EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr C Borg-Neal	Lloyds Banking Group PLC

Heard at: London Central (CVP) **On**: 8, 9, 12, 13, 14 June 2023
Chambers: 31 July 2023; 1 - 2 August 2023

Before: Employment Judge Lewis
Ms Z Darmas
Ms J Marshall

Representation

For the Claimant: Mr J Raizon, Counsel

For the Respondent: Ms I Ferber, KC

RESERVED JUDGMENT ON LIABILITY

The unanimous decision of the tribunal is that:

1. The claimant was unfairly dismissed.
2. The respondent subjected the claimant to discrimination arising from disability by dismissing him and not upholding his appeal.
3. The claim for failure to make reasonable adjustments is not upheld.
4. The claim for direct race discrimination is not upheld.

The remedy hearing will take place on **19 – 20 October 2023** unless the parties are able to reach agreement with each other on compensation and in respect of re-instatement**.**

The parties will be notified shortly of a date for a case management preliminary hearing to prepare for the remedy hearing.

INTRODUCTION AND SUMMARY

1. This case has raised very sensitive issues and the tribunal is anxious that our decision is not misunderstood. We therefore start with a short summary, but for our full reasoning, it is necessary to look at the Reasons below.

2. The claimant was a manager and a long-standing employee of Lloyds Bank with a clean disciplinary record. The Bank had launched a Race Action Plan in 2000 and was rolling out Race Education Training to over 70,000 employees. This is to be commended and we hope nothing in this decision lessens the Bank's resolve to instil a non-discriminatory culture which is inclusive for all. That would be a misunderstanding of our decision.

3. At a relevant point during one of the race education training sessions, which was discussing intent vs effect, the claimant asked how he should handle a situation where he heard someone from an ethnic minority use a word that might be considered offensive if used by someone not within that minority. The claimant was thinking partly about rap music. When he did not get an immediate response from the trainer, he added, 'The most common example being use of the N word in the black community'. Unfortunately the claimant used the full word rather than the abbreviation.

4. The Bank accepted that the claimant did not intend to cause any hurt, that he asked the question with no malice, and that the question itself was valid. However, it considered that the claimant should have known better than to use the full word in a professional environment and he should have realised that it could have serious impact, which in fact it did. Although the claimant had apologised immediately and not repeated the word, the Bank was told that the trainer had been off work for 4 – 5 days as a result. The Bank dismissed the claimant for these reasons.

5. The tribunal believes the Bank was entirely reasonable to hold the view that (1) the full N word is an appalling word which should always be avoided in a professional environment; and (2) even if no malice was intended and the full word was used not as a term of abuse and not as a descriptor of people, nevertheless, simply hearing it said is likely to be intensely painful and shocking for black people because it may well echo other discriminatory experiences in their lives and because of its history and derivation. Indeed white people might also be very uncomfortable if the word is used in their hearing.

6. Nevertheless, whether the claimant should have been *dismissed* for using the word, is a different question from whether he ought to have used the word. The tribunal suspects the Bank felt that not dismissing the claimant would somehow be condoning use of the word. In many circumstances, that may be true. But in the very unusual and particular circumstances of this case, the tribunal finds that no reasonable employer would have dismissed the claimant. Had the facts been different, we may well have said otherwise.

7. The very particular circumstances are that this took place at a race education training session, where the whole purpose was to explore intention vs effect, and for the attendees to learn. The Bank accepted that the question was

without malice. It was not a matter of the claimant using an opportunity to say the word under guise of an 'innocent' question. The word was not used as a term of abuse towards anyone. It was not used as a word to describe anyone. It was used in what the dismissing officer said was a good question. The claimant wanted to learn. The claimant apologised immediately and continued to apologise throughout the disciplinary process. He never used the full word again. There was no evidence that he had ever said or done anything racially discriminatory before. If the Bank wanted to make a point, it could have given the claimant a warning and more training, as he suggested himself.

8. We do not believe that any substantial part of the reason for dismissal was that the claimant was white. The key reason for dismissal was that the word was said in a professional environment and that it had badly distressed the trainer, as ought to have been anticipated. We have therefore rejected the race discrimination claim.

9. We have however upheld one of the disability discrimination claims. The claimant has dyslexia and this can lead him to keep reformulating questions and to 'spurt' things out before he loses his train of thought, so that he is concentrating more on the complex thought in his head than how he actually formulates the question and on the surrounding social cues. The evidence led us to believe, on the balance of probabilities, that the claimant's dyslexia was a strong factor causing how he expressed himself at the session, and in his use of the full word rather than finding a means to avoid it.

REASONS

Claims and issues

10. The claimant brought claims for unfair dismissal and disability discrimination (failure to make reasonable adjustments and discrimination arising from disability contrary to section 15 of the Equality Act 2010). He said his disability was dyslexia. At the start of the hearing, the respondent accepted he had dyslexia but not to the point that it was a disability.

11. During Mr Lewis's evidence and as a result of some evidence he gave, the claimant applied to amend to add a claim of direct race discrimination. We set out the application and our decision below. As a result of our decision to allow the amendment, we added the issues into the following list.

12. The final issues were agreed as follows:

<u>Unfair dismissal</u>

13. Has the respondent shown the reason for dismissal ie misconduct?

14. Was the reason a substantial reason of a kind which can justify dismissal?

15. Was the dismissal fair or unfair applying the band of reasonable responses? As part of that:

15.1. Following the 3 stage test in British Home Stores v Burchell [1978] IRLR 379

- did the respondent genuinely believe the claimant was guilty of misconduct?
- did it hold that belief on reasonable grounds?
- did it carry out a proper and adequate investigation ?

15.2. was dismissal a fair sanction?

16. Was there a breach of the ACAS Code on Disciplinary and Grievance procedures?

17. If the dismissal was unfair on procedural grounds, what is the chance that the respondent would have dismissed the claimant even if it had followed fair procedures and on what date would the dismissal have taken place?

18. Should there be any deduction from the basic award for conduct prior to dismissal? Regarding the compensatory award, did the claimant cause or contribute to his dismissal and if so, to what extent?

Disability discrimination

Was the claimant disabled at the relevant time?

18.1. At the material time, did the claimant's impairment (dyslexia) have an adverse effect on his ability to carry out normal day-to-day activities?

18.2. What was that effect?

18.3. Was the effect substantial?

18.4. If so, had the substantial effect lasted for a period of at least 12 months or was it likely to do so?

Did the respondent have knowledge of disability?

18.5. Did the respondent at the material time know:

18.5.1. That the claimant had dyslexia?

18.5.2. That his dyslexia had an adverse effect on his ability to carry out day-to-day activities?

18.5.3. That such effect was substantial?

18.5.4. That the effect had lasted 12 months or was likely to do so?

18.6. If not, could the respondent reasonably have been expected to know each of those things?

Reasonable adjustments

18.7. Did the respondent have the provision, criterion or practice of a zero tolerance disciplinary policy?

18.8. Did the provision, criterion or practice put the claimant at a substantial disadvantage compared to someone without his disability in that as a person with dyslexia, it is harder for him to formulate questions when speaking?

18.9. Did the respondent know – or could it have been reasonably expected to know – that the claimant was likely to be placed at that disadvantage?

18.10. What steps could have been taken to avoid the disadvantage? The claimant suggests:
18.10.1. Not dismissing him
18.10.2. Upholding his appeal.

18.11. Was it reasonable for the respondent to take that step?

18.12. Did the respondent fail to take that step?

Discrimination arising from disability (section 15)

18.13. The respondent accepts that the claimant was treated unfavourably by his dismissal and by not upholding his appeal.

18.14. Was that unfavourable treatment because of something arising in consequence of the claimant's disability? To decide that:
18.14.1. What was the reason for the unfavourable treatment?
18.14.2. Was that reason 'something arising' in consequence of the claimant's disability?

18.15. If so, can the respondent prove that the treatment was a proportionate means of achieving a legitimate aim? To decide that:
18.15.1. What was the respondent's aim?
18.15.2. Was the treatment a proportionate means of achieving that aim?

<u>Race discrimination</u>

18.16. Was the claimant's dismissal direct race discrimination?

Procedure

19. The tribunal heard from the claimant and these witnesses for the respondent: David Lewis and Seung Yun Lee Oxley. Each witness provided a witness statement. Ms Oxley also provided a supplementary witness statement.

20. There was an agreed trial bundle of 463 pages with a separate index. The claimant and other witnesses all had hard copies of the bundle. Additionally there was R1, some emails regarding the internal hearing notes; and the respondent's note of a section of the cross-examination of Mr Lewis.

21. We also had written opening and closing submissions from each side, an agreed cast list, an agreed chronology and an agreed time-table. Later we were provided with written submissions and counter-submissions on the issue of race discrimination.

22. The case had been fixed for 6 days to include time to deal with remedy / compensation if the claimant was successful. Unfortunately the tribunal was unable to offer the 6th day. It was therefore agreed to deal with liability (whether the claimant wins or loses) first, during the five days. We fixed provisional dates to deal with remedy (compensation and the application for re-employment) if the claimant was successful in any of his claims.

The amendment application

23. Late on day 3 of the hearing, during Mr Lewis's evidence and as a result of something he said, Mr Raizon stated that the claimant would be making an application to amend his claim to add direct race discrimination. At 23.10, the claimant sent the tribunal and respondent a written application to amend. The respondent opposed the application and this was discussed at the start of day 4.

24. The proposed amendment (which the tribunal ultimately allowed) was as follows: 'Further or alternatively the claimant's dismissal was an act of direct race discrimination. The claimant is white. His race was a material (in the sense of non-trivial) reason for his dismissal. He compares his treatment with how a hypothetical comparator who is black would have been treated in the same circumstances.'

25. The tribunal considered the application applying the Selkent principles. Race discrimination is a new cause of action. It was not a simple relabelling. The claimant did not suggest in his claim form that the reason he had been dismissed was anything to do with him being white. However, the facts and evidence involved in deciding such a new claim would be virtually identical. The claimant did not seek to rely on any evidence of discriminatory behaviour outside the facts already involved in the case and what Mr Lewis said in cross-examination. Although allowing the amendment would mean some more questioning of Mr Lewis, in chief and cross-examination, and some additional closing comments, the tribunal did not envisage many more questions or much additional time would be involved.

26. The race discrimination claim itself would be substantially out of time. The test for late discrimination claims is the 'just and equitable' test which is very similar to the 'balance of hardship' test in Selkent.

27. We gave a great deal of thought to the timing of the application and whether the claimant ought to have brought his race discrimination case in the beginning and/or once he had solicitors. However, although we did not agree that what Mr Lewis said was as conclusive as Mr Faizon suggests, it was an extra piece of evidence which was not present prior to the hearing.

28. In relation to that, we were neutral as to merits. We believed that the way the evidence emerged in cross-examination and precisely what was said by Mr Lewis – as opposed to Mr Faizon – was not as clear cut as Mr Faizon suggested. Both the factual and legal basis for a race discrimination claim were not straight-forward, but we accepted the matter was arguable.

29. Regarding the balance of hardship, if we refused leave to amend, the claimant would still have his unfair dismissal and disability discrimination claims. Of course a discrimination claim usually attracts higher compensation. However, the disability discrimination claim might not succeed – the respondent did not accept that the claimant was disabled; it disputed knowledge; and it disputed that the claimant's dyslexia in any way caused his use of the full word. A race discrimination claim would not have these difficulties – although it would have different difficulties as we have said. From the respondent's viewpoint, we were uncomfortable that this emerged in the middle of cross-examination of Mr Lewis and that Mr Lewis would not have the usual forewarning which respondent witnesses get when a case is fully pleaded from the outset. On the other hand, the factual and evidential circumstances were already part of the case and Mr Lewis was already prepared to answer those. We did not see a great deal of other prejudice to the respondent other than facing an additional claim. Ms Ferber would have to spend additional time researching law and writing submissions on comparators, but we did not expect that would be more than a few hours. Ms Ferber urged upon us the delays which would be caused, given that we would not finish within the 5 days and the tribunal could not meet again in chambers until August, thus pushing back any remedy hearing to October. Not only were delays stressful, but if the claimant's health deteriorated as a result, the respondent could end up paying more compensation if he succeeded. The problem with these arguments was that the delay had already arisen, whichever way we decided, as a result of the time taken to make the application. In any event, we were not likely to have finished and reached our conclusions without the need for meeting in chambers in August because the tribunal had reduced the listing from 6 to 5 days at the outset because the 6th day coincided with a tribunal training day. Weighing up these matters, we felt the hardship of refusing the application was greater than that of allowing it. Taken together with the other factors referred to, we decided to allow the amendment.

30. After we gave our decision to the parties, Mr Raizon said he had been speaking to Ms Ferber and they had agreed that she would not have time to provide written submissions on the race discrimination claim, given its complexity, by the end of day 5. They proposed that they exchange written submissions. We expressed our frustration that this had not been made clear to us before we reached our decision. We were very reluctant to have

written submissions on such complex points. Counsel then suggested they would exchange submissions and also exchange any further counter-submissions before supplying the whole package to the tribunal before August. They would make themselves available to answer any questions. When the tribunal suggested that Counsel attend 31 July to make oral submissions, Ms Ferber said she was not in fact available to do that as she was booked on two 10 day cases. We did not think this amounted to making oneself available. Nevertheless, she was adamant that she could not take time out of her cases (or whichever one she chose to do if both stood up) and further adamant that she could not provide written submissions by the end of day 5, however hard she worked. She said the claimant had the benefit of two Counsel, Mr Raizon and Mr Coghlin KC, whereas she was on her own and had first seen the written application at the start of day 4.

31. Overnight, Mr Coghlin emailed the tribunal to say he was merely supervising Mr Raizon as a third term pupil and had been instructed only to do some self-contained tasks. However, one of those tasks had been drafting the amendment application, which we felt rather made Ms Ferber's point.

32. Despite our frustration about this, we accepted that the respondent would be at a disadvantage if Ms Ferber did not have time to research her submissions. We did not expect her to have to stay up all night in order to do so. It was not possible for the tribunal to offer oral submissions on any other date prior to 31 July. We did not wish to defer the dates for discussion in chambers on 1 and 2 August. We would therefore accept the proposal agreed by both Counsel for provision of written submissions including comments on each other's submissions in advance of 31 July. If it turned out that the tribunal needs to ask questions of Counsel in person, the parties would have to accept the delays it would cause.

33. It was agreed that Counsel would make written / oral submissions (as they chose) on all other claims on day 5. The respondent now admitted disability and also that there was the requisite knowledge of disability and its alleged effect by the time of the dismissal and appeal.

34. Prior to Mr Lewis being recalled to answer questions on the race issue, he expressed his confusion regarding what he was alleged to have said in cross-examination which sparked the amendment request. Counsel had tried to agree a note but were unable to do so. Mr Lewis left the tribunal while this was discussed. The main issue of dispute was whether, when he was asked whether he took into account that the claimant was white as part of the context, the question added 'for dismissal'. The note of the judge, tribunal members and Ms Ferber all did not have the words 'for dismissal'. Mr Raizon only had a very short note, doubtless because he was the person asking the questions. It is understandable that his note may have been less precise. Further, on reading Ms Ferber's note of the preceding questions up to but excluding Mr Raizon's application, it accorded with the tribunal panel's memory. It was therefore agreed that this note would be shown to Mr Lewis and he was given 15 minutes to read and absorb it prior to being asked further questions.

Reasonable adjustments during the hearing

35. The claimant asked for adjustments to the hearing process for three reasons: predominantly the effect of his dyslexia, but also because of the impact on his mental health (he has also developed verbal tiks) and because of his chronic back pain.

36. The requested adjustments were set out in the claimant's solicitors' email of 7 June 2023. Reference was made to the section on dyslexia in the Equal Treatment Bench Book. The tribunal considered that section, and also the expert report which was relevant to the claimant's specific difficulties. The adjustments were agreed as follows:

    36.1. The claimant should feel free to stand or move around at any stage.

    36.2. There would be breaks of about 10 minutes every 45 minutes. In practice, the claimant was regularly consulted through his evidence regarding when he wanted breaks and when he wanted to finish for the day; as a minimum, 5 minute or longer breaks were provided every 30 minutes.

    36.3. Questions would be short, to the point, asked in plain English and structured in a straightforward way. They would be put slowly and the claimant would be given time to answer. If he did not understand, the claimant should feel free to say so. No impatience would be demonstrated. In practice, Ms Ferber did this very well. She also preceded each section of questioning by stating the topic.

    36.4. The claimant was allowed to work from a paper bundle which he had tabbed himself (though not annotated).

    36.5. The claimant would not be allowed to take a full note of his cross-examination as it was carried out. This would take an enormous amount of time and his representative was unable to explain how or why it would be of assistance to do so. Indeed, reading the expert report, it appeared to us that the claimant would not easily able to do this. However, he was allowed to have a piece of paper and pen, and to jot down notes as he was questioned to help his short-term working memory regarding the question and points he wanted to make. He indicated that this is precisely what he had in mind. He was also invited to say on an 'as and when' basis if he did not follow a thread and needed to write it down. The tribunal would bear in mind the effects of the claimant's dyslexia and Ms Ferber would not take any points about the claimant contradicting himself in evidence.

    36.6. It was agreed at Ms Ferber's suggestion that if for example the claimant wanted to refer to another document when answering a

question, in a situation where normally his representative would go back to it in re-examination, Mr Raizon could 're-examine' at that point in time.

36.7. The claimant was told not to feel self-conscious about his verbal tics. He suggested putting himself on mute until he had to speak to answer each question. He was told it was entirely up to him whether he wanted to do that or not.

36.8. The claimant's evidence was started at 2 pm on day 1 (a Thursday) and recommenced at the start of day 2 (Friday), finishing before the weekend.

37. The claimant confirmed at the start of the second day that he was happy with the adjustments.

Public access to documents

38. A reporter (Ms Faulkner) attending the hearing asked on day 1 to see the witness statements and trial bundle. The respondent – with the agreement of the claimant – sent Ms Faulkner the documents on the basis that she would delete them at the end of the hearing.

Fact findings

39. The claimant was employed by the respondent continuously from May 2004 and prior to that, from 1993 to 2002 when he was made redundant. No disciplinary matters had ever been raised with him prior to the issue in this case.

40. From 2011, the claimant was appointed PDA Manager of the new Payments Design Authority. In 2021, he was appointed a mentor on the respondent's new mentoring scheme. At the time of the disciplinary process, he was mentoring three mentees, one of African descent, one of Asian descent and one of White European (non UK) descent.

<u>The training event and subsequent complaint</u>

41. On 16 July 2021, the claimant attended one of a number of online MS Teams training sessions organised by the respondent for its line managers. This session (one and a half or two hours) was entitled 'Race Education for Line Managers'.

42. Race education training was rolled out to over 72,000 employees as part of the Race Action Plan launched by the respondent in 2020.

43. The training was provided by an external organisation, APS Intelligence. The trainer on this occasion was Ms Osei. Two other trainers appear to have been present. Roughly 100 of the respondent's line managers attended.

44. The session ran in the morning. At 14.43, Ms Osborne at APS emailed Ms Bird and Ms Onwochei at the respondent. The email said this:

> 'Hello lovely ladies,
>
> Hope you are well and looking forward to the weekend.
>
> I'm afraid I am not coming with the best of news.
>
> This is to let you know, the 'N' word which is specified at the beginning of each sessions, was used by one of the participants – Carl Borg-Neal used it during the group discussion. Naomi Osei stopped him half way, muted and reminded of the pre-session agreement, she managed this incident with high integrity and professionalism (despite how distressing it was for her). The named participant reminded [sic] silent for the rest of the session. We also received a supportive message from one of his colleague's in session's chat, direct quote: apologies for any embarrassment caused, but calling out the inappropriate language during Intent vs Impact really made the point'.
>
> If you need any further information/clarification, please do let me know.'

45. Ms Bird replied at 14.55:

> 'Thanks so much for this – how disappointing.
> Not that it makes any difference to whether or not we will act, but for clarity, can you please confirm the context it was used in so I am equipped with the facts … (eg was he referring to a person, or asking why the word was okay to be used by certain people etc?)
> Could you also please pass on to Naomi our extreme apologies – we're so sorry this happened in her group. Can you assure her that we are picking up on this and we are here if she would like to talk through anything. I hope she is okay.'

46. Ms Bird then sent a further email at 15.12:

> 'It was used to provide an example in group discussion – when asked for examples where intent was good but had a negative impact, the person said, direct quote – 'in America these ethnical minorities are called (and used the word)'. I have passed your apologies to Naomi (though it's not your fault in any form) and she's very grateful'.

47. We should add here, looking forward, that no one ever accused the claimant of saying those words ie 'In America these ethnical minorities are called'. The claimant denies those words and his version of what he said was accepted by the Bank. The focus in the disciplinary was simply on the fact that in a question, he used the N word in full.

<u>The investigation</u>

48. The HR case was opened on 26 July 2021 and Laura McMahon was appointed by HR to carry out an investigation into 'use of an unacceptable term during a Race Education session held on 16 July'. She submitted her report on 16 September 2021. The first page of the Investigation Form asks 'Is this conduct typical of the employee or totally out of character? How do they usually behave?' Ms McMahon noted 'Line manager's view is that this out of character'. The form also asks whether the employee has been suspended and the rationale. Ms McMahon noted that the claimant had not been suspended because he 'was not considered a risk'.

49. Ms McMahon was provided with various documents on 28 July 2021. She was on holiday from 2 – 12 August and the claimant was on holiday from 16 – 23 August 2021. The claimant was told on or about 25 August 2021 for the first time that an investigation had been opened. Everything had been 'business as usual' until then.

50. The claimant told the tribunal he feels these were unnecessary delays. Why did it take 10 days for HR to open a case on gross misconduct if the respondent supposedly had a zero tolerance policy? He also feels an investigatory officer should not have been appointed if they already had a holiday fixed.

51. Ms McMahon held an investigatory meeting with the claimant on 31 August 2021 and a meeting on 2 September 2021 with David Bahlaj, a colleague who also attended the training session. The claimant had told Ms McMahon that Mr Bahlaj had contacted him to discuss the incident afterwards. She had an informal discussion with Samantha Owo from Group Inclusion & Diversity 'to understand the impact of the word used on session attendees'. She also reviewed emails, session feedback, attendee details and the introduction script read out by the external facilitator at the start of the session.

52. On 2 September 2021, the claimant was sent the meeting notes for approval. On 7 September 2021, the claimant got back to Ms McMahon confirming his approval of the meeting notes (subject to one change).

53. The claimant told Ms McMahon during the meeting that he had been asking what action you should take if you hear a derogatory term used within a group. He gave the example of the N word, but he had said the word. He had heard it used when watching basketball. He had not intended malice or insult. He thought it was a valid question.

54. Having met Mr Bahlaj on 2 September 2021, Ms McMahon emailed him setting out his key points as follows:

> '- On the incident itself, CBN asked if he could raise a question and then proceeded. When he asked the question the facilitator became animated and advised CBN if that if he didn't stop speaking he would be 'ejected' from the call.

- CBN apologised and tried to re-phrase the question but was not allowed to continue.
- You do not recall hearing the policy statement from the facilitator at the beginning of the session. However there was a big issue with people being able to join and you were waiting in the lobby to be admitted for 5 minutes along with 50 other people.
- You do recall being told during the session that it was a safe space to be open and honest. However you feel this was only the case where questions/statements were supportive of the material and awkward questions/counter views were not welcome.
- You asked a question about one of the examples given on the course in relation to other ethnic groups. This wasn't answered and you were told it wasn't relevant to the focus of the session.
- You feel the session was not balanced in terms of up to date information or ethnic groups and that the facilitator's behaviour was not in line with our Group Values.
- You do not recall CBN acknowledging the specific word could be offensive ahead of asking the question.
- The question was asked at a relevant point in the session, regarding stepping in or not when colleagues see racist behaviour and that the intent was to seek clarity on a situation which can happen regularly – you cited football supporters as another example during our discussion.
- You contacted CBN after the call and he agreed in hindsight that using the initial rather than full word may have been more appropriate. You believe his question would have been heard had he done this in the first instance.'

55. Ms McMahon was unable directly to discuss the incident with Ms Osei as Ms Osei was uncomfortable with doing so. The Teams recording had been deleted.

56. Ms McMahon said the claimant agreed he had used an inappropriate word, but believed it was in the context of the session, in order to understand the recommended approach for a specific commonplace scenario. He believed he asked a valid question, albeit in a clumsy manner.

57. Ms McMahon recommended formal action for behaviour likely to cause offence to colleagues and partners / behaviour that is inconsistent with out Group Values. She classified it as gross misconduct.

58. The respondent has a Colleague Conduct Policy. The relevant parts of it state:

> '1.2: Colleagues must behave in a professional, responsible and appropriate manner towards other colleagues in the Group. Discrimination, victimisation, harassment (physical, verbal, or non-verbal) and bullying will not be tolerated. All colleagues have an obligation to report such behaviours irrespective of whether they are directly involved.
>
> 1.3: Colleagues must ensure that their communications are appropriate at all times. Telephone calls or any other electronic or social media sent or usedw within, or related to the Group must not contain abusive, obscene, offensive or libellous comments or contain any content that may bring embarrassment to or could harm the reputation of the Group, its employees, customers or

suppliers. Colleagues should also ensure they adhere to the requirements detailed under the group Acceptable Usage Responsibilities…'

59. Ms McMahon attached to her investigation report a list of anonymous feedback comments which had been collated. We reproduce this in full:

> **'Anonymous 'anything else you'd like to share with us' feedback from the day**
> **16th July Race Education for Line Managers training**
>
> I also thought one of the other presenters managed a tricky situation very well, when one of the other invitees seemed to lose self-control and used offensive language.
>
> During the course a colleague was sharing an experience where an inappropriate word was used. Although it was wrong the word used, he was very much reprimanded in front of us all and when tried to apologise or explain he was threatened with 'you will be thrown of the course' I felt that Naomi could have used the 3 Cs when feeding back as I felt very uncomfortable for the colleague, the tone of the conversation and could have been dealt with more tactfully given the audience .
>
> I didn't particularly enjoy the presenting style of one of the trainers - at times it felt a little preachy rather than educational. And she did not react well to the language used in what I accept was a very inappropriate and clumsily worded question by one of the attendees, albeit I don't believe the question was asked with any malice whatsoever. Instead of addressing the issue and trying to educate the person concerned, she cut him dead several times when he tried to clarify his question, she got rather angry and threatened to remove him from the call. If anything, she highlighted concerns some colleagues have raised that sometimes they feel they are walking on eggshells because they don't want to inadvertently say the wrong thing, and ultimately the safer option for some might be not to engage with persons of colour for risk of causing offence. I just felt the situation was very poorly handled, when if it had been addressed differently could have set a really good example of how to deal with that kind of question/issue.
>
> Only issue in training was the colleague who was warned for his behaviour and i just hope he was educated as to his behaviour.
>
> I was shocked by the manner and tone used by one presenter to a colleague. After saying at the beginning this would be a safe environment and it is acknowledged we may make mistakes, she launched into a vitriolic attack. Whilst I do not condone what the colleague said and there could have been a better way of saying it, I believe he was trying to ask a valid question to aid understanding. Unfortunately it made me fearful of asking any questions and after talking about stereotypes, the presenter then 'undid' all the good that had been said before. It marred what was otherwise a thought provoking course.'

60. The training agency provided the respondent with their script for an opening statement by the trainer. However, as we shall set out later, it was not clear that the script was read out verbatim and it seems that those joining late, including the claimant, did not hear all of the introductory comments. The

dismissing officer later accepted this (there is a document showing there was a log-in problem for several attendees including the claimant). The reason we are mentioning it at all is that, having been shown the script at the investigatory stage, the claimant tended to make comments about it. The relevant points in the script (had it all been read out and had it all been heard) were that 'our agreements for our session today' are (1) 'our clumsiness agreement' – 'when we talk about race, people often worry about saying the wrong thing. Please understand that today is your opportunity to practice, learn and be clumsy … The goal is to start talking, so please speak freely, and forgive yourself and others when being clumsy today'. (2) was 'our agreement .. to ensure we are creating a safe space for our Black and Asian colleagues, both in this session and during follow-up conversations. Every scenario we discuss today has happened at Lloyds recently, and these discussions can scratch at existing wounds. You may find that your Black colleagues will feel more comfortable excusing themselves from certain conversations about race, and that's okay. For everyone else, we encourage you to lean into that discomfort, because that is the exact reason for this session – to understand on a deeper level what our Black colleagues experience'. The script goes on to say that 'behaviours that impact others in the session today are not acceptable' Examples include purposeful derailment of topics, or persistent or aggressive challenging of the facilitator team or your colleagues' Such behaviours will not be tolerated and may lead to the instigator being removed from today's session.'

Disciplinary action

61. On 23 September 2021, David Lewis was appointed to hear the disciplinary. Ms McMahon emailed the claimant on 4 October 2021 to say the matter was moving on to the formal stage and a Hearing Manager would be in touch.

62. Mr Lewis emailed the claimant on 5 October 2021 to introduce himself as the Hearing Manager and agree dates. Mr Lewis was an independent manager – he headed up the General Insurance Claims function and did not know the claimant. In his 5 October 2021 email, Mr Lewis said his next available dates, bearing in mind that the claimant should be given at least 7 days' notice, were Friday 22, Monday 25 and Tuesday 26 October 2021. The claimant suggested they pencil in 22 October 2021 as he needed to find a rep. Eventually it was fixed for 29 October 2021.

63. On 15 October 2021, Mr Lewis sent the claimant a formal invitation to a disciplinary hearing on 29 October 2021 for potential gross misconduct. He was told that dismissal was a potential outcome and that he was entitled to be represented. The allegation stated:

> 'In your role as a manager within the Group you are expected to adhere to the Group's Colleague Conduct Policy, Code of Responsibility and the Group's requirements to act with integrity and in line with the Group's commitment to create an inclusive environment for all by being an anti-racist organisation.

As an anti-racist, inclusive business, we do not accept, and will investigate, language or behaviour that is discriminatory, offensive or harasses others.'

It was alleged that this was in breach of sections 1.2 and 1.3 of the Colleague Conduct Policy and section 3 of the Code of Responsibility.

Specifically, 'During a training session on race for line managers, hosted by an external learning provider, you used the N-word in a question that you asked the facilitator'. It is alleged that as a resident in the UK and an employee of the Group, it was known to you that this language is highly offensive and inappropriate to use in a professional or business environment, or any other context. Your actions caused the facilitator to advise you that if you did not stop speaking, they would need to remove you from the session.

It is alleged that the potential and actual risks and impacts of this conduct are:
- that your actions fall outside what is expected of all colleagues within the Group in line with its anti-racist values and culture
- that your alleged behaviour may have caused offence, intimidation or a feeling of vulnerability to the extent that an external party felt the need to report it to the Group
- That your personal integrity as a colleague has been brought into question.'

64. The letter attached various documents including the disciplinary policy, the investigation report, the investigation meeting notes, participant feedback on training, the note of Mr Bahlaj's evidence, the Introductory script to training, the Group Colleague Conduct Policy and the Group Code of Responsibility. The letter said that if the charge was upheld and found to be gross misconduct, there were a number of sanctions including dismissal.

65. The claimant sent an email dated 28 October 2021 in response to the allegations. He said he had been participating constructively in the training and seeking to tackle a situation where difficult language used within an ethnic group might cause offence to the others, and how to challenge that. He used the N word to clarify his question but not in a discriminatory way. It was in an anti-racist context. The claimant referred to the unsolicited feedback which had criticised the trainer's handling of the situation.

66. The claimant noted that the party who reported the incident had misquoted his words and had not included the context.

67. The claimant had had in mind in particular the use of the N word by black people in rap lyrics or to each other when playing basketball. In his email, he added links to a few articles about whether the word should be used in rap.

68. The claimant said that on understanding his comment may have caused offence, he immediately apologised. He said that this displayed empathy. He said that, contrary to what Ms Osborne had said in her email, the N word was not formally specified as to be avoided at the start of the session. He said there was an assumption that everyone would recognise it was a forbidden term, but such an assumption was found wanting in circumstances when the opening statement also 'encouraged everyone to lean into the discomfort'. He said the boundaries for the discussion were not clearly established in the training and a space was created which was too ambiguous for colleagues with innocent intent to navigate safely. In any event, the claimant said he had not in fact heard any warning and he had not heard the N word called out as a forbidden term as the Osborne email of 16 July stated. He said there were issues with colleagues joining on time in this particular session. The claimant also said he had also been misquoted, Mr Lewis asked what he had said (without using the actual word). The claimant said, 'Can you confirm how the N word as it might be used within the community?'

69. The claimant concluded that other steps could have been taken rather than moving to a full disciplinary process, eg re-issuing an apology to all concerned; mediation with the trainer if agreed; additional training; line manager discussion on offence that can be caused. He finished, 'I now recognise that the use of the N-word, even without guidance in training situations, which actively seek out challenges to be addressed, can cause offence. I re-emphasise I had no intention to cause offence and any such result was inadvertent. I wholeheartedly repeat my apology for any offence caused to all those concerned in the training or subsequent process.'

70. The first disciplinary meeting took place on 29 October 2021. Stuart Bailey attended as the claimant's support. Mr Bailey had been the claimant's head of function (line manager's line manager) for about 5 – 6 years. Mr Lewis chaired the meeting and there was a note-taker. The claimant repeated points he had made in his email.

71. The claimant said his question was following a session about intent and impact and that he had used the word with no intent other than to clarify a particular situation. He now understood it could be seen as an attack and offensive, but he had not intended to cause offence or upset. He was aware that black people sometimes used the word, and the question was how white people might respond. He wanted to increase understanding of how to manage a situation if eg an employee or someone else has walked into a branch listening to rap music and the full word been overheard. He said he had never heard use of the expression 'the N word' before as an euphemism. He said he would be happy to write a written apology as he had no intent to cause upset. The claimant mentioned he had asked his mentees whether they wanted to keep him on, and they did. The claimant said he believed in equality and inclusion for all.

72. Mr Lewis asked what the claimant understood of the impact on the trainer based on the independent feedback responses. The claimant said he

understood she could be upset in hindsight. A friend had explained why it was inappropriate and 'I get that now'. But before he had asked the question, he did not believe it would cause the impact that it did. The claimant added that his friend had not understood the trainer's reaction and believed the claimant's use of the word in the question could have been used as a training exercise. In summary, the claimant added that there were three trainers chairing the session and two of them did not appear upset. He also pointed out that what he was supposed to have said was misquoted in the emails. He was also concerned that the recording of the training session had been deleted.

73. At the end of the hearing, Mr Lewis said he would send the claimant a copy of the hearing notes. He would take time to consider the matter and may need to carry out further investigations, and he would also be liaising with an HR Case Consultant.

74. Following this meeting, Mr Lewis decided he needed to carry out some further investigations. He did not accept the claimant's contention that the training agency's email was a notification rather than a complaint. Mr Lewis noted that the trainer had not submitted a statement to support the investigation and therefore the immediate impact on her was unclear apart from what was said in other witness statements. Also, he noted that the claimant was saying that the trainer had over-reacted. He decided it would be helpful to speak to the trainer direct. This was the approach he takes when he deals with customer complaints in his area of the Bank, ie the Bank considers both the alleged cause of the dissatisfaction and the impact of the incident.

75. Mr Lewis therefore asked the HR caseworker to arrange for him to speak to the trainer. HR spoke to the respondent's staff who had commissioned the training. HR then told him that the trainer was not willing to engage. Mr Lewis wanted to know why she would not engage and it was suggested that a senior representative of the organisation might be able to explain this and act as a witness regarding the impact on the trainer at the time and subsequently. HR subsequently told Mr Lewis that they had identified two further witnesses for him to speak to, ie John Amaechi OBE, who was the founder of the training organisation, and Kay Cameron, the Skills Volunteering Lead for the Lloyds Bank Foundation, who had attended the training.

76. On 9 November 2021, Mr Lewis emailed the claimant to say that he was pressing on with further investigations prompted by their discussion the previous week. He said he was in the hands of others concerning timescales because of internal and external dependencies. If possible, he intended to share the outcome by the end of the week, and he would let him know if there was any delay. On 11 November 2021, Mr Lewis emailed again to say that he would not be able to deliver an outcome within the 14 day timescale. It also may be necessary for them to meet again so he had the opportunity to respond on any extra information. Mr Lewis also reminded the claimant that he was awaiting approval of the hearing notes.

77. On 15 November 2021, the claimant emailed Mr Lewis to ask when an outcome was likely because the stress was impacting on him. Mr Lewis replied at 18.46 as follows:

> 'The further investigations are in response to points that you made in our hearing on 28 October, specifically:
> - The lack of a recording of the session, which you were concerned would have been a key piece of evidence
> - That the external organisation had notified the Group of the incident in their professional capacity but no formal complaint had been presented.
>
> Given your statements on these points, I would hope that you'd agree it's appropriate for me to investigate as far as possible in order that I make a fair decision. I believe these are important points.'

78. Mr Lewis went on to say that he did not wish to prolong matters and he was making these enquiries as quickly as possible. But given the nature of the questions, there were some external dependencies, but he was pushing for timelines in which he would be able to speak to further witnesses. He would update him in the next couple of days and he was likely to want to meet the claimant again.

79. In fact, Mr Lewis had already spoken to Ms Cameron at 11 am on 15 November 2021.

80. Ms Cameron said she could not remember the topic which had arisen immediately before the incident, but she did remember the use of the N word. Mr Lewis asked her how she felt. She said she felt shock and that she physically recoiled and felt acutely embarrassed for all those present and for the claimant. She felt the facilitator handled the matter expertly, but that the claimant continued to talk over her, and it was clear he didn't get it. She said she did not want to overstate it, but she just felt really disappointed. She said the incident indicated why training is absolutely necessary, though it needs attendees to be receptive to learning.

81. Mr Lewis spoke to Mr Amaechi on 19 November 2021

82. Mr Amaechi was not present during the incident or the internal debrief. He was told what had happened soon after. Mr Amaechi said he had been given the context for his discussion with Mr Lewis by Ms Owo from the respondent's race action team. There is nothing in the note of this interview that shows exactly what Mr Amaechi had been told was allegedly said by the claimant.

83. Mr Amaechi said the incident was the 'log that broke the camel's back' for the trainer. He said, 'I don't have the specifics but she took 4 – 5 days off as a result of this'.

84. Mr Lewis asked how the trainer felt about use of the word. Mr Amaechi said, 'incredulity, rage and sadness – hence why she took time off. It's perfectly understandable to me that she would feel impacted in terms of how she

would be able to manage emotional tone of the room in future sessions. It is frustrating because a big part of our preamble is don't use bad language at all …' We comment here that Mr Amaechi was unaware that the claimant had not heard the preamble.

85. Mr Lewis asked why the trainer had not come forward. Mr Amaechi said she had not explained to him directly why not.

86. Mr Lewis then asked Mr Amaechi how hearing the N word would make him feel. Mr Amaechi replied: 'It is difficult to convey the magnitude of this term.' He felt it was a difficult time to be alive because of the pushback on attempts to move forward with race equality. It made him feel angry all the time. He added that it was not just that the word had been used, but in the context of a race education programme, and in front of a large group of professional colleagues whom the claimant would not know. Part of the frustration was that there was no weight in the room to stop the word being used.

87. Mr Lewis asked whether he felt there was any amelioration for the word used given that the training was designed to address race education. Mr Amaechi felt there was did not. He felt there should have been a cascading response from everyone on the call to reject that language. That was why he was making his agency's protocols more robust in terms of an immediate response to end the session.

88. Mr Lewis then said, 'The colleague against whom these allegations have been made has stated that the word was used constructively to provide and example and learn more about challenging offensive language. What are your views on whether there are any appropriate contexts in which the N word could be used?' Mr Amaechi replied to this general question at length:

> 'Many levels to this. First of all, it is never appropriate in a workplace environment.
> It's a black person's word to use if they want to, not for white people to use. I don't use it but I have a friend who does, but that is based on a relationship which is long-standing, where you know what love it is drenched in, and it is bred from commonality. A stranger used it with none of the above, no relationship context.
> Even as a black person, you would never use it in mixed company or at work as you don't have that relationship. My friend would only use it with me.
> It is interesting that the context claimed infers that the individual thinks it was his role to be affording education to others. Why would you flip to be the educator in a session designed to improve your education?
> Even without the word, the question is wrong.
> Final level, you would have a clear code that precludes use of such words in a work environment….
> So no context in which this word is appropriate. It's such an extreme place to go. There's so much in the middle between safe and the N word – why do you start here? It's the absolute extreme – what do you say beyond that?'

89. Even though Mr Amaechi was not present at the training, Mr Lewis did not try to speak to one of the two other trainers. When asked about this in the

tribunal, he said he was unaware there were two other trainers in the room and at no stage had that been mentioned to him.

90. Mr Amaechi signed the notes of his interview on 23 November 2021. On 24 November 2021, the claimant was invited to a reconvened disciplinary hearing on 3 December 2021. He attached the statements from Ms Cameron and Mr Amaechi, his findings into the absence of a recording, and the notes of the first disciplinary meeting.

91. On 30 November 2021, the claimant's line manager, Ms Hamilton, emailed Mr Barrett, the Payments Director Group CIO, expressing her concerns about the delays and procedure. She said 'There appear to be serious flaws in the process being followed which does not appear to be either independent or indeed ethical. Without going into detail, examples are new 'witnesses' being interviewed more than 4 months after the incident and new 'evidence' being introduced. It is also clear that discussions are taking place with witnesses prior to the provision of statements'. She went on to say this was all having a significant impact on the claimant and there did not appear to be any sign of a conclusion.

92. The disciplinary meeting was duly reconvened on 3 December 2021 to discuss the further evidence. The claimant made comments on the two new pieces of witness evidence. He said that Mr Amaechi's complicated answer itself indicated the complexity of the issues relating to use of the word. The fact that Mr Amaechi said the word could be used with strong affection showed that someone like the claimant may not understand how the word was being used. That – apart from having used the full word – was what the claimant had been trying to get to.

93. Mr Bailey said that the claimant had dyslexia and could take time to form verbal questions. He said he thought this was what had happened here – that the claimant was trying to formulate a complex question and fell into the word inadvertently. Mr Lewis did not explore this possibility.

94. Also on 3 December 2021, the claimant sent Mr Lewis an email expressing concerns about the process. He felt that the race action team had been involved in sourcing witnesses, when they had a conflict of interest, being the team which had appointed the training agency. He expressed concern that the contact with Mr Amaechi had been through Ms Owo of the race action team, who had briefed Mr Amaechi, However, she had already expressed a view when asking about the context of the original complaint 'Not that it makes any difference to whether or not we will act'. He pointed out that the training agency had a conflict of interest in that there had been criticisms of the trainer's handling of the situation by some of the feedback. He observed that although Mr Amaechi called his question 'wrong', Mr Amaechi had actually answered the question when asked by Mr Lewis 'in a thoughtful and detailed way and explained the cultural norms around it. This was exactly what I sought to learn by originally asking the question.' In closing, the claimant said, 'I am a colleague genuinely interested in the anti-racism agenda and demonstrate this in my work, through my mentoring of 3

ethnic minority colleagues and my personal life…. The question I had asked has subsequently been answered, indirectly, by the head of the firm providing the training and I have learnt from his explanation'.

95. Mr Lewis decided to dismiss the claimant. He wrote the dismissal letter to the claimant on 17 December 2021. Mr Lewis said the allegation of gross misconduct was upheld. He said the claimant had admitted saying the N word in full whilst asking a question during the training session. The dismissal letter said that the term 'is a racially-loaded and offensive word which is totally unacceptable in the workplace, and as such, contravenes the values of the group as an anti-racist organisation'. Mr Lewis said use of the word breached sections 1.2 and 1.3 of the Group Colleague Conduct Policy and section 3 of the Group's Code of Responsibility in that the referred term was not conducive to valuing differences in order to build trusted relationships with customers, colleagues and communities and it represented failure to take responsibility for creating a working environment which is inclusive and welcoming for everyone.

96. Mr Lewis said he did not believe the claimant deliberately set out to cause offence, but he should have anticipated the impacts. Mr Lewis said the word is commonly understood to be a highly offensive racial slur. As a senior employee, it was highly unlikely that the claimant did not recognise his use of the word in such a context was unacceptable. Mr Lewis accepted the term was not directed at anyone and was being used to clarify a question. However, this was a professional setting with a large mixed audience of colleagues and external participants. However it was framed, it was likely to cause offence. Although the claimant had apologised immediately and had repeated the apology, Mr Lewis 'did not find any empathy for the impact of your actions. You made several statements that you feel that fault lies with the facilitator for her reaction'. There was no evidence that the claimant recognised or had sought to understand why his use of the word had caused the severity of impact. For these reasons and 'because of the absence of any deeper acceptance as to why your use of the word was so inappropriate made it difficult to make the case that action short of dismissal such as further training or removing you from a position of influence as a role model would be sufficient'.

97. The reason for speaking to witnesses was to understand the impact of use of the term on the facilitator and other attendees, since the claimant was asserting that no complaint had been made, and since there was no witness statement from the trainer.

98. Regarding Mr Bailey's suggestion that the claimant's dyslexia may have explained use of the word, Mr Lewis felt 'this does not align with your previous explanation that you used the word in full to clarify a particular question as an example of offensive language in order to ask a question about how such language should be challenged.'

99. Mr Lewis concluded 'your action in using a highly offensive racial term has caused significant offence and impact, manifest in a period of time-off work

to an external training partner supporting the Group. The Group's Code of Responsibility makes plain the expectation that a zero tolerance approach is taken to discriminatory behaviour of any form on the grounds of ethnicity. As such, I consider your action to be gross misconduct and I have determined appropriate sanction accordingly'.

100. What Mr Lewis meant by his reference to a zero tolerance approach was that, on the facts, he considered the claimant's use of the N word to be discriminatory behaviour. As such, it should not be tolerated and was gross misconduct. Regarding sanction, the finding of gross misconduct meant dismissal was an option.

101. We would note at this point that Mr Lewis told the tribunal he accepted the claimant's account of what he had said and also that he did not hear the full opening script.

The appeal

102. On 22 December 2021, the claimant emailed Mr Lewis to say he wanted to appeal. On about 17 January 2022, the claimant provided detailed grounds of appeal. He made these key points:

- Regarding acceptance and empathy – He had apologised immediately and had continued to apologise to date. He did understand that the external facilitator felt angry and later upset about his comment. He said, 'I very deeply regret that my ill-judged comment had this impact. It was never my intention to cause this reaction and for that I am deeply remorseful. I again wish to repeat my apology without reserve and would welcome the opportunity to apologise personally to the external facilitator. I appreciate this would need to be sensitively managed by Lloyds given the impact described. However, I would like the chance to apologise on a more personal footing, even if that were to be conveyed in writing'.

- Understanding that the facilitator was upset, he had immediately apologised, did not ask any further questions, and respectfully remained and listened to the rest of the training event.

- The claimant said he was not highlighting the learning environment to diminish the impact of his actions, but he asked that it be taken into account that he was partaking in an educational course. He was trying to learn. He was clumsy. He made a mistake. The session was about intent vs effect. He asked a question was because he was very keen to learn. In so far as he could remember – and this was 6 months ago – he asked something along the lines of:
'As a line manager, if you hear someone from an ethnic minority use a word that might be considered offensive if used by someone not within that minority, how would you deal with it? The most common example being the use of the N word in the black community'.

(The tribunal clarifies that, as the claimant had accepted, he did not mean he had said 'the N word' at the time.)

- The claimant referred to the independent feedback which said, 'I believe he was trying to ask a valid question to aid understanding'.

- Regarding outcome, the claimant said he accepted that on 16 July 2021, his conduct had fallen below the usual expectation. However, he had explained, apologised and shown remorse for this. It did not follow under the Group Colleague Conduct Policy that he had to be dismissed. He suggested a fairer outcome would be to reinstate him with a warning and further training.

- If he could go back and reframe his question, of course he would do so.

- He said Mr Bailey had made a point about his dyslexia at the disciplinary and that he had observed himself that it could take the claimant time to form verbal questions and that it can take numerous attempts to articulate a question. Mr Bailey had suggested that the claimant was probably trying to formulate a complex question and fell onto the word inadvertently.

- The claimant said that Mr Amaechi's organisation had provided inaccurate information in Ms Osborne's email to the Bank about what he had said and he could only assume that Mr Amaechi's opinion and statement was formed on the same inaccurate information.

- The claimant asked that his length of service and clean record be taken into account.

- The claimant said there had been unreasonable delay. The incident took place on 16 July 2021. He was not notified of the investigation till 25 August 2021 and was not interviewed until 31 August 2021. Two witnesses were not spoken to until November 2021. By this time all evidence of the training had been deleted and memories could well have faded. The delay had also caused the claimant significant health difficulties.

103. The appeal hearing took place on 10 February 2022. The hearing manager was Seung Yun Lee Oxley. The claimant was represented by Mr Bailey and there was a notetaker.

104. On 24 February 2021, Ms Oxley interviewed Ms Hamilton, who had been the claimant's line manager since February 2020. Ms Hamilton said she had been unaware of the claimant's dyslexia. She did not profess to understand dyslexia, but she had not noticed anything specific in the claimant's writing or spelling which would raise concerns. She did not ever feel there was any limitation of expression. She did notice he took longer than other team members to read documents, but she had attributed that to his learning

style. She mentioned that in his role – which was to test if presented designs were fit for purpose – he did sometimes have to reframe the question, ask it twice in a different way. Her interpretation was that sometimes the presenter had not gone into the necessary detail and sometimes the presenter's body language made the claimant try to express it in a clearer way. All of that to her was within expectation and not out of the ordinary.

105. On 8 March 2022, Ms Oxley asked the claimant for his consent to refer him to Occupational Health so she could give due consideration to his dyslexia. After some negotiation, the claimant gave consent on 13 May 2022.

106. On 23 June 2022, Dr Emslie of Occupational Health carried out a telephone assessment and provided a report to Ms Oxley. Dr Emslie noted (relevantly) the claimant's description that 'His problems particularly pertain to the written and spoken word with word finding issues, difficulty in posing questions in clear and succinct ways often requiring verbal iteration when in meetings.' There was also a description of typographical grammar and spelling mistakes. In meetings he can sometimes get frustrated in conversation, and can get put off his chain of thought, 'and again amplifies his issues with iteration and question posing'. Dr Emslie said there was clear evidence – and he was able to observe it during the telephone consultation – of the claimant 'having a somewhat staccato speech pattern, problems with word finding and the need to iterate questions and answers in the course of dialogue'.

107. The claimant added an addendum to the report that for dyslexic people thought and speech centres work at a different speed, and there is a tendency 'to 'spurt things out' before having reflected fully on them, eg not engaging brain before operating mouth'.

108. On 15 August 2021, Ms Oxley wrote to the claimant, rejecting his appeal. She did not think there was sufficient evidence to conclude that the claimant's dyslexia caused him to use the N word. She said she had spoken to Ms Hamilton, who had not noticed anything specific and had not ever felt there was a limitation of expression or communication skills. She said she had asked the claimant for colleagues with whom he had worked in relation to the visibility of their dyslexia. She said the claimant had only suggested Mr Bailey. However, she had not interviewed Mr Bailey, because Mr Bailey was not an independent witness due to his involvement in the disciplinary process. Moreover, even if the claimant's dyslexia had caused the claimant to use the N word in full, Ms Oxley said she had considered the impact on the individual carrying out the training and on the respondent's Group values.

Medical evidence

109. The claimant's solicitors had obtained an expert medical report on the claimant's dyslexia. They did not consult the respondent over this or follow

the usual process for a joint report set out in the De Keyser guidelines. Additionally, they provided the respondent with the report at a late stage. The respondent did not wish for an adjournment. It decided to be pragmatic. It agreed to the report being used on the basis that the expert would attend the hearing to answer questions. It reserved the right to make comments about the effect of not having been involved in the commissioning of the expert and at an earlier stage.

110. We set out relevant extracts from the report in our conclusions.

111. The claimant explained to the tribunal that he had not formally disclosed his dyslexia to anyone at the Bank prior to the reconvened disciplinary hearing, but a few people were aware of it, having made comments about his spelling etc. Mr Bailey had realised the claimant could not always express himself and had put mitigations in place. The claimant had always felt he should not have to disclose his dyslexia unless it affected his job. He felt there was a lot of stigma associated with it and many people felt it meant that you were not very clever. The claimant has faced a lot of prejudice over the years and comments about his spelling and grammar, and he believes it has held it back. He finds it embarrassing and upsetting. The claimant said that Mr Bailey had brought it up during the disciplinary because he felt it was relevant and suspected that the claimant would probably not bring it up himself. We accepted this evidence. The claimant came across as genuine – and it was the only point during the hearing when he became tearful.

Law

112. The representatives provided detailed legal submissions and we do not propose to reproduce them again in this decision. We just make a few points here.

Unfair dismissal

113. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), eg conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

114. The reason for dismissal is 'a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee'. (Abernethy v Mott Hay and Anderson [1974] ICR 323, CA.)

115. Under s98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing

the employee, and shall be determined in accordance with equity and the substantial merits of the case.'

116. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4). However, tribunals have been given guidance by the EAT in British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT. There are three stages:
(1) did the respondents genuinely believe the claimant was guilty of the alleged misconduct?
(2) did they hold that belief on reasonable grounds?
(3) did they carry out a proper and adequate investigation?

117. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondents, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the respondents (Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693).

118. Finally, tribunals must decide whether it was reasonable for the respondents to dismiss the claimant for that reason.

119. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for the tribunal to substitute its own decision.

120. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA)

121. In reaching their decision, tribunals must take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

122. The Code is also relevant to compensation. Under section 207A, if the claim concerns a matter to which the Code applies and there is unreasonable failure by either the employer or the employee to comply with the Code, there can be an increase or reduction in compensation (respectively) according to what is just and equitable of up to 25%.

123. Where the dismissal is unfair on procedural grounds, the tribunal must consider whether, by virtue of Polkey v AE Dayton Services [1987] IRLR 503, HL, there should be any reduction in compensation to reflect the chance that the claimant would still have been dismissed had fair procedures been followed.

124. Under s122(2) of the Employment Rights Act 1996, the tribunal shall reduce the basic award where it considers that any conduct of the claimant before dismissal was such that it would be just and equitable to do so.

125. Under s123(6), the tribunal can reduce compensation for Foutory fault. The compensatory award can only be reduced for a successful claimant on the ground that he contributed to his dismissal by his own conduct, if the conduct on his part relied on for this purpose was culpable or blameworthy. The Court of Appeal quotes a passage explaining this as follows: 'This includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or if I may use the colloquialism 'bloody-minded'. It may also include action which, though not meriting any of those more pejorative epithets is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy, it must depend on the degree of unreasonableness involved.' (Nelson v British Broadcasting Corpn (No 2) [1979] IRLR 346, CA)

126. The tribunal must (1) identify the conduct which is said to give rise to possible contributory fault, (2) ask whether it isblameworthy, (3) consider whether such blameworthy conduct has caused or contributed to the dismissal to any extent, and if so (4) consider to what extent the award should be reduced and to what extent it is just and equitable to reduce it. (Steen v ASP Packaging Ltd [2014] ICR 56, EAT.)

Disability discrimination

127. Section 15 of the Equality Act 2010 prohibits discrimination arising from disability. This occurs if the respondents treated the claimant unfavourably because of something arising in consequence of the claimant's disability. The respondent has a defence if it can show such treatment was a proportionate means of achieving a legitimate aim.

Direct race discrimination

128. Under s13(1) of the Equality Act 2010 read with s9, direct discrimination takes place where a person treats the claimant less favourably because of race than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

129. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as he was. (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285) 'Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was, and postponing the less favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? If the former, there will usually be no difficulty in deciding whether the treatment afforded to the claimant on the proscribed ground was less favourable than was or would have been afforded to others.'

130. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out. (Nagarajan v London Regional Transport [1999] IRLR 572, HL) 'Significant' in this context just means 'more than trivial' (EAT in London Borough of Islington v Ladele [2009] IRLR 154, [2009] ICR 387, EAT; upheld by CA.)

131. The fact that the circumstances leading up to dismissal include a relevant racial consideration (eg the race of fellow employees and customers) does not in itself mean the dismissal was on racial grounds. Taken to its logical conclusion, it would mean it could be an act of racial discrimination for an employer who was trying to improve race relations at work to dismiss an employee who he discovered had committed an act of race discrimination eg racial abuse of a fellow employee or customer. (Redfearn v Serco Ltd t/a West Yorkshire Transport Service [2996[IRLR 623.) 'The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred or of thesequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.' (Observed in the context of discussing the 'but for' test by Mr J Underhill as he then was in Amnesty International v Ahmed at paragraph 37)

Burden of proof for discrimination claims

132. Section 136 of the Equality Act 2010 sets out the burden of proof. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (Hewage v Grampian Health Board [2012] IRLR 870, SC.)

133. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the

provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof.

Conclusions

Unfair dismissal

134. The respondent has proved the reason why it dismissed the claimant, ie that he used the full N word during a professional training session, which was in breach of their policies. This is a substantial reason of a kind which can justify dismissal. The question for us is whether it justified dismissal in this instance, applying the band of reasonable responses.

135. We are acutely aware that we must beware of substituting our own personal views for that of a reasonable employer. The question here is whether a reasonable employer could have dismissed the claimant for the particular reason.

136. First of all, applying the British Home Stores v Burchell questions, did the respondent genuinely believe the claimant was guilty of misconduct. We find that the respondent did genuinely hold this belief. The respondent actually believed the claimant was guilty of gross misconduct.

137. Second, did the respondent hold that belief on reasonable grounds? The claimant had admitted that he had used the full N word. There is no dispute that this had taken place at a training session delivered by an external agency and attended by about 100 professional colleagues including a few from outside the immediate organisation. The respondent is a bank, which provides services to the public. It had anti-discrimination policies.

138. There is also no dispute that the claimant said the word only once, immediately apologised and attended the rest of the session quietly. The respondent accepted the claimant's account of what he had said – broadly, 'As a line manager, if you hear someone from an ethnic minority use a word that might be considered offensive if used by someone not within that minority, how would you deal with it? The most common example being the use of the N word in the black community'.

139. The respondent considered the question to be valid. It does not dispute that the question was asked at a relevant part of the session. The topic had been intent vz effect. The only objection was use of the full word. In other words, the respondent accepted that the claimant had not used the word as a term of abuse or as a descriptor. The claimant had used the word simply to ask a question about how to handle a situation when unacceptable language was being used.

140. In terms of anonymous attendee feedback on the course generally as well as the interview with Mr Bahlaj, comments indicated that the claimant had used an offensive and inappropriate word, but that no malice was intended, and there was mixed feedback about how the trainer dealt with it.

141. There was a script which warned against about language, but the evidence suggested the full script had not been read out. In any event, the key point is that the respondent accepted the claimant had not heard the full script because he, like many others, was having trouble joining at the beginning.

142. The respondent placed a lot of weight on the distressing effect of the word being used on the black people in the room. In terms of evidence, Ms Cameron said she 'physically recoiled'. However, Mr Lewis would have been aware that she made no complaint at the time and was only asked 4 months later. The respondent had no direct evidence from the trainer herself. The trainer did not make her own complaint and did not state why she was unwilling to participate. Another person in the agency had raised it on her behalf, misquoting what the claimant allegedly said 'in America these ethnical minorities are called (and used the word)'). The other two trainers present also made no direct complaint or statement and were not interviewed by the respondent. The respondent gave weight to Mr Amaechi's assertion that the trainer had taken 4 – 5 days off as a result of this, but he 'did not have the specifics'. There was a reference to it being the 'log that broke the camel's back'. Mr Lewis did not give any consideration to the possibility that there were entirely unrelated difficulties in the relationship between the trainer and the training agency. Regarding Mr Amaechi's own reaction, he had been briefed by Ms Owo, and therefore may well have had a misleading impression regarding exactly what the claimant had said by way of context. (She had received the 'America' email.) Mr Amaechi was not himself in the room and much of his discussion with Mr Lewis was about his general feelings regarding the use of that word and backward steps in race relations.

143. Taking these factors into account, we find that a reasonable employer could have considered the claimant's use of the word to be misconduct, because it was inappropriate and because some euphemism should have been used. However, we do not think a reasonable employer would consider it to be gross misconduct. We take into account that the Bank is a professional organisation, serving diverse members of the public, and that a large number of people attended this professional training session, that it was part of a training initiative, and what was written in the Group Colleague Conduct Policy and the Group's Code of Responsibility. However, context is everything in this case. The incident took place during a race education training session. The claimant had not heard the full opening script. The discussion was on intent vz impact. It was a well-intentioned relevant question regarding how to handle a situation of racially offensive language in the workplace. The word was not used abusively or to describe a person or group of people. There is no suggestion that the claimant was taking an opportunity to say an abusive term under cover of a question. The claimant

apologised as soon he realised the upset. He did not repeat the word. He respectfully attended the rest of the event quietly.

144. So even without taking into account the aspect of dyslexia, we find the respondent did not have reasonable grounds to consider the claimant committed gross misconduct.

145. We have further considered the effect of what the respondent knew from the claimant, Mr Bailey and Occupational Health regarding the claimant's dyslexia when we consider sanction. The respondent did not of course have the expert report at that stage.

Was it a reasonable investigation?

146. The claimant said at his first disciplinary hearing that there were two other trainers in the room who did not appear to be upset. Given how much emphasis Mr Lewis was placing on the impact of what the claimant said, we would have expected Mr Lewis to seek to speak to those two trainers - especially once he decided to carry out further investigations. He initially told the tribunal he was unaware there were the other trainers, which is incorrect. Instead he spoke to the head of the training organisation, Mr Amaechi, who was not present, had heard about things second-hand, and whose evidence regarding the precise incident was somewhat vague.

147. We are concerned that Mr Lewis spoke to Ms Cameron 4 months after the training event. While she might remember the use of the particular word at that distance in time, it being so shocking, it was unlikely she would have a precise recollection of the contextual words by either the claimant or the trainer so long after the event. We are also not sure what the purpose of speaking to her really was. If the issue was the impact of the claimant's words on others in the room, there had already been an investigation of that. The respondent had collated the anonymous feedback comments and had interviewed Mr Bahlaj.

148. It concerns us that the additional witnesses, particularly Ms Cameron, were identified by the race action team via HR. This appears to be outside the process, and involved a team which had quite a different role, ie liaising with the training agency in the organisation of the training. Over 100 people had been at the event and we are concerned regarding how Ms Cameron alone came to be selected to give further evidence. Ms Cameron had not made the approach to the respondent. She said she was talking to Mr Lewis now purely because she had been asked to by the race action team.

149. Regarding the claimant's dyslexia, Mr Lewis should have done more to explore the matter once the claimant raised dyslexia rather than relying on what would have been a lay person's assumptions and understanding about what dyslexia could affect. However, Ms Oxley did commission an Occupational Health report at the appeal stage, and she did speak to Ms Hamilton. Ms Oxley was influenced by Ms Hamilton saying she had not

noticed any effect on communication. We find that a reasonable employer would also have spoken to Mr Bailey, given that he was the one who had encouraged the claimant to speak out and had had a much longer history of working with the claimant than Ms Hamilton. Mr Bailey was the claimant's representative, but he had also known him for 5 – 6 years as his head of function and was employed by the organisation. Even if Ms Oxley felt his evidence would not have been impartial, she should have seen what he had to say.

150. We therefore find the investigation in these respects was not reasonable.

Was there a breach of the ACAS Code on Disciplinary and Grievance procedures?

151. The claimant says there was a breach of the ACAS Code in that there was 'unreasonable delay' in dealing with the matter.

152. Looked at globally, the respondent took a long time to investigate a very short incident, the facts of which were largely undisputed. The incident occurred on 16 July 2021. The dismissal decision was notified on 17 December 2021. The final appeal outcome was notified on 15 August 2022.

153. Much of that time-line is explicable when we look at the steps which were taken, and there were reasonable time periods between the steps. What stands out most is the initial delay between the incident on 16 July 2021, the training agency's email that same day and the opening of the HR file on 26 July 2021; then the further delay in notifying the claimant of the investigation until 25 August 2021.

154. The explanation given for the delays is partly the holiday of Ms McMahon and then that of the claimant. We have not been given an explanation for the original 10 days delay, other than the speculation that it would take a period of time to find a manager to carry out the investigation.

155. We understand why it may have taken 10 days to find an Investigating officer, and we accept it is possible that the most suitable person already had a booked holiday (it being in August), however, we feel that given the complaint was about something which had been said, and the importance of verbal recall, the claimant should have been notified at the outset that there had been a complaint which may lead to an investigation. On the facts, we find this was a breach of paragraph 4 of the ACAS code which says employers 'should raise and deal with issues promptly' and should not unreasonably delay meetings, decisions or confirmation of those decisions' and paragraph 5 which says 'It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case.'

156. The other notable delay was from the first disciplinary hearing on 29 October 2021 to the second disciplinary hearing on 3 December 2021.

Looking at the steps taken in between, that period is not unreasonable. There is of course the argument that these extra interviews should all have been carried out as part of the original investigation.

157. The delay on the appeal decision is largely because of the OH report and the negotiations with the claimant regarding the terms. Although it sounds like a long delay, Ms Oxley was taking steps at regular intervals.

158. However, we do not find the 10 day delay or the later delays made the dismissal was unfair, because in practice, as far as we can tell, the delay did not crucially affect the claimant's memory (it being accepted that the only issue was use of the N word).

Sanction

159. Finally we considered whether a reasonable employer could have dismissed the claimant for using the full N word. We have already explained why we do not consider that a reasonable employer would say use of the full word, in this very specific context, was gross misconduct. But regardless of whether it was classified misconduct or gross misconduct, we find that a reasonable employer would not have dismissed the claimant for what he did. Had the factual circumstances been different, we might well have said something else.

160. A reasonable employer could certainly take the view that the N word is an offensive and insulting word, which is often extremely shocking and hurtful to black people. A reasonable employer could certainly take the view that the full word should not have been used even in the particular context, because just hearing the word could cause pain and saying the word was unprofessional. However, whether the word ought to have been said and whether the claimant should have been dismissed as a result are two different questions. Our impression is that Mr Lewis conflated the two questions, and felt that not dismissing the claimant would condone use of the word. We do not think that is a reasonable view on the particular facts.

161. As well as his immediate apology, the claimant repeatedly apologised from the start of the investigation and throughout disciplinary process. In all his correspondence and verbal communications in various hearings, he never used the full word again. He demonstrated by his behaviour that he had learnt the lesson – he used the expression 'the N word' at all times, even when referring back.

162. The respondent relies primarily on the claimant demonstrating a lack of 'empathy'. This is an unusual distinction given that the claimant had repeatedly apologised . He told Mr Lewis that he understood in hindsight that the trainer could be upset. He said a friend had told him use of the word was inappropriate and 'I get that now'. He said he understood his conduct had fallen below expectation. One wonders what was expected of him. He offered to apologise for the upset directly to the trainer, in person or in

writing. He acknowledged that he had learnt from Mr Amaechi's explanation to Mr Lewis.

163. The claimant was never resistant to furthering the objective of race equality, and he suggested as a lesser sanction that he be given a warning and further training. There was no evidence that the claimant had ever said or done anything racist previously. He had long service and a clean disciplinary record.

164. The respondent says that the claimant's repeated complaint that the trainer mishandled the situation demonstrated lack of empathy. We find that a reasonable employer would not have reached such conclusions or held it against the claimant. The claimant was fighting for his job. He made a point that some of the anonymous feedback made - the trainer could have turned this into a useful training opportunity; it precisely demonstrated the difference between intent and effect. Importantly, the claimant never suggested this was a reason why it had been acceptable for him to use the full word. He accepted immediately and consistently that he should not have done so.

165. For all these reasons, the dismissal was unfair. No reasonable employer could or would have dismissed the claimant in the particular circumstances.

Polkey

166. There is no deduction made on the Polkey principle. We have found the dismissal unfair on substantive grounds.

Contributory fault

167. We make no deduction from the compensatory award for contributory fault. The claimant's conduct was not perverse or foolish or bloody-minded. It was ill-judged (for a moment, disregarding the aspect of dyslexia), but not to the extent of 'foolish'. We do not consider his action was culpable or blameworthy. He was asking a respectable question with no ill-intent, but he misjudged his language.

168. For the same reasons, we would not find it just and equitable to make any reduction for contributory fault, even if we had thought the claimant was to some degree blameworthy.

169. Therefore, even without considering the impact of the claimant's dyslexia, we make no deduction.

170. We also further consider that the claimant's dyslexia affected his ability to formulate his question carefully and talk round using the full word in the heat of the moment, ie his desire to get his train of thought out before he forgot.

We discuss this more below. But for this reason too, we would make no deduction for contributory fault.

171. Nor do we make any deduction from the basic award for conduct prior to dismissal. In the circumstances we have described, we do not consider it just and equitable to do so.

Race discrimination

172. Before we considered the evidence, we read Counsel's submissions on the race discrimination claim and considered the approach we should take.

173. We do not think this is a case where it is helpful to construct a hypothetical comparator. One difficulty is that highlit by Ladele and Henderson as discussed in the parties' written submissions, ie the claimant's argument is that his race was one factor in the respondent's decision, so that asking the comparator question could be misleading. Even if he would have been dismissed regardless of his race, he still ought to succeed and get compensation, at least for injury to feelings, if race discrimination was a factor. The other reason is the difficulty in constructing a truly equivalent hypothetical comparator.

174. The whole point about why the N word is offensive is because it has been used by white people to describe black people historically in an offensive and demeaning way. Therefore, while it might be offensive for anyone to use the word, in nearly all circumstances, it will by definition be more offensive for a white person to say it to a black person.

175. The simplest comparator would be a black person in the claimant's position who had asked the question, all the other facts essentially remaining the same. This potentially runs into the above difficulty.

176. It does not work to completely flip the ethnicity of the individuals concerned and the nature of the word, so that eg we consider a black person asking an equivalent question, but using a term racial offensive towards white people, because there is no such term with the equivalent level of offensiveness, backed by a history of oppression of white people by black people.

177. A better comparator could be a black person (ie of African / Caribbean heritage) who had used the full 'P' word in an equivalent question before a mixed audience, with a trainer of Pakistani heritage. This is not a perfect comparison because, as far as we know, the 'P' word does not derive specifically from any history of oppression of Pakistani people by African/Caribbean people. But it is closer. Ms Ferber suggests the comparator be a person of Indian heritage asking the question. We still do not think the comparison entirely works.

178. A better starting point than these hypothetical comparators is simply to ask 'the reason why' Mr Lewis dismissed the claimant and whether the fact that he was white had a significant (non trivial) influence on the outcome.

179. Looking at the contemporaneous documentation, the detailed charge set out in the invitation to the disciplinary talks about the anti-racist policy and 'an inclusive environment for all'. It says that the claimant knew the N word was offensive and inappropriate as an employee of the Group. It says the claimant's actions fell outside what was expected 'of all colleagues'. It does not say anything about it being specifically offensive because the claimant was white.

180. In his dismissal letter, Mr Lewis said he regarded the term as a 'racially-loaded and offensive word which is totally unacceptable in the workplace, and as such, contravenes the values of the group as an anti-racist organisation'. He said he believed that use of the referred term was not conducive to valuing differences in order to build trusted relationships with customers, colleagues and communities and it represented failure to take responsibility for creating a working environment which is inclusive and welcoming for everyone. Again there is no mention of it being worse because the claimant was white.

181. Mr Lewis said he accepted the term was not directed at anyone, but it was a professional setting with a large, mixed audience of colleagues and external participants. We cannot go through the whole letter here, but there are numerous opportunities where Mr Lewis discusses intent, impact and the word itself, where he might have referred to the fact that it is not a word for white people to use. But at no stage does he say anything about that. There is no indication that a black person would have been permitted to use the full word when asking the relevant question.

182. There is no mention in the minutes of the first disciplinary hearing of it being in any way relevant that the claimant was white. There was a discussion about the claimant's question and the claimant explained that he was aware that black people sometimes use the word and he was wondering how white people might respond and how a manager should manage that situation.

183. The reason Mr Lewis made further enquiries following the first disciplinary hearing was because the claimant had said the trainer over-reacted and mishandled the situation, and because, as he does with customer complaints to the Bank, he wanted to find out more about the impact of the alleged action. He ended up talking to Mr Amaechi because the trainer would not engage.

184. Having discussed the trainer's unwillingness to come forward and what Mr Amaechi knew of the impact on her, Mr Lewis asked how Mr Amaechi would feel hearing the N word. Mr Amaechi's response was predominantly a general expression of frustration about progress on matters of racism in this country. Within that context, he expressed anger and frustration that the

word had been used in the context of a race education programme and that there was no outcry in the room. Mr Lewis then put a general question, though it related to the claimant's explanation, 'What are your views on whether there are any appropriate contexts in which the N word could be used?' Mr Amaechi answered both generally and specifically. He started by saying it was never appropriate in a workplace environment (even if used by a black person). He then explained that some black people may use it in a relationship context, but not in mixed company. It was for a black person to use if they wanted to, not for white people to use. The discussion is interesting because, as the claimant later noted, it went a long way to answering his original question.

185. At the reconvened meeting, the evidence from Mr Amaechi (and Ms Cameron) was discussed, but Mr Lewis did not say he felt that the use of the word was more offensive because the claimant was white. The claimant referred to how Mr Amaechi's answer about use of the word by the black community showed the relevance of the question he was trying to ask.

186. The correspondence and minutes of meetings at the time, therefore, do not suggest that Mr Lewis was thinking about the use of the word being more offensive, let alone it being a more dismissable offence, because the claimant was white. It was Mr Amaechi who said it was not a white person's to use in response to a question from Mr Lewis as to whether there were appropriate contexts in which the word could be used (including the context of the question that the claimant was asking).

187. There is no doubt that Mr Lewis in his investigations and conclusions was very interested in the impact which the comment had had on the trainer. However, to the extent it was a factor in the decision to dismiss, he was thinking of the time-off work which he had been told the trainer took as a result. The fact that Mr Amaechi had told him it was not for a white person to use the N word was contextual background, but it was not the reason operating on Mr Lewis's mind. The reason operating on his mind in relation to impact was the actual impact on the trainer – not that it was a white person as opposed to a black person who caused that impact.

188. Prior to a particular piece of late cross-examination, it did not occur to the claimant himself from all the letters and correspondence which he had received, including the note of the Amaechi interview, or from the discussions in the disciplinary process, that he was dismissed in any way because he was white. The claimant relies on what Mr Lewis said in cross-examination. For the purpose of the amendment application and for the purpose of these Reasons, we will rely on the respondent's note of the particular passage. Mr Lewis's evidence does require some thinking about, but after due consideration, we do not think it is as clear-cut as Mr Raizon suggests.

189. The lead up to the relevant piece of evidence was cross-examination about the note of the interview with Mr Amaechi and a series of questions from the Judge about what Mr Amaechi had stated and what Mr Lewis

understood by it. The Judge asked whether Mr Lewis would not explore with Mr Amaechi the distinction between the word being used in an abusive or descriptive way, and it being used in the context that it was. Mr Lewis replied that two contextual points were material, (1) that the word was used in a professional setting, which for him was very significant, and (2) that it was said by a white person, which was a really important bit of context. It was clear from the etymology, where the word has come from, that it is highly inappropriate and offensive to be used by a white person in the company of a black person. He said that 'in terms of exploring context, JA perspective as expert on subject matter was extremely helpful'.

190. After a short break, Mr Raizon referred to what Mr Amaechi had said in the paragraph starting 'Many levels to this'. He said 'not for white people to use'. Mr Lewis responded, 'That is what JA said'. Mr Raizon went on 'Also agree that fact C is white was a relevant factor you took into account when assessing context'. Mr Lewis said, 'Yes, took into account as part of context, yes'. Mr Raizon said 'Race material factor that you took into account'. Mr Lewis replied, 'Yes but these are JA's words. Don't necessarily agree to that'.

191. In our view, Mr Lewis, having had his attention focussed on the interview and what he understood Mr Amaechi to be saying, was largely summarising what Mr Amaechi said. He does adopt some of it. He certainly says the use in a professional setting 'for me' was very significant. And that was consistent with everything he had said up to that point, both at the time and to the tribunal. Mr Lewis had laid huge emphasis on the professional setting. Mr Lewis may also be saying that it being said by a white person was a really important bit of context that he (Mr Lewis) 'took into account', but his almost concurrent answers that 'that is what JA said' and 'yes, but these are JA's words' and 'I don't necessarily agree' are confusing.

192. We have also considered what Mr Lewis said after the amendment was granted. Of course Mr Lewis would have been alerted at that point to the race discrimination claim. We take that into account. But in the vast majority of discrimination cases before the tribunal, the person accused of discrimination knows the allegation long before the hearing, and indeed has much more opportunity than Mr Lewis had to take advice, absorb the allegation and think about the defence. So while we are always cautious about self-serving evidence, that goes with the territory in relation to the majority of witnesses.

193. After the application to amend and overnight, Mr Lewis – unprompted – sent his lawyers a note (and no one complains that he did so) which said, 'I was somewhat confused about the turn of events .. as a lay person I didn't understand .. I was not allowed to further explain my position. It struck me that given I didn't say anything different from the evidence bundle, either I misunderstood the question or the meaning of my response was …'

194. We think it is a fair comment that Mr Lewis did not get a chance to further explain his position during the relevant snippet of cross-examination as, at

that stage, Mr Raizon immediately made an application to amend and the discussion quickly diverted to how to handle that.

195. When Mr Lewis was asked to expand on his note to the tribunal, he said he was responding to the Judge's question regarding whether he explored context with Mr Amaechi (and Ms Cameron). He said the overriding point was that he considered the workplace environment. He had thought he had been explicit about that. Whoever would have used that word in a workplace environment, he would have considered it exactly the same way. Mr Raizon had then asked him a question about context. Generally who says something is an important part of context. That is exactly what the claimant had been asking about. But the N word 'is never an appropriate word to use in the workplace, which I believe is consistent with the group policies because offence could be taken and therefore it could be discriminatory'.

196. We are satisfied that the overwhelming contextual factor for Mr Lewis was that the claimant had used the word in a professional environment. Mr Lewis kept referring back to that at the time and during the hearing. In contrast, he did not refer to the fact that the word was said by a white person at all, except in this passage of questioning which was by reference to the note of the Amaechi interview. Of course it is possible that Mr Lewis knew better than to mention the claimant's ethnicity as a factor. However, the way he answered the questions in the relevant part of questioning, as well as his overnight note to his own lawyers, shows that he did not understand there was any problem with referring to the claimant being white. So if that was a significant factor, we would expect it to have emerged sooner.

197. We believe there is also an important distinction to be drawn to what is repeatedly referred to as 'context' here and the reason for dismissal. We accept it is possible for the two to be connected. But on the facts here, we believe there is a separation. One cannot escape the fact that the N word is a term of abuse used about black people. The word was used by white people to describe African Caribbean people at the time of slavery and indeed post slavery, for example (but not confined to) in the American South. When trying to understand impact, one cannot therefore ignore the fact that hearing the word is far more likely to cause deep pain to a black person than a white person – even though many white people might also be very upset to hear it said. We would suggest that it is intrinsic to the word, that in almost all circumstances, it is likely to be more painful if said by a white person, because that echoes its derivation, and may well echo experiences black people have had in their own lives. That is not to say it never causes pain if said by a black person. And that is not to say that a black person has a general license to say the word, especially in a professional context.

198. Mr Lewis was concerned with the actual impact on the trainer, and that was essentially about the 4 – 5 days off. Mr Lewis was told that impact was caused by the claimant saying the word in full.

199. Mr Lewis did not dismiss the claimant because he was white. He dismissed him because he used an offensive word in a professional setting which upset the external training provider, and because Mr Lewis felt this was contrary to the Colleague Conduct Policy and the Code of Responsibility.

200. As part of the deeper context or background was Mr Amaechi's explanation about when and in what circumstances a black person might find it acceptable to use the word (not in a workplace environment either), but generally it was not a word for white people. Mr Lewis listened and took that perspective on board. But it was not a substantial (ie non-trivial) part of the decision to dismiss because (i) it was said in a professional environment (Mr Amaechi said a black person also should not say it in a professional environment) and (ii) he had been told of and was focusing on the actual impact on the trainer (4 – 5 days off).

201. We do not think taking account of this context means the claimant was dismissed because he was white or that that was a factor, let alone a substantial factor, in the actual decision to dismiss.

202. We have not discussed this on the basis of the two-stage burden of proof because we do not think it is practical or helpful or adds anything to do so. The explanation why Mr Lewis dismissed the claimant is impossible to sensibly divorce from any other primary facts.

203. For these reasons, the claim that the dismissal was direct race discrimination is not upheld.

Disability discrimination

204. The next question is whether there was disability discrimination.

205. The respondent has admitted that the claimant was disabled with dyslexia at the time of his dismissal and rejection of his appeal, and that it was aware of this at those times. This resolves issues 9.1 – 9.6.

206. It is not clear to us what a 'zero-tolerance' disciplinary policy means. The respondent had a 'zero-tolerance' *approach* in the sense that, as stated in paragraph 1.2 of the Colleague Conduct Policy, 'Discrimination, victimisation, harassment and bullying will not be tolerated'. However, the matter still needed to be investigated and a sanction decided upon.

207. Such a policy would not put the claimant or other dyslexic people at a particular disadvantage because an investigation would still take place and discretion would still be used as to sanction, taking into account all the relevant circumstances. Mr Lewis did consider possibilities other than dismissal.

208. Further, if operated in this way, ie by investigating properly, taking account of all the relevant circumstances, and flexibility regarding sanction, this would be a justifiable policy.

209. We therefore do not uphold the reasonable adjustment claim. We think that what the claimant is trying to say regarding his disability is in fact better suited to his section 15 claim, which we turn to now.

Discrimination arising from disability

210. There is no dispute that the claimant was dismissed for using the full N word in a question during a training session, and that is why his appeal was not upheld. The key question is whether his use of that word was 'something arising in consequence of his disability'.

211. The claimant says the 'something arising' is either 'use of the N word in full' or 'Inability on occasion properly to express what he is thinking'. Or, put in another way, as put in the reasonable adjustments claim, 'It is harder for him to formulate questions when speaking'.

212. In his evidence, the claimant described what happened like this. He said he initially asked this question 'As a line manager, if you hear someone from an ethnic minority use a word that might be offensive if used by someone not within that minority, how would you deal with it?' He paused waiting for a response from the trainer. After a short pause when she did not respond, he went on, 'The most common example being the use of the N word in the black community' (save that he said the full word). The trainer spoke to him angrily (he does not remember the exact words). He was taken aback, He immediately apologised as he had not intended to offend or upset her or anyone. While apologising, he tried to clarify his question because he thought she might not have understood him correctly. This made the trainer even more angry and she threatened to eject the claimant if he did not stop talking, which he then did. We accept this was the gist of what he asked (it may be that he did not formulate the original question exactly like that, but near enough). We also accept that the original question did not contain the N word, but the swift follow up did, and that the claimant 'spurted out' the word which was in his head when the trainer did not immediately answer him.

213. This strikes us as consistent with what Dr Emslie put in the Occupational Health report, eg 'difficulty in posing questions in clear and succinct ways often requiring verbal iteration when in meetings'; that In meetings he can sometimes get frustrated in conversation, and can get put off his chain of thought, 'and again amplifies his issues with iteration and question posing'; Dr Emslie's own observations of the claimant 'having a somewhat staccato speech pattern, problems with word finding and the need to iterate questions and answers in the course of dialogue'; and the claimant's addendum that there is a tendency 'to 'spurt things out' before having reflected fully on them, eg not engaging brain before operating mouth'

214. Mr Doherty provided a detailed report on the instructions of the claimant and appeared at the tribunal to answer questions. Mr Doherty said the claimant's screening test was consistent with moderate or severe dyslexia. Mr Doherty explained that in general, individuals with dyslexia can have difficulties with word retrieval, fluency and articulation.

215. Mr Doherty concluded that the claimant's dyslexia probably did impact on his oral communication. Although his general intelligence was very high, his ability to articulate that, in spoken and written language was at best only average, ie his vocabulary and understanding of words was only average. Also his poor working memory made it harder for him to mentally formulate and then explain the full extent of his thinking about a topic. 'That means his oral communication is likely to be less impressive and nuanced (simply and potentially clumsy) than his conceptual understanding or awareness of an issue would suggest.' He also 'has substantial difficulties with word retrieval, fluency, and articulation of sounds. This deficit affects his ability to communicate fluently in conversations, express thoughts clearly, or participate actively in group discussions. In addition .. because his attentional resources are weak (poor working memory) he has to focus them on the key point that he wants to make, else he risks losing his train of thought. Unless given direct instructions, the risk is that he becomes prone to missing the wider subtlety of an interpersonal situation, for example, the unsaid 'rules' governing the interaction, or he fails to invest enough attentional resource in 'reading' the room, with the result that he is more likely to make a faux-pas.' Mr Doherty said that the claimant had some awareness of this, so he would check his understanding of what he had been told, often by repeating it back in a much simplified way. He was likely to quickly lose track of unstructured conversation and simplify them down. So 'he probably is more prone than most people to being too direct, inarticulate and clumsy in his communication, perhaps using an imprecise, unhelpful (incorrect/wrong) word.'

216. Mr Doherty observed the claimant's communication to be frequently unclear and verbose. He said the claimant appeared to lack precision in his choice of words, often saying he could not think of the right word, so needed to talk around what he meant. There was also lack of confidence so, having explained his point, he would repeat it again. He was 'capable of complex subtle thinking on issues with the risk that he may get lost in thought which he struggles to explain.' Word retrievable was 'a significant problem' for the claimant and very clearly impacts his oral communication.

217. When asked whether the claimant's dyslexia could have been the cause of him using the N word in full, Mr Doherty in the report said he could not comment on a specific instance. He could say generally that from his cognitive profile and Mr Doherty's observations, the claimant was more likely to make oral communication errors, partly due to missing social cues and focusing on the key point he wants to make without sufficient detail being given to the manner or detail of how he is making his point. Because he struggles to articulate in a way which reflects the complexity of his thinking, he can come across as imprecise and vague or (as he rushes to express

thoughts before he forgets) simplistic and clumsy. Mr Doherty said it is a reasonable hypothesis that when formulating the question in his head, he used the N word in full, especially as he was thinking about rap songs. Then when articulating the word out loud, he would have had to use the term N word instead, 'which would have required additional mental attentional effort that he might simply not have had available to him at that moment.' So 'his dyslexia could have contributed to his use of the N word in full, particularly when he was seeking to rephrase his initial question to make it clearer.' In answer to a further question, Mr Doherty said that in the claimant's case, 'Dyslexia was probably a contributory factor' for the reasons he had already said. The claimant's neurodiverse profile 'probably suggests a tendency to 'spurt out words' before having fully reflected on their precise meaning and impact.'

218. We consider there is a strong similarity between the descriptions of Dr Emslie and Mr Doherty of the claimant's communicative difficulties and what actually happened. The claimant had the full N word in his head when he started to ask the question because he was thinking of what he had heard in rap songs and on the basketball court. He was asking a complex question which he may have struggled to articulate. Because of lack of confidence in how clear he had been, when the trainer did not immediately respond, he reformulated and spurted out the explicit example before he lost his train of thought. We believe that on the balance of probabilities, he did not have the 'additional mental attentional effort' required to think about the way he should make his point in more detail and to pick up on the social cues.

219. The claimant was on medication at the time of the assessment, but said it did not affect his cognitive abilities. We did give thought to whether the claimant's way of speaking was affected by factors other than dyslexia by the time Mr Doherty saw him. However, Mr Doherty was aware that the claimant was depressed and had just developed tics. He was also aware of this at the hearing. He nevertheless stood by his analysis as dyslexia being the 'probable' cause.

220. Dr Emslie's report at an earlier stage, before the claimant's health completely broke down (although we accept the claimant was get increasingly unwell) also is supportive of the effect of the claimant's dyslexia on his formulation of questions and use of words .

221. The evidence is clear that on occasion the claimant is unable properly to express what he is thinking because of his dyslexia. On the balance of probabilities, we find that the claimant's dyslexia did make it harder for him to do so on this occasion; it made it harder to formulate his question about use of the N word, which in turn led him to use the N word in full. This is consistent with the claimant's evidence of his tendency to reformulate questions when he does not get an immediate answer and to spurt things out before he loses his chain of thought. Mr Doherty's evidence supports this. Mr Doherty describes how the claimant can be so focused on a subtle and complex question which he cannot easily articulate, and that he can lose focus on how he puts the question. This is all consistent with what

happened here. Mr Doherty also talks about actual inappropriate use of words by the claimant during his assessment. Mr Doherty said that in the claimant's case, 'Dyslexia was probably a contributory factor' to his follow-up question using the full N word.

222. As far as Ms Hamilton's evidence is concerned, she is obviously not an expert, and she had not been alerted to look for indications of dyslexia. The claimant told Mr Doherty that he felt he was able to mask his dyslexia at work well. But even then, she had noticed that the claimant did sometimes reframe questions and ask them twice in a different way (without realising its significance).

223. Mr Bailey, another and longer standing manager, albeit not completely neutral in the sense that he acted as the claimant's representative, had also thought it was a sufficient possibility from his own observations to raise it at the disciplinary.

224. The fact that the claimant did not immediately raise the possibility of his dyslexia, does not mean it was not the reason he expressed himself as he did. We heard evidence – and saw for ourselves when the claimant broke down in tears – how reluctant he was to acknowledge that he is dyslexic.

225. On the balance of probabilities, therefore, we find that the claimant's dyslexia was a strong factor causing how he expressed himself at the session, and in his use of the full word rather than finding a means to avoid it.

226. The final question is whether the respondent proved that dismissing the claimant was a proportionate means of achieving a legitimate aim. The aim of furthering the Bank's anti-racist education programme and race action plan, and of making it clear that racist language was unacceptable, was legitimate.

227. However, dismissing the claimant was not a proportionate means of achieving that aim. The impact on the claimant was enormous. He lost a job where he had found he could excel with his dyslexia. He was a long-standing employee. His mental and physical health were severely damaged. In the very specific circumstances of the case, there was no reason why the respondent's aim would have been damaged by not dismissing him. If they wished to make the point that the word would be tolerated in no circumstances, they could have issued a warning and they could have put the claimant on further training if they felt he did not understand quite how hurtful the word was, even in that context. However, the claimant had demonstrated he did now understand the point, he understood the hurt, and he wud not repeat the word in future. There was no rational basis to think that he would do so.

228. For these reasons the section 15 claim is upheld. The claimant was unjustifiably dismissed because of something arising from his disability.

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Employment Judge Lewis
04/08/2023

Judgment and Reasons sent to the parties on:

07/08/2023

For the Tribunal Office