EMPLOYMENT TRIBUNALS

Claimant: Mrs T Kenworthy-Dowdall

Respondent: North West Ambulance Service NHS Trust

Heard at: Manchester **On:** 27 and 28 July 2023 and in chambers on 6 September 2023

Before: Employment Judge McDonald (sitting alone)

REPRESENTATION:

Claimant: Mr P Norbury (Solicitor)
Respondent: Ms J Ferrario (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of unfair dismissal fails and is dismissed.

2. The remedy hearing will be cancelled.

REASONS

Introduction

1. The claimant claims she was unfairly dismissed. She filed her claim with the Tribunal on 26 October 2021 following a period of early conciliation from 13 September 2021 until 22 September 2021.

2. The claimant was represented by Mr Norbury and the respondent by Ms Ferrario. I heard evidence on 27 and 28 July 2023. Ms Ferrario had prepared a written note/skeleton argument which was sent to the Tribunal at the start of the hearing. I heard oral submissions from Mr Norbury and Ms Ferrario on the afternoon of Day 2 of the hearing. Those submissions dealt with liability, Polkey and whether

there should be any reduction in any compensation awarded on the grounds that the claimant had contributed to her dismissal. I reserved my decision. I apologise to the parties that absences form the Tribunal and other judicial work has led to a delay in finalising this Judgment.

3. The claimant's dismissal resulted from a finding by the respondent that she had used a term accepted to be offensive and racist in relation to a colleague, Ms Greaves, who describes herself as being of black African/Caribbean descent origin. Given the offensive nature of that term we referred to it as the "n-word" during the hearing and I refer to it in that way in this judgment.

Preliminary Matters

4. The parties had prepared a joint bundle of documents for the hearing ("the Bundle"). References in this judgment to page numbers are to pages in the Bundle. The Bundle consisted initially of 247 pages.

5. The claimant's dismissal resulted from the respondent's conclusion that the claimant had referred to a black colleague, Ms Greaves, as "that n-word" during incidents in July 2020 and in December 2020. Ms Greaves was not present during either of those incidents.

6. In December 2022 an Employment Tribunal chaired by Employment Judge Hodgson heard a claim brought by Ms Greaves against the respondent in this case (case no.2407259/2021). In this judgment I refer to that as "the Greaves case".

7. The claimant was named as the second respondent in the Greaves case. The liability judgment from the Greaves case was included in the Bundle (pp.169-183). Neither party raised any objection to my reading that judgment. While accepting that the Greaves judgment is not binding on me, Mr Norbury in his submissions placed weight on the Tribunal's finding of fact that the incident of the use of the n-word by the claimant in December 2020 did not occur. I note from paragraph 49 of the judgment that that was because the Tribunal had live evidence from the claimant but not from Ms Herbert. In the Greaves case the claims of race related harassment and direct race discrimination against the claimant relating to that incident failed.

8. The Greaves Tribunal found that that the use of the n-word by the claimant in July 2020 did occur and that the claim of race-related harassment arising from that incident succeeded against the claimant. The claim of direct race discrimination against the claimant in the Greaves case relating to the July 2020 incident failed because it was pleaded in the alternative to the race-related harassment claim which succeeded.

9. At the start of the hearing, I granted the claimant's application to add the respondent's grounds of resistance from the Greaves case to the Bundle (at pp.248-250). I also ordered that the particulars of claim in the Greaves case and the response filed by the claimant as second respondent in that case should be added to the Bundle (at pp.251-254). I gave oral reasons for my decisions on these matters which were not requested in writing.

The Issues

10. The List of Issues for the Tribunal to determine at this liability hearing were set out in the Annex to Employment Judge Johnson's case management order dated 3 February 2023. For convenience I set it out below. Issue 1.1 (whether there was a dismissal) was not in dispute – the respondent accepted it had dismissed the claimant.

1. **Unfair dismissal (for the final hearing of liability)**

Dismissal

1.1 Can the claimant prove that there was a dismissal?

Reason

1.2 Has the respondent shown the reason or principal reason for dismissal? The respondent relies upon the potentially fair reason of conduct.

1.3 Was it a potentially fair reason under section 98 Employment Rights Act 1996?

Fairness

1.4 Did the respondent dismiss the claimant for the potentially fair reason of conduct?

1.5 Did the respondent act reasonably or unreasonably in treating the conduct as a sufficient reason to dismiss the claimant? Having regard to:

a) The failure to issue a sanction against the claimant in July 2020.

b) The decision of the respondent not to suspend the claimant.

c) Using the claimant's apology against her.

d) The respondent concluding on the evidence that the claimant had committed the alleged misconduct.

e) Failing to take account of the fact that the alleged comments were not made directly to SG.

f) Proceeding with the disciplinary hearing when she was not well enough to participate.

11. Although a separate remedy hearing has been listed, I confirmed that I would as part of my liability judgment make findings about Polkey and any reduction to compensation due to the claimant having contributed to her dismissal. In the event I have found the dismissal was not unfair. In those circumstances I have not had to make findings on those issues. For completeness, I have at the end of my judgment

briefly indicated what my findings on those issues would have been had I found the dismissal to be unfair.

The Witness Evidence

12. I heard the respondent's witness evidence on day 1. It called 2 witnesses. The first was Malcolm Saunders, Operations Manager ("Mr Saunders"). The second was Daniel Smith ("Mr Smith"). He was the dismissing officer and was at the time the respondent's Interim Head of Operations. On the morning of Day 2 I heard the claimant's evidence. I had read each witness's written statement and the documents in the Bundle referred to in them. Each witness was cross examined and re-examined by Mr Norbury or Ms Ferrario, having answered my questions after cross examination.

13. The claimant became distressed during her cross-examination evidence and appeared to indicate that she was not certain whether she wanted to continue. I allowed a break and Ms Ferrario confirmed she had no objection to Mr Norbury taking instructions from the claimant despite her being subject to the witness warning. After that break, the claimant confirmed that she wanted to continue and did so.

14. I set out below my findings of fact relevant to the issues I have to decide. I do so on the balance of probabilities having taken into account the oral and documentary evidence before me.

Findings of Fact

Background Facts

15. The claimant was employed by the respondent from 5 December 2005 until 28 July 2021 when she was summarily dismissed for gross misconduct. She was employed as an Emergency Medical Technician 1 based at Oldham ambulance station. That was a clinical role but she was not a qualified paramedic.

16. The claimant was line managed by Jason Shaw ("Mr Shaw"), who was a Senior Paramedic Team Leader ("SPTL"). He reported to Mr Saunders. As Operations Manager, Mr Saunders was responsible for the day-to-day management of Oldham and Middleton ambulance stations. That involved managing approximately 110 staff and 16 ambulances. He was based at Oldham Ambulance Station. Mr Saunders was line managed by Sara-Jane Jones-Roberts who was a Sector Manager ("Ms Jones-Roberts"). She reported to Mr Smith whose line manager was the Deputy Executive Director of Operations.

The January 2021 allegation against the claimant and the decision not to suspend her

17. At 01:26 on 25 January 2021, one of the respondent's paramedics, Laura Herbert, emailed Ms Jones-Roberts to tell her that while working with the claimant on either the 3 or 4 December 2020 (she could not recall which shift) the claimant had used the phrase "that [n-word]" in reference to Ms Greaves (p.61). In her email, Ms Herbert said the conversation had been about a miscommunication between other

staff that had involved Ms Greaves and the claimant. She did not identify exactly where the conversation had taken place. Her email was headed "Complaint Evidence – Sharon Greaves". In it, Ms Herbert confirmed she had not challenged the claimant about her use of the word at the time. She said that "Ideally due to the nature of this I would prefer my name not to be passed to [the claimant] during any investigation but understand if that is not possible."

18. I find that Ms Herbert had told Ms Greaves about the incident a few weeks after it took place. They were friends and Ms Greaves had told her that she had submitted a Dignity at Work allegation against the claimant and others at Oldham Ambulance Station about the way they treated her. She told Ms Herbert that she felt that some of what happened was related to her race. That prompted Ms Herbert to tell Ms Greaves what the claimant had said about her. She agreed that Ms Greaves could tell Ms Jones-Roberts about the incident.

19. I find that Ms Greaves told Ms Jones-Roberts about the incident by phone on 24 January 2021. Ms Jones-Roberts asked Ms Greaves to ask Ms Herbert to email Ms Jones-Roberts about it. That resulted in Ms Herbert's email.

20. Ms Jones-Roberts told Mr Saunders about the allegation on either 25 or 26 January 2021. She told him that she would speak to Mr Smith who would decide whether the claimant should be suspended.

21. Section 4 of the respondent's Disciplinary Police and Procedure deals with suspension (p.190-191). It says that authorisation to suspend can be given by any member of the Senior Management Team. Read as a whole, I find that section is aimed at ensuring that unnecessary suspensions are avoided because of a recognition that while ostensibly suspension is a neutral act, "it is difficult to argue, other than in a limited context, that this is indeed the case" (para 4.2.1). With that in mind para 4.2.2 provides that suspension should only be considered if the alleged offence is likely to be gross misconduct; that prior to any decision to suspend, unless there are exceptional circumstances, a preliminary assessment should be made immediately to ascertain whether the perception of alleged gross misconduct is confirmed; and that there is no requirement that gross misconduct dismissal be routinely preceded by a period of suspension.

22. Para 4.2.2 also says that alternatives to suspension "must always be considered". That includes identifying alternative work and/or an alternative location for the employee. In considering the suitability of alternative work "the key consideration will be the elimination of risk and the smooth and efficient conduct of the ongoing investigation". If a decision to suspend is made, para. 4.2.4 says that it should be subject to continuous review and risk assessment and the relevant Senior Manager should be kept updated every 2 weeks.

23. Shortly after speaking to Mr Saunders, Ms Jones-Roberts spoke to Mr Smith about whether the claimant should be suspended pending an investigation into the allegation. I found Mr Smith to be a credible witness and accept his evidence that he did not at that point see the email from Ms Herbert.

24. Mr Smith decided not to suspend the claimant. I accept his evidence that based on the information Ms Jones-Roberts provided, his assessment was that there

was a need to obtain more information before a decision whether to suspend was made. He was also satisfied that a fair investigation could be carried out if the claimant remained in work.

Mr Saunders's meeting with the claimant on 27 January 2021, the risk assessment and the claimant's apology

25. Ms Jones-Roberts relayed Mr Smith's decision to Mr Saunders. She asked Mr Saunders to complete a risk assessment. The relevant risks were those associated with the claimant's reported conduct.

26. The claimant met with Mr Saunders at 11.30 a.m. on 27 January 2021. It is not clear whether Mr Saunders had by then seen Ms Herbert's email (p.61). Mr Saunders could not remember whether he had or not. On balance, I find he probably had not. I find it more probable that his information about the allegation came from his 2 telephone conversations with Ms Jones-Roberts.

27. However, Mr Saunders accepted that by the time he met with the claimant he knew that the allegation had been made by Ms Herbert and that it related to the use of the "n-word" in relation to Ms Greaves. I find he understood it to have been made on 3-4 December 2021. I accept his evidence that he genuinely (but he accepted mistakenly) understood that the alleged use of the word had been in the Oldham Station Mess Room in front of Oldham staff members.

28. There was no note of that meeting between the claimant and Mr Saunders. However, after the meeting Mr Saunders completed an "Initial Assessment and Risk Management" form ("the Risk Assessment")(p.62). That included a brief summary of "Actions to Date" and of the matters discussed with the claimant. Although the disciplinary Investigation Report index (p.230) refers to a Risk Assessment dated 29 January 2021 I accept Mr Saunders's evidence that he completed the Risk Assessment on the 27 January 2021. That is the date on the Risk Assessment itself.

29. The claimant disputed that the Risk Assessment accurately recorded what she and Mr Saunders discussed at the meeting. Specifically, she disputed that she had "admitted the allegation" as was recorded in the "Mitigations" section of the Risk Assessment. She said that her response to the allegation at the time was more accurately captured in her email headed "Apology" sent to Mr Saunders and Mr Stone (the Investigating Officer) the following day (p.63).

30. I find that at the meeting Mr Saunders told the claimant that an allegation had been made that the claimant had used the "n-word" in relation to Ms Greaves in front of other Oldham Staff at Oldham Mess Room on 3 or 4 December. I find that Mr Saunders did not tell the claimant who had made the allegation. I accept his evidence that the reason he did not say it was Ms Herbert who had made the allegation was not because he was seeking to protect her anonymity. I find it was because his focus was on assessing the risks of a repeat of the conduct rather than investigating the allegation.

31. On balance, I find that the claimant at that meeting accepted she might possibly have used the "n-word" in relation to Ms Greaves but said she would have done so in a light-hearted and not malicious way. I find that she was not positively

admitting to having used the word in the circumstances alleged. I do find that she was saying that she could not positively deny using the word and so might have used it in the context alleged.

32. I find that Mr Saunders advised the claimant to speak to her trade union rep, Jonathan Reading ("Mr Reading"). The claimant's evidence was that it was Mr Saunders who told her it would be appropriate for her to apologise. Mr Saunders's denied that. The claimant did not in her investigatory interview on 4 February 2021 (p.212-215) suggest that it was Mr Saunders who had advised her to apologise. I found Mr Saunders' evidence to be more reliable than the claimant's and prefer it on this point. I find it was the claimant who offered to apologise if she had caused any offence rather than Mr Saunders suggesting she do so.

33. I find that Mr Saunders told the claimant that Mr Smith had confirmed she could remain in work and was not suspended during the investigation into the allegation. Mr Saunders then completed the Risk Assessment and submitted it to Ms Jones-Roberts. His provisional conclusions were that "the risk of the claimant remaining in working and further using racist language was high".

34. Mr Saunders recorded in the Risk Assessment that in reaching that conclusion he took into account that it was not the first time that the claimant had used "racial language" at work and that a "previous warning was not taken seriously". I find that refers to an incident in July 2020 when Mr Saunders and 3 SPTL had witnessed the claimant using the "N-word" in Oldham station car park ("the car park incident"). The car park incident was also referred to at section 3 of the Risk Assessment headed "Concerns Identified". That noted that in "early 2020, possibly May 2020" the claimant had been spoken to by an SPTL and told her language was unacceptable and that if he heard her using racist language again he would pursue the matter formally".

35. I find Mr Shaw had spoken to the claimant at the time to make it clear that the language she used was unacceptable. Mr Saunders reiterated that to her the following day. It was not in dispute that no formal disciplinary action at the time. Instead, I find that the incident was dealt with by Mr Shaw and Mr Saunders "having a word" with the claimant.

36. Mr Saunders sent the Risk Assessment to Ms Jones-Roberts. I find it was referred to Mr Smith, but he decided that the claimant should not be suspended. The claimant continued in work until she began a period of long-term sickness absence on 10 March 2021. She remained absent from work due to ill-health until her dismissal.

37. On 28 January the claimant sent an email headed "Apology" to Mr Saunders and James Stone ("Mr Stone"). I will refer to that as "the Apology" (p.63). Mr Stone had been appointed as Investigating Officer. She copied the email to Mr Reading and I find that by then she had spoken to him and that on balance it was him who had advised her to formally apologise. Mr Saunders' evidence was that it was Mr Reading's standard practice to advise such an apology be made.

38. In the email the claimant said she was taking the opportunity to apologise following concerns raised about inappropriate language she had used in the

communal area. She said that due to the passing of time she was unable to recall specifically the context in which she used the unacceptable language but that it was never her intention to cause any colleague offence or distress. She offered a full and unreserved apology and said she felt she had let down herself, her colleagues and the respondent. She "did not dispute the possibility I have used the offensive word". She explained her daughters were "in long-term relationships with ethnic minority partners" and that it was quite common for them to use this word to describe themselves. She accepted however that that was "no excuse for me to have used it in a work setting and I personally refute any racist connotations as unacceptable and repugnant to me". She ended the email by repeating her unreserved apology and promised to use her best efforts to never use such language again "knowing the deep upset and distress it could possibly cause people directly and indirectly".

The investigation process

39. I did not hear evidence from Mr Stone. In outline, I find that the process was that he held a series of interviews with witnesses. He then prepared an Investigation Report. As provided by section 2.2 of the Disciplinary Policy and Procedure he submitted his Investigation Report to an Incident Review Panel consisting of a senior manager and an HR Manager. The Panel concluded the investigation was thorough and well-presented and agreed with Mr Stone's recommendation that formal disciplinary action should be progressed against the claimant. The Panel signed off its review report on 30 April 2021 (pp.106-110).

40. The Bundle included 2 versions of Mr Stone's Investigatory Report. The version at pp.91-105 was a draft version. I find the version at pp.216-230 was the final version submitted to the Incident Review Panel. The draft version is a near-final version and the details of the investigation, the evidence quoted and recommendations remain the same in both. There are minor changes in terms of formatting and re-ordering and re-numbering of the Appendices. In terms of changes the most significant is in the section headed "Incident Decision Tree" in each report.

41. The "Decision Tree" section in the draft report followed the "NPSA Decision Tree" at Appendix I to the Disciplinary Policy and Procedure (p.210). It set out a series of questions to be asked in reaching a decision about appropriate action in relation to an incident. The next question to be asked depended on whether the preceding question had been answered "yes" or "no". The initial questions dealt with whether the actions of an individual were intended and whether harm was intended. Subsequent questions aimed to assess whether ill-health or substance abuse issues were involved; whether the employee had departed from protocols or procedures; whether another comparable individual would have behaved the same way; and whether there were any significant mitigating circumstances.

42. The "Decision Tree" section in the final report followed the "Just Culture Decision Tree" (p.211). This followed a similar approach to the NPSA Decision Tree using the same headings ("deliberate harm test"; "health test" etc) but with differently worded questions. I do not find that there were significant inconsistencies in the way Mr Stone answered the questions in the draft and final versions.

43. On balance I find that Mr Stone had used the incorrect decision tree in his draft and been advised to use the up to date "Just Culture" decision tree instead.

That may explain the difference between the date when he says he submitted his report to HR (18 March 2021 – p.218) and the date it was recorded as submitted in the Incident Report Panel report (25 March 2021 – p.107).

44. It does not seem to me that anything turns on the differences between the draft and the final version. In both cases Mr Stone answered the Health/Incapacity Test in the decision tree by saying there were no indications of physical or mental ill-health and in both said there were no significant mitigating circumstances.

45. Mr Stone conducted the interviews with witnesses between 3 February 2021 and 9 March 2021. There were notes of each interview on a "Statement Proforma" (pp.64-90). As I discuss below there was a dispute about what the claimant said in interview. There was no suggestion that the notes of other witnesses' interview were inaccurate. The notes were included as Appendices to Mr Stone's Investigation Report.

46. Ms Herbert and Ms Greaves were interviewed on 3 February 2021.

47. Ms Herbert confirmed that the claimant had referred to Ms Greaves as "that n-word" on 3 or 4 December 2020. Ms Herbert said that it had happened when just she and the claimant were sitting in the ambulance they were crewing. They were discussing an incident which had occurred when the claimant and Ms Greaves were on light duties at Oldham station. Ms Herbert's evidence was that the claimant and others present at the station (including Ms Greaves) had been talking about another member of staff, Ms Dawson. Ms Greaves had then reported that conversation to Ms Dawson who had complained to Mr Saunders about what was said about her. Mr Saunders had challenged those present about what had happened. The claimant was unhappy because she felt Ms Greaves had not accurately reported to Ms Dawson what had been said. The claimant also felt that she had not actually contributed to the discussion about Ms Dawson. Ms Herbert said that the claimant felt that Ms Greaves had caused her a problem that didn't need to exist. Ms Herbert confirmed she was friendly with Ms Dawson so the claimant felt she could discuss the situation with Ms Herbert. Ms Herbert confirmed she had not challenged the claimant at the time because the claimant was an established person at Oldham and Ms Herbert wasn't sure who to speak to about it. Her union rep was Ms Greaves and she didn't want to upset her by telling her about what happened. She confirmed the explanation she had given Ms Jones-Roberts about why she had not reported the matter earlier. In answer to Mr Stone's specific questions, she confirmed she had not seen the claimant display similar behaviour although she also said she had not worked with her that often (pp.64-65).

48. Ms Greaves' statement (pp.66-70) confirmed the circumstances in which Ms Herbert had told her about the allegation. She gave evidence that the relationship between her and the claimant was not good. She gave various examples. It seems to me that one of the examples she refers to is the incident where Ms Dawson reported to Mr Saunders that other staff had been talking about her. It is clear from Ms Greaves' statement that she felt that the claimant was antagonistic towards her both before and because of that incident. Mr Stone asked Ms Greaves whether she was aware of any other occasions where the claimant had said something which might be considered racist or discriminatory. Ms Greaves did not suggest the

claimant had spoken to her directly using the “n-word”. Ms Greaves explained the impact of the incident on her, saying that in her eyes it was” the worst word you could call a black person” and reporting that her blood pressure was raised, that she did not want to leave the house and that when in work she would check to see whether the claimant was going to be on the station because being in her presence made her feel apprehensive and uncomfortable due to her behaviour.

49. The claimant was first interviewed on 4 February 2021. Mr Reading, her union rep, was also present. The notes of that meeting were at pp.212-215. They were the notes on which the claimant’s investigation Statement was based.

50. I find that the claimant’s position was that she could not remember using the n-word in December 2020. Her answers at the interview were somewhat confused but she but did appear to accept that because it was a word used at home it “may have slipped out”. She was clear that if it had, it was not used with any malicious intent. She accepted that it was a word that was unacceptable in the workplace.

51. Part way through the interview, Mr Stone said that in order to be able to answer the claimant “needed to know what she was accused of. He said that the allegation was “during a shift in early December you’ve said it to your crewmate in reference to an individual. You’ve described someone else as ‘that n-word’”. The claimant repeatedly said she could not remember doing that. Mr Stone said that what he was not wanting to do was for the claimant to make stuff up. The claimant repeated that she could not remember. At that point in the notes (mid-way through p.213) there is a “Clarification that [the claimant] doesn’t disagree she said the word, she just didn’t remember it.”

52. Mr Reading made the point that there was no context for what Mr Stone was asking. I find that Mr Stone seemed reluctant to name names of staff involved. Only when prodded by Mr Reading did he clarify that the allegation related to a conversation in the cab with a crew mate about a black member of staff who the claimant was alleged to have referred to as “n-word”. He did not name Ms Greaves at that point nor did he name Ms Herbert as the crew member with whom the conversation was alleged to have taken place. Ms Greaves was the only black colleague based at Oldham. Mr Stone clarified that it was a negative conversation and that “there had been a dispute with members of staff”. I find that was referring to the issue with Ms Dawson but Mr Stone did not name her at this point.

53. Mr Stone then asked the claimant whether she had been spoken to before about use of language. I find Mr Stone was there referring to the car park incident. I find that his information about that incident had come from the Risk Assessment. The claimant confirmed there was an incident when Mr Shaw had a word with her because she used the n-word to her step-daughter’s boyfriend on the phone. She thought it might have been overheard.

54. Mr Stone did then clarify that the member of staff being spoken about negatively was Ms Greaves. Mr Reading pointed out that given the claimant had been told that the incident was in the mess room it was no surprise she was flummoxed. Mr Stone accepted she had been given the wrong information and then provided more context by telling her that the specific conversation when she was alleged to have used the n-word was regarding Ms Dawson. He still did not tell the

claimant that it was Ms Herbert who she was alleged to have had the conversation with. He did not do so at any point during the interview.

55. The claimant confirmed that there had been a discussion about Ms Dawson in Oldham station to which she wasn't a party. She confirmed she was subsequently asked by Mr Saunders whether she had told people about Ms Dawson's health issues. The claimant said she had gone to speak to Ms Greaves. She said Ms Dawson thought she had broken her trust but said there wasn't a nasty conversation and no confrontation.

56. There was then a break in the meeting. On return, the claimant confirmed she did not recall a conversation with someone in the cab about Ms Dawson – she didn't have a thought about who it could be. She apologised again if she had said the "n-word" but said she could not remember anything about it.

57. At the end of the meeting Mr Reading summed up the claimant's position as being that she was under no circumstances denying the use of the word. Given her home situation there was potential that she might have used it. He said that there was no excuse for using the word but the claimant had apologised; knew it was inappropriate; made efforts to change her home life so the word didn't "dribble into her vocabulary" and would never use it again. She would welcome input in terms of training or diversity courses. The claimant closed by saying she had racked her brains but "I can't think who I was with" despite checking the rota and her diary.

58. The first version of the statement produced from that interview was at pp.71-73. In terms of key points it confirmed that the claimant could not remember using the n-word but if it had slipped out it would not be malicious but an accident. It also confirmed that the claimant did not recall having a conversation with a colleague in the cab about the fall out from Ms Dawson's complaint to Mr Saunders. It also recorded the claimant saying that the n-word was one used at home because she lived in a multicultural household and that it was probably a word that had slipped out. In relation to the car park incident, the statement recorded the claimant as saying that there was one incident with Mr Shaw at some point in 2020 when he overheard her using the word on the phone to her daughter's boyfriend. Mr Shaw had had a word with her and told her the word was unacceptable and she apologised. She was unable to recall when that was.

59. The claimant was sent that first version of the statement to review. She requested that the statement be amended. That second, amended, version was at pp.74-76. The amendments were to the answers recorded to Mr Stone's questions to the claimant at paras 6, 7 and 9 (para 10 in the original version). The amendments to paragraphs 6 and 7 clarified the claimant's family situation. As in the original statement, she confirmed that she "lived in a multi-cultural household" and was "about to be a grandmother to a mixed race grand-child". As in the original version, she confirmed that she would use the "n-word" at home and that it was used by her step-daughter's Afro-Caribbean partner as a greeting. She also confirmed that if the word had slipped out at work it was probably an accident, adding that it was due to "recent familial contact" and would not have been done intentionally or to offend anybody. The amended version removed the statement at paragraph 9 of the original

version that the claimant had told her family numerous times that she would lose her job if she didn't make adjustments to the language she used.

60. The amended paragraph 9 (equivalent of paragraph 10 in the original) confirmed that Mr Shaw had spoken to her at some point in 2020. However, the amended version removed reference to the claimant having referred to her step-daughter's boyfriend as "n-word" while on the phone to him. In the amended version, the claimant said she was not 100% sure of the incident or the circumstances but did remember speaking to her step-daughter's boyfriend earlier that day.

61. Both versions of the claimant's statement were included in the pack for the Disciplinary Hearing. When it comes to paras 9/10 I find that the first version accurately reflected what the claimant said at the interview with Mr Stone. She had during that interview confirmed that she had used the n-word to her step-daughter's boyfriend (p.214).

62. Mr Stone interviewed Mr Shaw on 9 February 2021. He confirmed that on 1 July 2020 the claimant had come into the yard in Oldham station where he and other SPTLs were sitting and said "what's that n-word being doing all day". He confirmed he had spoken to her about that word being unacceptable at the time. Having thought about it further overnight he said he also pulled the claimant to one side on the following day and told her again that the comment was unacceptable and racist and that he did not want to hear any other racist comment again. He said the claimant played it down and said the comment was only made in jest. Mr Shaw told Mr Shaw he had had a word with the claimant. Mr Shaw's statement does not suggest that Mr Stone asked him about the claimant's suggestion that he and his colleagues had overheard the tail-end of her conversation with her step-daughter's boyfriend and that it was him she had referred to as "n-word". Mr Shaw confirmed he was not aware of any other occasion when the claimant had used similar language or behaviour (pp.77-78)

63. Kelly Barton was interviewed on 1 March 2021 (pp.79-80). She was a SPTL and was asked about the July 2000 incident. She confirmed that the claimant had said "what's that lazy n-word done today" in the yard/car park outside Oldham station in the presence of herself, Mr Saunders, Mr Green and Mr Shaw. Her evidence was that it was clear to her that the clamant was referring to Ms Greaves. She knew that because Ms Greaves was the only black person at the station and she was aware the relationship between the two of them was not a good one. She confirmed that Mr Shaw had spoken to the claimant about it at the time. She confirmed that she was not aware of any other occasion when the claimant had used similar language or behaviour. She was not specifically asked about the claimant's suggestion that the use of the "n-word" was in an overheard conversation with her step-daughter's boyfriend.

64. On the 1 March 2021 the claimant was interviewed by Mr Stone for a second time. Mr Reading was present. Instead of a statement there was a transcript of that interview, which lasted around 30 minutes (pp.81-86). I find that the claimant was confused and uncertain at that meeting. At one point she said that her memory was "awful" at the minute. She was asked by Mr Stone about the changes to para 10 of her original statement. He confirmed that because he was certain that she had

referred to the telephone conversation with her step-daughter's boyfriend in the interview on 4 February 2021, he was intending to include both versions of her statement from that interview in the investigation pack. He asked the claimant about the July 2020 incident. The claimant confirmed that Mr Shaw had spoken to her on the day of the incident but she was definite that she did not remember any conversation with Mr Shaw in the office on the following day. She confirmed that she spoke to her step-daughter's boyfriend on the phone a number of times a day and had done so earlier on the day of the incident. When asked whether she accepted that she had used the "n-word" in some kind of context in July 2020 she said "yeah probably. I'm not going to deny that I don't use the word as it was quite frequent in my house, well it was until this." Mr Stone asked the claimant whether her using the "n-word" in the telephone conversation was a third example of her using that word. The clamant was confused by the question but when it was clarified she accepted that she did call her step-daughter's boyfriend "n-word" but "not in work, it's not being used at home at the minute either".

65. On 4 March 2021 Mr Stone interviewed Mr Saunders. He confirmed the claimant had used the "n-word" in the Oldham station yard and that he was clear that she was referring to Ms Greaves. He said it was in "June 2020". He confirmed that Mr Shaw had spoken to the claimant. Mr Saunders said that the claimant had come into his office on the day after the incident to tell him that Mr Shaw had told her off. Mr Saunders had told the claimant that the language was totally unacceptable. Mr Saunders confirmed he was not aware of any other occasion when the claimant had used similar language. Mr Saunders was not asked about the claimant's suggestion that the use of the "n-word" was in an overheard conversation with her step-daughter's boyfriend (pp.87-88).

66. On 9 March 2021 Mr Stone interviewed Mr Green. He also confirmed that the claimant had used the "n-word" in the context described by Mr Shaw, Mr Saunders and Ms Brooks. He confirmed that Mr Shaw had challenged the claimant on the day and that Mr Shaw had also spoken to her the following day. Mr Green confirmed he was not aware of any other occasion when the claimant had used similar language. Mr Green was not asked about the claimant's suggestion that the use of the "n-word" was in an overheard conversation with her step-daughter's boyfriend (pp.89-90).

67. Having carried out his evidence gathering, Mr Stone then wrote up an Investigation Report for submission to the Incident Review Panel (pp.91 to 104).

68. His report referred to "Allegations" (para 2.2) which was the allegation made by Ms Herbert in January 2021. Under a separate heading it referred to "Secondary Allegations" (para 2.3). These were said to be the allegation that "the claimant had made a further reference to Ms Greaves in a racist and discriminatory manner" and that the claimant had "used racist language during a telephone conversation with a relative".

69. Section 5 of the report clarified what the "specific allegations" were and summarised the evidence in the statements and interviews Mr Stone had carried out.

a. "Specific Allegation 2" (para 5.2) referred to the car park incident in July 2020 although it was said to be "approx. June 2020". It was said to

have been disclosed by Mr Saunders in the risk assessment and then by the claimant in her interview on 4 February 2021.

b. "Specific Allegation 3" (para 5.3) was said to be that the claimant "had used the word "n-word" whilst in the workplace during a telephone call with a relative. That allegation was said to have arisen from the claimant's own recollection during the interview on 4 February 2021, i.e. when she referred to the telephone conversation with her step-daughter's boyfriend.

70. Mr Stone's "Findings" were set out in section 6 of his report.

a. Allegation 1 was "upheld" on the basis that Ms Herbert's recollection of events was clear whereas the claimant said she "was unable to say whether she remembered whether she said the n-word or not". Mr Stone's report does not make clear that the claimant had not been told that it was Ms Herbert who she was alleged to have made the comment to.

b. Specific Allegation 2 was also "upheld" because there were a number of witnesses who recalled very similar accounts of the car park incident.

c. Specific Allegation 3 was also "upheld". The only evidence for this allegation was that of the claimant. Mr Stone said the claimant at her second interview "admits she may have used the word at work while in conversation with a family member on the telephone". Mr Stone did not make clear that none of the witnesses to the car park incident had been asked about this allegation.

71. In the Mitigation section (section 7) Mr Stone referred to the fact the claimant was exposed to the n-word" on a regular basis at home because of the multi-cultural nature of her family. He also noted that Mr Reading had said the claimant would be producing a statement about her mental health in due course but that that had not been received at the point when the report was prepared. By the time he was finalising the report the claimant was off sick but had not yet had a consultation with Occupational Health.

72. Mr Stone's concluded that allegations 1 and 2 were a breach of the Respondent's Gross Disciplinary rules namely unlawful discrimination or harassment against a member of staff (para 2.17) and a serious act of bullying or harassment in connection with employment (para 2.21). He concluded that allegation 3 breached the respondent's General Disciplinary Rules because it was a failure to comply with the respondent's standards or procedures (para 3.6); that it was personal behaviour or attitude inconsistent with the respondent's values, in the course of employment (para 3.8); and was a failure to maintain the respondent's required standards of behaviour with reference to its Dignity at Work policy and relevant codes of conduct (para 3.9). Mr Stone's recommendation was that disciplinary allegations should be progressed against the claimant. In completing the decision tree, he recorded that there was no intention to cause harm, no indications or physical or mental ill-health and no mitigating circumstances.

73. The Incident Review Panel considered Mr Stone's report on 14 and 23 April 2021 and agreed with his recommendations. Its rationale was that the explanation that the language used was a normal factor within the claimant's home and that she found it difficult to limit that unacceptable behaviour to home was not acceptable. It concluded that that type of language was "unacceptable regardless of where it occurs" and should not be condoned by the respondent. It accepted the recommendation that the disciplinary action should be based on a breach of paras 2.17 and 2.21 but also suggested that the Investigating Officer should also consider para 3.8 under the general misconduct rules.

The claimant's sickness absence

74. The claimant was absent from work for ill-health reasons from 10 March 2021. Initially, that was due to physical symptoms related to gynaecological and abdominal issues. Those symptoms resulted in exploratory surgery. She had an informal sickness absence review with Mr Saunders on 27 April 2021 and he and various SPTLs checked in with the clamant by phone on more or less weekly basis.

75. The claimant was referred to the respondent's occupational health centre ("OH"). She had a video consultation with Dr Loren Zelic on 5 May 2021. Dr Zelic's report of the same date confirmed the claimant was unfit for work (p.111). Dr Zelic noted that there had been reassuring news in relation to the physical symptoms and medical concerns which were the initial cause of the claimant's absence. The consultation focussed instead on the claimant's mental health. Dr Zelic reported a decline in the claimant's psychological well-being. That was due to numerous difficult personal challenges the claimant had faced over the last year. That had had an impact on the claimant's mood and motivation. The report noted the claimant had approached her GP for support a few months previously and was undergoing counselling. She was due to see her GP again to review her treatment and progress. Dr Zelic advised that the claimant's absence was likely to continue until there had been further improvement in her psychological well-being. Dr Zelic anticipated that would be an additional 8 weeks at least.

76. The OH referral had asked about the claimant's fitness to attend formal meetings. Dr Zelic advised that the claimant had communicated well during the consultation and believed that the claimant would be able to understand the nature of formal issues with extra time if necessary. Dr Zelic noted she had mentioned that the claimant would be able to instruct a representative to act on her behalf to "support her through the process".

77. Ms Jones-Roberts carried out a Formal Long Term Sickness Absence Review meeting on 27 May 2021. Mr Reading and Mr Saunders attended as did a representative form HR. The purpose of the meeting was to discuss the advice in the OH Report and any supportive measures the respondent could put in place to assist the claimant's recovery and return to work. Ms Jones-Roberts was extremely concerned about the claimant's mental health as a result of what the claimant told her at that meeting about how she was feeling. Ms Jones-Roberts went so far as to get the claimant's permission to disclose what they had discussed to the claimant's husband who is a paramedic. It was agreed that the claimant would be re-referred to OH (pp.123-124).

78. On 17 May 2021 the claimant was invited to attend a disciplinary hearing on 18 June 2021 (pp.114-115). That hearing was postponed because of the claimant's ill-health. The claimant said that Mr Saunders pressured her to return to work so the process could be concluded. That was not put to Mr Saunders in cross examination. On balance I find that did not happen. It is not consistent with the approach of the respondent in the absence meeting or its decision to postpone the original disciplinary meeting.

79. Dr Zelic carried out a telephone review with the claimant on 3 June 2021. The resulting OH Report of 3 June 2021 advised that the claimant remained unfit for work due to her low mood. Dr Zelic reported that that low mood was having a significant impact on the claimant's daily functioning with anxiety making it difficult for her to leave her home. The discussion with the claimant had not identified any major work-related factors contributing to the situation. Instead, the issues stemmed from personal pressures including bereavement and the ill-health of family members. Dr Zelic advised that the claimant was not in the right frame of mind to participate in formal work matters at that time. The claimant had reported being overwhelmed with everything that was going on and not feeling able to participate in the disciplinary process even with a representative to act on her behalf. Dr Zelic's advice was to temporarily delay any formal work matters as a short-term measure. Dr Zelic anticipated that the claimant's absence would continue for many weeks. A further OH review was to be organised for mid-July (p.116).

80. On 6 July the claimant emailed Mr Reading to ask him to continue with the disciplinary process on her behalf. She explained that her mental health had not been great for a while and said that she felt the process needed to be completed to help with her recovery. She said that she felt attending the hearing may set her back because she had started to make slight progress (p.118). On 8 July 2021 she emailed Mr Readng to confirm she was happy for the hearing to continue in her absence. She said she understood it would be within 21 days which was "fine by me". She asked Mr Reading to get the [management] pack and "please continue". She said that she did not wish to receive the management pack because she was worried that would set her back. She confirmed that her next OH review was on the 13 July 2021 (p.119).

81. That further OH review took place by telephone consultation on 13 July 2021. The OH Report from that meeting (dated 13 July 2021) reported that the claimant had had some initial improvements in her psychological well-being since the previous OH consultation. The indication was that the claimant's medication and treatment were helping and that she had also worked with her GP on a structured plan to introduce more day to day activities to her day. That was helping with her anxiety. Dr Zelic advised that the claimant was still not at a point where she was fit to resume work.

82. The claimant told Dr Zelic that she had instructed an union representative (i.e. Mr Reading) to act on her behalf in formal meetings. Dr Zelic said that "on balance, I believe this is the right way forward". Dr Zelic made other recommendations which would make the claimant more comfortable about being involved in formal meetings. They included attending meetings virtually, over the phone or in a neutral environment. The OH Report advised that the claimant would understand the formal

process and could make decisions with the support of her union representative. It advised that the claimant may benefit from written information with extra time. (p.122).

The lead up to the Disciplinary Hearing

83. On 8 July 2021 she claimant was sent a letter requiring her to attend the rescheduled disciplinary hearing on 28 July 2021 (pp.120-121). It referred to "the allegation" being that that the claimant had used racist terminology towards a colleague. It said the allegation amounted to breaches of the respondent's disciplinary rules. It specified 3 breaches, the first 2 being gross misconduct breaches and the third being a general misconduct breach. The allegation was said to be:

a. Unlawful discrimination or harassment (para 2.17 of the Disciplinary Rules on p.195)

b. Serious acts of bullying or harassment (para 2.21 of the Disciplinary Rules).

c. Personal Misconduct including inappropriate behaviour or attitude inconsistent with the respondent's values in the course of employment (para 3.8 of the Disciplinary Rules on p.196).

84. The letter did not set out the factual details of the "allegation" said to amount to these breaches. It said that an accompanying management pack "would follow". It noted that Mr Reading would be "supporting" the claimant at the hearing and confirmed he had been sent the letter and would be sent the management pack. The letter was in identical terms to that sent on the 17 May 2021 other than the change of relevant dates.

85. The management pack made it clear that there were 3 allegations against the claimant. The first was the 3-4 December 2020 incident. The second was the car park incident. The third was her use of racist and discriminatory language during her telephone conversation with her step-daughter's boyfriend. The management pack included Ms Herbert's initial complaint email and her statement. The pack was sent to Mr Reading so from that point he was aware that the first allegation related to a comment made to Ms Herbert. The respondent accepted that the claimant was not sent the pack. I find that was because the claimant had made clear to Mr Reading she did not want to be sent it.

86. Mr Reading prepared written submissions ("the Submissions") for the hearing on behalf of the claimant. By the time he did so he had been sent the management pack. He cross-refers to sections of that pack in the Submissions.

87. Mr Reading sent the Submissions to the claimant on 20 July at 12.45. She responded 45 minutes later to say she had read through all the submissions and was happy for Mr Reading to send the relevant documents ahead of the hearing (p.126). In cross-examination evidence the claimant said she had not in fact read the Submissions before emailing Mr Reading to say she was happy with them. I accept that evidence but find that Mr Reading could not have known that from the wording

of her email to him. Mr Reading forwarded the submissions to Ms Stephens of the respondent's HR team that same day (p.127).

88. The Submissions denied the gross misconduct charges but admitted the misconduct charge. They said the claimant accepted she probably did use the "n-word" twice and agreed that that was unacceptable. She denied that she harassed or bullied Ms Greaves. The Submissions pointed out that a press release by Ms Greaves' union in June 2021 made it clear that she was "blissfully unaware" of the comments made until they were reported to her in January 2021. The key point made in the submission in relation to the first 2 allegations was that the claimant had not used the "n-word" to or in Ms Greaves presence and had had no intention to harass or offend. When it came to allegation 3 (the claimant using the word to her step-daughter's boyfriend on the phone) the submission said that Mr Stone had "extrapolated" that 3rd incident from the claimant's own account. By her own admission, the claimant's memory was "an unreliable source" so the suggestion was the evidence for that allegation was unreliable. The claimant apologised again at the end of the Submissions and said she was happy to participate in any sort of assistance or education to reinforce expected behaviours and language in the workplace.

89. The "mitigation" section of the Submissions referred to the use of the "n-word" in the context of the claimant's multi-cultural household. It also said that in her declining mental health the claimant used the word in the work environment and was deeply repentant. It explained that memory was a problem when you are ill and that "moral boundaries become difficult to rationalise, there are human factors that can affect all of us" (p.132).

90. There were 4 appendices to the Submissions. The first was the claimant's email of 8 July confirming she was happy for Mr Reading to continue with the hearing in her absence. The second and third were copies of the union's press release and an article in the Bolton News both of which confirmed that Ms Greaves was unaware of the comments when they were made. The Submissions suggested that the union was putting pressure on the respondent to push through to a conclusion on the disciplinary proceedings. The press release does say the union wanted the respondent to "press the accelerator on the disciplinary process" (p.137).

91. Appendix 4 was an email from the claimant to Mr Reading dated 25 May 2021. It set out in details the numerous personal challenges which the claimant had faced over the preceding 20 months which had led to the decline in her mental health. Those challenges included extremely difficult personal circumstances including bereavements and serious physical and mental health issues involving the claimant's immediate family. In that email the claimant also explained again the diverse nature of her home life which had led to normalisation of use of the "n-word" in her household. She also pointed out that when she was spoken to by Mr Saunders initially she had been wrongly informed that her use of the word was in the Oldham mess room.

92. Mr Reading provided copies of the claimant's OH Reports with the Submissions.

<u>The Disciplinary Hearing and the decision to dismiss</u>

93. The disciplinary hearing took place on 28 July 2021. The hearing was chaired by Mr Smith who was assisted by Charlotte Binns, HR Manager. Mr Stone attended to present the management case. Ms Jones-Roberts attended to support him. Rachel Stevens, HR Administrator, attended as note taker. The claimant did not attend but was represented by Mr Reading.

94. The notes of the hearing were at pp.144-153. The claimant could not give evidence about what happened at the hearing or challenge the notes because she did not attend the hearing. I base my findings about what happened at the hearing on those notes and Mr Smith's evidence. Mr Reading did not give evidence at the Tribunal hearing.

95. At the start of the hearing Mr Smith checked that the claimant was not going to attend. Mr Reading confirmed that was the case. I find that Mr Reading had suggested alternatives to allow the claimant to participate such as her dialling in remotely or attending in a different room. Based on her emails to Mr Reading, I find that the claimant had made clear that she did not feel able to attend but wanted the process to continue to its conclusion in her absence.

96. Mr Smith considered whether it was appropriate to continue in the claimant's absence. He concluded that it was, given the comprehensive nature of the Submissions, the fact the claimant had been given ample notice and had been offered alternatives to attend which had been refused. In reaching his decision he also referred to the OH Report suggesting that continuing with the process was in the claimant's best interests.

97. I find that Mr Smith was conscious of the impact of the claimant's absence on the way the hearing was conducted. He made it clear that no new matters could be introduced at the hearing by the management side. Everything would have to be based on what was already in the management pack. In answer to Mr Smith's question, Mr Reading confirmed that the claimant had not seen the management pack because she had refused to see them. He confirmed, however, that he had been through the pack top to bottom and had sent the claimant a presentation which identifies the parts of the pack in it and the claimant had "confirmed the pack we've submitted", i.e. the Submissions.

98. Mr Stone presented the management case. Mr Reading confirmed he had no questions for him. He confirmed that the claimant was "not in denial that [the claimant] had used the word". He said that Mr Stone had "presented a good management case".

99. In answer to Mr Smith's question, Mr Stone confirmed that he had thought long and hard about whether the claimant had intended to cause harm. He said his conclusion was that the claimant had not intended to harm Ms Greaves but had not thought through making the comment, i.e. using the n-word. In answer to further questions from Mr Smith he confirmed that his view was that when the claimant used the term in relation to Ms Greaves it wasn't a term of endearment but was used in a negative manner and in an angry way. It was, he accepted, used in a negative context. He also confirmed that the 4 managers who had witnessed the claimant's use of the n-word in July 2020 had viewed it in a negative manner. He confirmed that Ms Herbert and the 4 managers found the use of the word unwanted and

unwelcome. He confirmed that Ms Greaves had not heard the term about her directly.

100. Mr Reading did question Mr Stone about the third allegation (the telephone conversation). He put it to Mr Stone that the only evidence for that allegation was the claimant's own recollection in answer to a question put to her by Mr Stone in interview. He suggested the claimant did not understand the question put to her. Mr Stone confirmed his view that the claimant had recalled an incident clearly which was separate from the second incident.

101. Mr Reading then presented the claimant's case, reading the Submissions. Mr Reading was then questioned by Mr Stone. Mr Reading accepted that the claimant had used the n-word on two occasions in 6-8 months. His case on behalf of the claimant was that to be bullied and harassed a person has to be aware of the word being said, which Ms Greaves was not. He accepted however that Ms Greaves had subsequently been made aware of the word being used.

102. When it came to the points made in mitigation, Mr Stone queried how the claimant could have remained on operational shifts if her mental health crisis was as severe as had been suggested in the Submissions. Mr Reading said that he could only answer on what the claimant had told him, which is that she had wanted to be operational because it was good for her and that she was in denial about how unwell she was. l.

103. Turning to the car park incident in July 2020, Mr Stone asked who the n-word was used to if not in relation to Ms Greaves. Mr Reading's answer was that the claimant did not remember the incident but had put forward the suggestion that she was talking to her step-daughter's boyfriend on her mobile phone. The claimant's case was that she might have been making a joke. He confirmed, however, that the claimant did recall saying the word. He also confirmed that the claimant accepted that the word was totally unacceptable. Mr Smith asked Mr Reading whether the claimant accepted that she did say the word in front of Ms Herbert, and Mr Reading confirmed that she did (page 149). In answer to Mr Smith's questions, Mr Reading also confirmed that it was said about Ms Greaves. He said it was for the panel to decide whether it believed the word was said in a negative way on this occasion.

104. Mr Reading reiterated on a number of occasions during the hearing that the claimant did not deny using the n-word and had issued an apology. He said (page 150) that the claimant "holds her hands up in terms of general misconduct. She says it's totally out of order". He also confirmed that the claimant totally understood the gravity of using the word.

105. Mr Reading made 3 main points on the claimant's behalf. The first was that even though she accepted she had used the "n-word" twice, her use of it did not amount to harassment, bullying or discrimination. It was not said to Ms Greaves and not said with a harassing or discriminatory purpose. Ms Binns put it to him that the definition of harassment includes creating an offensive environment regardless of intent. Mr Reading's response was that Ms Herbert did not raise a concern at the time or report it which was not the action of someone who was offended. When it came to the car park incident, he pointed out the four managers listened to the word but did not start any formal procedures or write anything down. His suggestion, I

find, was that if the n-word had the offending effect which Ms Binns was suggesting then the managers would have taken formal action.

106. Mr Reading's second main point was to ask how, given the low-key approach taken by her managers to the car park incident, the claimant was meant to know the use of the word amounted to gross misconduct. He confirmed that he was not saying that the claimant did not know the behaviour with Laura Herbert was incorrect.

107. Mr Reading's third main point was that the investigation was flawed by the introduction of the third allegation. That allegation was never put to the witnesses to the car park incident and derived solely from the claimant's flawed recollection of events.

108. After an adjournment of around an hour at 11.46am Mr Stone and Mr Reading gave their summing up. The meeting adjourned at 12.55pm and resumed at 14.56pm. Mr Smith confirmed that the panel's decision was that the claimant was summarily dismissed for gross misconduct.

109. Mr Smith confirmed the panel's reasons for the dismissal in his letter of 30 July 2021 (pages 155-158). In brief, it was satisfied that the claimant had on at least two occasions used the "n-word". It noted that Mr Stone's investigation concluded on the balance of probability that there were two such occasions when the term had been used in a derogatory way about Ms Greaves. Mr Smith recorded that the panel had heard that the claimant accepted during the investigation that she had potentially used the term and that she understood it to be unacceptable. They also heard that she wished to extend her apologies to the individuals involved. They referred to the mitigation, including the domestic environment where the term was in regular use and had perhaps become normalised for the claimant. However, the panel had heard at the hearing that the term was not being used as a positive label and that on both occasions when it was used it was being used negatively about Ms Greaves. The panel had noted the claimant's submission in mitigation that she was aware the term should not be used. It also noted that on one occasion the claimant was able to recall a manager speaking to her about the use of racist language in the workplace. Although the panel noted the claimant was unable to recall why that conversation had taken place, the panel agreed that it was highly probable that it followed on from the car park incident. The panel heard that the claimant had been spoken to about that incident, although no formal action was taken. The panel was however satisfied that there had been a conversation with the claimant about the term being used in the workplace. I accept Mr Smith's evidence that in reaching its decision the panel did not rely on allegation 3.

110. The panel in reaching its decision therefore took into account that the claimant had had training and education by the respondent on the values and expected standard of behaviours and, despite a specific occasion when a manger had spoken to her about acceptable behaviour, the claimant had used the term again when speaking negatively about a colleague. That occurrence was witnessed and subsequently reported by a member of staff. The panel had also heard that Ms Greaves had been made aware of the claimant's behaviour by Ms Herbert which prompted the investigation. The panel confirmed that it had heard the mitigation provided by Mr Reading relating to the claimant's mental health and had considered

that in their deliberations. The letter recorded that the panel concluded on the balance of probabilities that the claimant had twice used the n-word whilst in work in a negative manner about a BAME colleague. While the individual did not directly hear the claimant use that term, they had since been made aware of it and on both occasions other colleagues did hear it.

111. The panel had then considered whether that behaviour amounted to a breach of the relevant misconduct rules. In relation to rule 2.17 (unlawful discrimination harassment) it found the claimant's behaviour amounted harassment of the staff member based on their race. It noted that harassment could be intentional or unintentional unwanted behaviour linked to a protected characteristic that violated someone's dignity or creates an offensive environment. It noted that could be a serious one-off incident as well as repeated behaviour. It considered each element of that definition in turn. It found that the use of the word was unwanted by the respondent, which has no tolerance of racist behaviour. Secondly, it found that the behaviour was unwanted by colleagues. None of those who heard the term felt it to be wanted or invited the behaviour and one was left feeling very uncomfortable and another felt the need to challenge the behaviour. Finally, and most importantly, the individual who was referred to (i.e. Ms Greaves) reported feeling degraded. On that element therefore the panel concluded that the behaviour was unwanted by multiple individuals including Ms Greaves. The panel then considered whether the unwanted behaviour was linked to a protected characteristic and found that it was, the n-word being widely accepted as being linked to race. The panel then considered whether the use of the term violated someone's dignity or exposed them to an offensive environment. It concluded that Ms Greaves' dignity had been compromised by the use of the term, and that anyone who heard the use of the term in a negative manner were exposed to an offensive environment. On that basis it concluded that the claimant's behaviour amounted to a breach of rule 2.17.

112. When it came to breach of rule 2.21 (serious acts of bullying, harassment in connection with employment) the panel concluded that there was no evidence of bullying. However, it was satisfied that the claimant's behaviour amounted to harassment and so there was a breach of gross misconduct rule 2.21.

113. When it came to the lesser charges of general misconduct rules 3.6 (failure to comply with trust or departmental standards or procedures); 3.8 (personal misconduct including inappropriate behaviour or attitude inconsistent with the respondent's values in the course of employment) and 3.9 (failure to maintain the Trust's required standards of behaviour), the panel also found the claimant's behaviour breached those rules.

114. The panel then considered what the reasonable response to those breaches was. Having considered the range of responses available, the mitigation submitted and the apology the claimant had extended it found that "the proven behaviour to be abhorrent and so far outside of acceptable and reasonable behaviour and of such a serious nature that the full range of sanction had to be considered". Having concluded that the presentations to the panel demonstrated that the claimant was fully aware that her behaviour was unacceptable yet repeated it, limiting the confidence that a corrective sanction short of dismissal would adequately manage

the future risk to colleagues in the workplace, the panel decided that summary dismissal was the most reasonable and appropriate sanction.

115. The claimant was summarily dismissed with effect from 28 July 2021. The letter from Mr Smith confirmed her right to appeal within 14 days. The claimant did not appeal. Her evidence was that she could not find anybody to assist with the appeal.

116. It was put to Mr Smith that his decision to dismiss had been influenced by the Tribunal claim brought by Ms Greaves against the respondent. Mr Norbury put it to him that the Grounds of Resistance to that claim was filed before the disciplinary hearing took place. At paragraph 10 of those grounds the respondent accepted that the claimant made the discriminatory comments. The suggestion was that the respondent had pre-judged the outcome of the disciplinary hearing. Mr Smith's evidence was that he was aware of the claim brought by Ms Greaves when he conducted the disciplinary hearing. I found him a credible witness and accept his evidence on this point.

Relevant Law

117. S.94 Employment Rights Act 1996 ("ERA") gives an employee a right not to be unfairly dismissed by their employer. To qualify for that right an employee usually needs two years' continuous service at the time they are dismissed, which the claimant had in this case.

118. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or if more than one the principal reason) for dismissal is one of the potentially fair reasons set out in s.98(2) of ERA or some other substantial reason justifying dismissal.

119. The reason or principal reason is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

120. An employer with grounds to dismiss for a fair reason, such as misconduct, might still be found to have dismissed for an impermissible reason if the latter is the reason operating on his mind: **ASLEF v Brady [2006] IRLR 576.**

121. If a potentially fair reason within section 98 is shown, such as a reason relating to conduct, the general test of fairness in section 98(4) will apply. Section 98 reads as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal and**

> **(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this sub-section if it … relates to the conduct of the employee …**
>
> **(3) …**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) 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**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case".**

122. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

123. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer genuinely believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

124. If a genuine belief is established, the band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.** The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

125. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: **A v B [2003] IRLR 405**.

126. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

127. Tribunals should not consider procedural fairness separately from other issues arising. They should consider the procedural issues together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss **Taylor v OCS Group Ltd [2006] IRLR 613.**

128. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee (instead of imposing a lesser sanction) was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

129. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer had reasonable grounds for treating the misconduct as gross misconduct: see paragraphs 29 and 30 of **Burdett v Aviva Employment Services Ltd UKEAT/0439/13.** Generally gross misconduct will require either deliberate wrongdoing or gross negligence. Even then the Tribunal must consider whether the employer acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

130. If a Tribunal finds that an employee has been unfairly dismissed, s.118(1) ERA says that:

> **"Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of —**
>
> **(a) a basic award (calculated in accordance with sections 119 to 122 and 126, and**
>
> **(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).**"

131. The basic award is calculated based on a week's pay, length of service and the age of the claimant.

132. The compensatory award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

133. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee could have been dismissed at a later date or if a proper procedure had been followed (the so-called **Polkey** reduction).

134. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).

135. Where the Tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was

such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly (s122(2) ERA).

Discussion and Conclusion

136. I set out below my conclusions applying the law to my findings of fact. I use the List of Issues as headings. I have not set out the submissions I heard from Mr Norbury and Ms Ferrario in full but took them into account in reaching my decision. I refer to specific points raised by them where relevant to my conclusions.

Dismissal

1.1 *Can the claimant prove that there was a dismissal?*

137. It is not in dispute that the claimant was dismissed.

Reason

1.2 Has the respondent shown the reason or principal reason for dismissal? The respondent relies upon the potentially fair reason of conduct.

1.3 Was it a potentially fair reason under section 98 Employment Rights Act 1996?

138. The respondent has established that there was a potentially fair reason for dismissal, namely (mis)conduct.

Fairness

1.4 Did the respondent dismiss the claimant for the potentially fair reason of conduct?

139. I find that the respondent did dismiss the claimant for the potentially fair reason of conduct. I do not understand it to be part of the claimant's case that that was not the reason or principal reason for dismissal. Although Mr Norbury suggested to Mr Smith in cross examination that his decision to dismiss may have been influenced by the tribunal proceedings brought by Ms Greaves against the respondent, he did not pursue that point in submissions. In any event, I found as a fact that Mr Smith was not aware of those tribunal proceedings when he made the decision to dismiss.

1.5 Did the respondent act reasonably or unreasonably in treating the conduct as a sufficient reason to dismiss the claimant?

140. Mr Norbury and Ms Ferrario disagreed during the Tribunal hearing about the extent to which the claimant was limited in its criticism of the reasonableness of the respondent's action to the specific criticisms set out in points 1.5 (a) to (e) of the List

of Issues. In particular, Mr Norbury submitted for the claimant that there had been a failure to carry out a reasonable investigation into the allegations against the claimant. That is not an issue specifically identified in 1.5 (a) to (e). Ms Ferrario submitted that this meant that the respondent was placed at a disadvantage. It had not called Mr Stone, the Investigating Officer, to give evidence nor had she prepared to make submissions on this issue. The claimant had known at least from the point when witness statements were exchanged that Mr Stone was not being called but had not, for example, applied for a witness order in relation to him. It seems to me, however that in deciding issue (d), i.e. whether the respondent acted reasonably in concluding that the claimant committed the misconduct, the well-established principles in **Burchell** require me to consider whether that conclusion was based on a reasonable investigation. I have dealt with the submissions relating to the reasonableness of the investigation in dealing with that issue.

141. I have set out below my conclusions on issues 1.5(a) to (e). In assessing the reasonableness of the respondent's actions under those points it is important to put those specific issues in the broader context. When the decision to dismiss was taken, there was overwhelming evidence from 4 witnesses that the claimant had used the "n-word" in July 2020 and had been warned not to use it again. Via her representative Mr Reading who she had authorised to act on her behalf she accepted she had said the word to Ms Herbert. The word is accepted to be a word which is related to race. It is accepted to be an extremely offensive word when its use is unwanted. The claimant throughout the process accepted that use of the word at work was completely unacceptable and apologised for using it.

142. I find that Mr Smith and the dismissing panel genuinely believed that the claimant had used the n-word twice in the December 2020 and car park incidents. Given the admissions made in the Submissions and the witness evidence in the management pack there were reasonable grounds for that belief.

(a) The failure to issue a sanction against the claimant in July 2020.

143. The evidence from 4 managers was that the claimant had used the n-word in July 2020 during the car park incident. The respondent accepts that no formal disciplinary action was taken at the time. Although Mr Shaw "warned" the claimant the word was unacceptable and not to use it again this was not recorded as "counselling" or action short of formal action. I do find that surprising given the nature of the word used. Mr Saunders in cross examination evidence appeared to accept that it would not be appropriate to go back to that incident once it had been dealt with, however informally. Mr Norbury's submission was that in doing so the respondent was having "two bites at the cherry".

144. I was not referred to any legal authorities on this point. It seems to me the position is that whether it was within the band of reasonableness for the employer to take into account earlier misconduct depends on the fact of each case. There is no general rule that past misconduct is automatically excluded from consideration (**Airbus (UK) Ltd v Webb [2008] IRLR 309**). In this case, I find it was reasonable for the respondent to take into account the car park incident when deciding whether to dismiss. This was not a case where that incident had been dealt with by a time limited warning which had expired. The incident and the claimant having been told

not to repeat the behaviour was relevant to the decision to dismiss because it showed that the incident which the respondent concluded had occurred in December 2020 was not the only occasion when the claimant had used the n-word. It also supported the conclusion that the second occasion took place after she had been warned not to use the word. I find it was reasonable for the respondent to take it into account in deciding whether dismissal was the appropriate sanction because it suggested that lesser corrective action would not alter the claimant's behaviour.

145. I do not find the inclusion of the car park incident in the decision making rendered the process leading to dismissal unfair. The claimant and witnesses were asked about it during the investigation and the management pack made it clear that it was a specific allegation being made against the claimant. It was not something, for example, raised at the disciplinary hearing for the first time. The claimant and her representative had an opportunity to (and did) make submissions relating to it. I do not find the failure to issue a sanction in July meant it was "out of bounds" to the respondent. It was reasonable for it to take it into account.

(b) The decision of the respondent not to suspend the claimant.

I find it difficult to understand how a decision not to suspend took the respondent's decision to dismiss or the procedure it followed outside the band of reasonable responses. There was no suggestion as I understand it that the failure to suspend led to unfairness in the investigation. I accept Mr Smith's evidence that he adopted the approach set out in section 4 of the Disciplinary Policy and Procedure of not suspending unless it was necessary to do so. That Policy does not require suspension in all gross misconduct cases. I find that the decision not to suspend was a reasonable decision.

(c) *Using the claimant's apology against her*.

146. By the claimant's apology I understand the claimant to mean the Apology (p.64). I found that it was the claimant who volunteered the Apology on Mr Reading's advice rather than it being Mr Saunders who prompted her to apologise. The Apology was part of the management pack. In that pack (para 4.3.7) Mr Stone recorded that the claimant had sent an email apology but also recorded that the claimant could not recall using the n-word but apologised if she did. He does not refer to it in concluding that the December incident took place (para 5.1 of his Conclusion section). The Apology is not referred to in the letter giving reasons for the dismissal. It does not seem to me that the Apology was a material factor in the decision to dismiss. The respondent accepted that at the time it was given the claimant had been given wrong information about the location and context of the alleged incident by Mr Saunders. The decision that the December incident took place did not rest on the Apology. The claimant repeatedly accepted that she probably used the relevant word and apologised for doing so when the alleged context was clarified. It was reasonable for the respondent to take that into account in reaching its decision to dismiss.

(d) The respondent concluding on the evidence that the claimant had committed the alleged misconduct.

147. Mr Norbury's submissions focussed strongly on flaws in Mr Stone's investigation and the matters taken into account in deciding to dismiss. One of those was taking into account the car park incident. I have dealt with that above.

148. Overall I find the investigation was a thorough and well documented one. However, Mr Norbury was critical of the failure to name Ms Herbert as the person who made the allegation about the December conversation. I find there is force in that submission. There was an apparent reluctance on Mr Stone's part to name Ms Herbert as the person to whom the claimant was alleged to have made the comment in December 2020. I have to decide whether that takes the investigation outside the band of reasonableness. In doing so I have to view the investigation process as a whole. I do find that the claimant was told when the incident was said to have happened and in what context (i.e. in the cab with one crew mate present). She was told the context for the alleged remark, i.e. a discussion about Ms Greaves having told Ms Dawson that the claimant had made remarks about her. Ms Herbert's name was not mentioned in any of the interviews with the claimant. However, when the management pack was sent to Mr Reading it included both Ms Herbert's email and her witness statement. The identity of the person to whom the comment was made was apparent from that point on. Although the pack was not sent to the claimant, Mr Reading confirmed at the disciplinary hearing that he had gone through it "top to bottom" and had documented and sent the claimant a presentation which identified the parts of the pack in it" (p.145). The Submissions make specific reference to Ms Herbert (e.g. at p.133). The claimant at the Tribunal hearing confirmed that she had not read the Submissions but that is not what she told Mr Reading in her email to him and not what the respondent understood to be the position. In those circumstances, taken as a whole I find that the failure to name Ms Herbert earlier in the investigation did not take the investigation outside the band of reasonableness.

149. Mr Norbury referred me to the judgment in the Greaves case. He accepted I was not bound by it but pointed out that the Tribunal in that case had accepted that the claimant had not in fact admitted making the comment to Ms Herbert. It had concluded that when the claimant said she could not recall making the remark she was in fact maintaining a denial of having made the remark rather than saying she could not remember either way whether she had made it (para 46 at p.177). It also found that Mr Reading had no authority to make the admissions he made at the disciplinary hearing on her behalf (para 48).

150. I find that the disciplinary hearing panel reasonably took the view that when the claimant said she "could not recall" using the n-word she was not denying using it. Instead, she was saying that she could not recall one way or another. Taken together, the evidence, the Submissions and what Mr Reading said on her behalf with her apparent authority supported that conclusion. They showed that she accepted that it was a word that was used at home and that it may have "slipped out". She accepted that her memory at the relevant time was "awful". The panel also had specific admissions by Mr Reading that the word had been used to Ms Herbert. The evidence before the panel from Mr Reading was that the claimant had authorised him to make the Submissions and, by implication, the admission. In those circumstances, I find that the panel did act reasonably in concluding that the claimant had used the n-word to Ms Herbert. Unlike the tribunal in the Greaves case, it was

not faced with denial by a live witness contradicted only by written evidence from Ms Herbert. It had written evidence from both and admissions from the claimant.

151. I have found that the panel did not rely on the third allegation in reaching its decision.

152. Mr Norbury also raised concerns about Mr Smith's involvement in the risk assessment process. He suggested that meant his views on the case were pre-judged. In particular, the Risk Assessment's reference to the car park incident might have influenced his views on the matter before he considered the evidence. I reject that submission. I accept Mr Smith's evidence that the decision whether to suspend the claimant was a different matter from the decision whether she had in fact been guilty of gross misconduct. I find he carried out an even handed and thorough disciplinary hearing. There was no evidence he had a pre-conceived idea that the claimant was guilty of gross misconduct. If anything, his decision not to suspend the claimant supported his evidence that he had an open mind on the case.

(e) Failing to take account of the fact that the alleged comments were not made directly to SG.

153. I find that the respondent did expressly take into account the fact that the claimants were not made directly to Ms Greaves. That is apparent from the notes of the disciplinary hearing and the decision letter.

154. In fairness to the claimant, I have also considered whether it was not within the band of reasonableness for the respondent to find the claimant had harassed Ms Greaves when the comment was not made to her. I find it was reasonable for the respondent to conclude that the use of the n-word in relation to her did have a harassing effect even if it did not have a harassing purpose. Certainly, it was reasonable for it to conclude that it did have that effect on Ms Greaves once she was made aware of it by Ms Herbert given her evidence on that effect.

(f) Proceeding with the disciplinary hearing when she was not well enough to participate.

155. I find it was reasonable for the respondent to proceed with the disciplinary hearing. The claimant herself had made it clear that that is what she wanted. According to her email of 6 July 2021 (p.118) she wanted the process to be completed to help with her recovery. The respondent had sought OH advice and Dr Zelic had confirmed in the OH Report of 13 July 2021 that the claimant instructing Mr Reading to act on her behalf in formal meetings "is the right way forward". I found that there were attempts to involve the claimant, e.g. by getting her to join remotely but that Mr Reading confirmed that the claimant felt that doing so would impact on her mental health (p.144). I understand Mr Norbury to be suggesting that the respondent should have gone further and "looked behind" what the claimant was telling it she wanted to do. I do not find that failing to do so was in any way unreasonable. The claimant was clear in her views and the OH report supported the decision to proceed to a conclusion.

156. For the avoidance of doubt, I do not accept that the respondent was influenced in its decision to proceed by pressure from the news items and press release by Ms Greaves' union.

Summary of Conclusions

157. I find that the decision to dismiss in this case was based on a genuine belief in the claimant's misconduct based on reasonable grounds. I have concluded that the investigation was within the and of reasonableness. It was not suggested that the respondent had failed to take into account relevant mitigation. I find that the procedure followed was reasonable. Taking all those matters into account I find that the decision to dismiss was not unfair.

158. If I am wrong about that and the dismissal was unfair because the investigation was not within the band of reasonableness, I would have found that the respondent would have fairly dismissed the claimant on the same date had the investigation been reasonable. I am satisfied that even if the respondent had during the initial investigation named Ms Herbert as the crew member to whom she was said to have used the "n-word" in December 2020 her responses in interview would have been the same. By her own admission, her memory at the time was "awful". She accepted repeatedly that the word was used at home and so might have "slipped out". Although she now says she did not make the remark, I find her honest response at the time was that she could well have made the remark even if she did not specifically remember doing so. Given the clear evidence that she did use the "n-word" in July 2020 and Ms Herbert's evidence to the investigation that she did use it to her, I find the respondent would have reasonably concluded that she did use it as alleged by Ms Herbert. In those circumstances, given that she had been told the word was unacceptable by Mr Shaw in July 2020 and given her own repeated acceptance that it was unacceptable in the workplace I find the claimant would have acted reasonably in dismissing her. I would have reduced the compensatory award to nil on a **Polkey** basis. I would also have concluded that there had been culpable and blameworthy conduct by the claimant in using the n-word and found that she contributed 100% to her dismissal. I would have reduced the basic award to nil on that basis.

Employment Judge McDonald
Date: 10 November 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 10 NOVEMBER 2023

FOR THE TRIBUNAL OFFICE