remorse. This conclusion was outside the band of reasonable responses given the evidence before the panel and Mr Akinfe's comment.

64 Mr Akinfe also says that the claimant had not been mindful of the distress using the N word in full had caused. But the claimant had said to Mr Akinfe he felt terrible about the impact he had had. A reasonable employer would have recognised this as the claimant being mindful of the distress he had caused.

65 Mr Zovidavi put to the claimant in cross examination that he had plenty of time in which to contact the people who had been on the training course and to apologise for his language. The claimant said this would have been unprofessional and inappropriate. I find that no reasonable employer would expect someone accused of gross misconduct to start trying to make contact with those individuals who might have raised the complaint.

66 In his evidence to me the claimant in says that he accidentally used the N word in full. However, it is quite clear that throughout the investigation and disciplinary hearing the claimant never once suggested that the use of the full word had been an accident. The first time the claimant suggested it was an accident was at the appeal stage. The respondents were entirely reasonable in their conclusion that the claimant had deliberately used the N word in full in the training session.

67 I have the band of reasonable responses clearly in mind in reaching my decision. It is immaterial what decision I would have made. The claimant's case is that dismissal was a foregone conclusion. The claimant raises a suggestion that the decision to dismiss was already made prior to the disciplinary hearing given the content of the email of 18 June 2020. However, this allegation was never put to Mr Akinfe in cross examination and no other evidence I have seen supports any

suggestion that the decision was pre-judged before the disciplinary hearing. I therefore conclude that the decision to dismiss the claimant was not predetermined ahead of the disciplinary hearing.

68 I do not regard the fact Mr Akinfe found the N-word to be an appalling word as significant. The focus is on the reasonableness of the management's actions in response to the claimant's conduct. The fact Mr Akinfe found the word appalling does not mean that the decision to dismiss the claimant was pre-determined.

69 The claimant also complains that he was treated differently to Mr Akinfe who also used the N word in full in the disciplinary hearing. I find that the circumstances were entirely different. Mr Akinfe had to ensure that the claimant understood the allegation he was facing and that there could be no misunderstanding. The fact that no action was taken against Mr Akinfe does not mean the respondent acted outside the band of reasonable responses in investigating the claimant.

70 The claimant raises various other points to do with process and procedure and changes in language used in letters and HR's and Ms Thompson's involvement in the process. I can deal with these points briefly in that the claimant admits the misconduct. He admits to using a highly offensive and racially loaded term during a training course. The respondents genuinely believed he had used the word, their belief is reasonable given the admission from the claimant. These issues raised by the claimant do not change that conclusion.

71 With regard to the claimant's length of service unfortunately because of the respondent's misapprehension as to his role within the HR department this in fact counted against him. A reasonable employer would have concluded that 31 years' service with an entirely clean disciplinary record throughout that period was significant mitigation against imposing the sanction of dismissal.

72 I have considered the size of the respondent's undertaking. This is a London Borough with a large HR organisation and well drafted written policies. A formal disciplinary process was followed. Within the range of reasonable responses, the respondent's size and administrative resources do not excuse the unfairness in this case.

73 For these reasons the respondent's decision to dismiss the claimant was outside the band of reasonable responses open to it as a reasonable employer.

74 I find that the claimant was unfairly dismissed by the respondent within section 98 of the Employment Rights Act 1996.

75 Having found that the dismissal was unfair the claimant has expressed a wish to be reinstated by the respondent or failing that re-engaged. On behalf of the respondent Mr Zovidavi forcefully puts that given the respondent had a genuine belief in the claimant's misconduct and the very nature of the misconduct itself means that the tribunal and confidence that the respondents had in the claimant was significantly destroyed. He points to the fact that the claimant intentionally used the N word in full and that the claimant's explanation as to why he used it changed during the course of the disciplinary process. The respondent believed that he used the full word for impact, so that others at the session could understand it's impact.

76 He also reminds me that the respondent's belief was genuine and rational not withstanding that this Tribunal may not have come to the same decision.

77 There is a further fundamental point which Mr Zovidavi says precludes reinstatement or re-engagement as being practicable which is the claimant belief of a conspiracy against him by Ms Thompson and others to enhance the allegations against him to ensure that he was dismissed.

78 When addressing me in his submissions the claimant rather made the respondent's case for them in relation to the practicability point as he was at pains to point out the difficult relationship he had had with Ms Thompson for the 2 years prior to his dismissal and how heavily he believed she was involved in encouraging people to complain about him.

79 The claimant does, however, make the further point that he carried on working for 167 days from the incident to his dismissal and there were no problems between him and two complainants at all during this period. The claimant says this shows that it is practicable for the reinstatement order to be complied with. He also says that although he has issues with Ms Thompson he had worked with her for 2 years and he would be prepared to do so again.

80 In considering the claimant's conduct which led to his dismissal Mr Zovidavi reminds me that the claimant accepted that he could have used another word and that the session was meant to be about radicalism not racism and that it had been the claimant himself who had steered the conversation towards issues of racism.

81 I find that the claimant did use the N word in full deliberately. I do not accept the claimant's evidence that its use was accidental.

82 It is my determination that it is not practicable for the respondent to reinstate or re-engage the claimant. The claimant's use of the N word in full in a context where even he accepts he could have used another word contributed significantly to his dismissal. The lack of trust on the claimant's part between himself and Ms Thompson means as well that it is quite clear that any order could not be effected with success. The claimant's conduct has genuinely broken the trust and confidence that the respondent had in him. Put shortly the respondent says the claimant should have known better than to use the N word in full and that they have no confidence that he would not use the word again. The fact that he worked for 167 days before dismissal does mitigate somewhat this concern, but this was a period where from the end of March onwards he was working from home due to the COVID 19 pandemic and had no direct contact with the complainants. If the claimant were reinstated after the lockdown restrictions are eased he would be expected to work from the respondent's premises again.

83 Turning to the issue of re-engagement I did consider whether the claimant could work in another role which meant he had no contact with Ms Thompson, however, this does not resolve the fundamental issue of the loss of trust and confidence that the respondent had in him due to his culpable conduct. I find that it is not practicable for the respondent to re-engage the claimant.

84 Turning to deal with the financial remedy due to the claimant. I heard submissions from the respondent and the claimant in relation to the issue of contributory fault and although the claimant was cross examined on the issue of mitigation of loss the respondent did not adduce any evidence in relation to a failure to mitigate loss nor did Mr Zovidavi make any submissions to me in relation to a suggestion that the claimant had not mitigated his loss. I therefore find that the respondent has not discharged the burden of proof on them relating to mitigation of loss.

85 The respondent also did not seek to pursue any argument that the claimant would have been dismissed in any event had a fair procedure been followed.

86 There is no doubt that the claimant in using the N word in full used a racially loaded and offensive word in the training session. At this tribunal hearing the claimant has again said its use was accidental but I have found that this was not the case. The claimant deliberately chose to use the word in full. In his investigation meeting said the claimant said he used the word as he wanted those attending to understand its impact.

87 The claimant was a long serving employee of the council. He had attended diversity and inclusion training courses and by his own account he knows that the N word is extremely offensive and in fact he, himself was offended by its use. The N word is an offensive and racially loaded term and is not appropriate for use in the workplace. One of the complainants made clear he was impacted by the use of this word. The claimant could have told the same story but just said “and the individual used the N word”, rather than saying it in full. The story he was telling would still have made sense and would still have had impact. The facilitator would still have understood the question he was asking and have been able to answer him.

88 I therefore make a finding that by deliberately using the N word in full the claimant’s conduct was such that it is just and equitable to reduce the basic award by 90% under section 122(2) ERA 1996.

89 I also make a finding that by deliberately using the N word in full the claimant’s culpable conduct significantly contributed to his dismissal. I therefore reduce any compensatory award by 90% under section 123 (6) ERA 1996.

90 Unfortunately, neither party had come prepared to deal with the compensation of pension loss in relation to the claimant. He was a member of a defined benefit pension scheme but the relevant information needed to be able to calculate this loss was not available during the hearing and the respondent was not able to obtain the information during the time available for this hearing. The matter of the amount of compensation the claimant is entitled to will be resolved at a further hearing.

Employment Judge Noons
Date: 11 June 2021