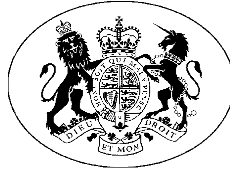

EMPLOYMENT TRIBUNALS

Claimant: Mr. Kevin Bursey

Respondent: Massmould Limited

Heard at: **Norwich** **On:** **4th and 5th September 2023**

Before: **Employment Judge Mr A. Spencer**

Representation
Claimant: In person
Respondent: Mr. R. Kellaway (solicitor)

JUDGMENT having been sent to the parties on **18 October 2023** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The respondent is a large company in business as manufacturers of injection moulded plastic products. The claimant was employed by the respondent as a Process Technician.

2. By a claim form presented to the tribunal on 2 August 2022 following a referral to ACAS for early conciliation from 31 May 2022 to 11 July 2022 the claimant brought complaints of unfair dismissal and detriment for making protected disclosures ("whistleblowing").

3. The issues to be determined were confirmed at a preliminary hearing on 24 January 2023. The claimant withdrew the whistleblowing claims and a judgment dismissing those claims was made on 24 Jan 2023. That left only the unfair dismissal claim to be determined.

4. This judgment relates to liability only. I confirmed at outset of the hearing that I would deal with remedy (if necessary) after hearing the evidence and giving judgment on liability.

Witnesses

5. For the claimant, I heard evidence from the claimant himself. No other witnesses were called.

6. For the respondent, I heard evidence from:

   (a) Mark Buckenham (HR Manager). Mr. Buckenham managed the claimant's suspension and sickness absence following the incident that led to the claimant's dismissal.
   (b) Neil Chatten (Manufacturing Manager). Mr. Chatten chaired the disciplinary hearing and made the decision to dismiss the claimant.
   (c) Michael Pedder (Operations Director). Mr. Peddar chaired the claimant's appeal against dismissal.

7. The witnesses confirmed the truth of their written statements under affirmation. I had the benefit of seeing the evidence of each witness tested under cross examination and the opportunity to put questions to each witness.

Documentary Evidence

8. I considered the contents of an agreed hearing bundle, witness statements for each witness, an agreed chronology, cast list, list of issues and written closing submissions from both parties (which both read out).

Findings of Fact

9. Having heard the evidence my findings of fact are as follows:

10. The respondent is a large company in business as manufacturers of injection moulded plastic products. Approximately 350 of its 500 employees were employed at the respondent's factory in Norwich. The claimant worked at the factory, latterly as a Process Technician since 2 September 1991.

11. The business had an HR team of four employees including Mr. Buckenham who provided the HR function for the Norwich factory.

12. The Norwich factory has approximately 100 injection moulding machines and many items of auxiliary finishing equipment. Health and Safety is important due to the risk of death and injury from working with machinery.

13. The claimant was an experienced and skilled Process Technician. Mr. Chatten considered the claimant's knowledge and experience as "*second to none*" and described him as a "*highly valuable member of the team.*"

14. However, the claimant was, as Mr. Chatten described, "*a difficult employee at times.*" It was common ground that the claimant had regularly criticised management and raised concerns about how the factory was run. Mr. Chatten perceived the claimant as prone to losing his temper and being rude to colleagues. Furthermore, when challenged about inappropriate conduct the claimant was "*slow to accept responsibility*" and tended to go off about

unrelated historical issues rather than focus on his own conduct. However, I accept Mr. Chatten's evidence that there was no agenda or desire to get rid of the claimant. Although the claimant was difficult to manage this was more than offset by his skill and experience.

15. The respondent's Employee Handbook included their disciplinary, grievance and appeals procedure. It set out the procedures to be followed in the event of disciplinary action. It made it clear that the usual sanction for gross misconduct would be dismissal without notice or payment in lieu of notice. The written procedure also gives examples of behaviors that would normally be gross misconduct. This includes "*violence, physical or threatened or bullying against another person*" and "*serious breach of health and safety regulations.*"

16. The claimant was given a verbal disciplinary warning in July 2019. Melanie Rolfe (Production Controller) had reported the claimant for an alleged breach of health and safety regulations. The decision was not to give the claimant any disciplinary sanction for the health and safety issue. However, he was warned for acting aggressively towards Melanie Rolfe by confronting her and shouting at her aggressively. The warning was not "live" by the time of the dismissal. It remained on the claimant's record for only 6 months. It is clear from the claimant's evidence before me that to this day he still feels strongly aggrieved about the 2019 incident and was unable to put this behind him. He plainly still felt particularly aggrieved towards Ms. Rolfe.

17. During the disciplinary investigation in 2019 the claimant made an adverse comment in passing about Mr. Chatten's management, describing Mr. Chatten as "*completely useless*". However, there is no evidence that Mr. Chatten held any kind of grudge against the claimant for the comment.

18. In 2020, one of the claimant's work colleagues, Steve James, was disciplined for a breach of health and safety rules for standing on a guard railing while working at height.

19. In 2021 the respondent introduced a requirement for those working on the factory floor to wear "bump caps". A bump cap is headgear that provides limited protection against minor impacts and bumps. It provides less protection than a hard hat or helmet. The policy was introduced as there had been numerous injuries caused by employees entering machinery without head protection. Employees accepted the new policy and complied with the requirement. Employees were encouraged to report any failures to comply with the policy.

20. In 2021 one of the claimant's work colleagues, Richard Smith, was disciplined for refusing to wear a bump cap. I have seen docs relating to the disciplinary process and outcome.

21. The incident that led to the claimant's dismissal occurred on 10 March 2022. The incident was reported to Mr. Buckenham who was told that during the incident the claimant had kicked and thrown his bump cap on more than one occasion including throwing the cap towards or at Melanie Rolfe in the office in an aggressive manner.

22. Mr. Buckenham decided to suspend the claimant on full pay pending a disciplinary investigation to be conducted by Jonathan Edwards (Health & Safety and Training Manager) who was experienced in conducting such investigations. Mr. Buckenham wrote to the claimant on 10 March 2022 to inform him of his suspension. The letter was handed to the claimant that day by Mr. Chatten.

23. Mr. Edwards interviewed the employees who had been present during incident on 10 March 2022 (including Stuart French, Glen Folkard, Neil Bush, Melanie Rolfe and Karen Kett). Notes of the meetings with each employee were taken. The statements from the various witnesses suggested that the following events had occurred:

    23.1 Stuart French, Melanie Rolfe and Karen Kett were in the office when Melanie Rolfe spotted the claimant working on the factory floor without his bump cap on.
    23.2 Melanie Rolfe told Stuart French to go and tell the claimant to put his cap on. She was concerned that the claimant would get the sack as she had seen the respondent's Managing Director, Paul Lister, touring the factory with visitors earlier.
    23.3 Mr. French went out onto factory floor and told the claimant to put his cap on as Melanie Rolfe had seen Paul Lister going round with visitors.
    23.4 At this point, the claimant "*exploded and kicked the hat over the machine*" and was swearing "*this f-ing place*." This was directed at Melanie Rolfe. Mr. French described the claimant as having "*just gone from 0 to 200 miles an hour*". He described the claimant's reaction as "*it was like watching an explosion*."
    23.5 The claimant had retrieved his cap then thrown it towards Neil Bush, hitting the window of office with it. He retrieved his cap after kicking it out of Mr. French's hands.
    23.6 The claimant then "*picked it up and threw it at Mel in the office*." It was described as "*an aggressive throw*." The cap was thrown into the office, hitting a computer monitor and knocking it over. Karen Kett described the throw. When asked whether it was gentle, she said "*no, he really meant it*."
    23.7 The incident was not isolated (albeit it appeared to be an extreme example compared to the claimant's previous outbursts). Mr. French referred to the claimant having regular "*outbursts*" and "*explosions*." Mr. Bush also said he had seen the claimant behave this way before. Melanie Rolfe said, "*everyone has had their moments with Kevin, but nothing close to that*." Karen Kett had also seen the claimant "*cop the hump*" before "*but never direct his anger like that*."

24. The evidence of witnesses was broadly consistent with each other. All gave a description of the claimant "*exploding*," reacting aggressively and violently to being told to put his bump cap on.

25. On 11 March 2022, the claimant was assessed by his GP and signed off work for two weeks with work related stress. The sick note was provided to the respondent the same day. This was later extended to 14 April 2022.

26. On 23 March 2022 Mark Buckenham contacted the claimant by email to update him regarding the investigation. Mr. Buckenham confirmed that he had interviewed the witnesses and wanted to give the claimant an opportunity to give his version of events before a decision was made as to whether disciplinary action was taken. He invited the claimant to come in later in the week (before the claimant was due to begin a period of holiday leave) or to give a written statement. The claimant did not take up this opportunity.

27. Mr. Buckenham arranged an occupational health appointment for the claimant. He left a voicemail for the claimant to confirm an appointment on Friday 25 March. The claimant could not attend as was traveling abroad that day for wife's 60th Birthday (a holiday that had been booked many months earlier).

28. On 4 April 2022 Mr. Buckenham made a further referral for an occupational health assessment after the claimant's return from holiday. The written referral makes specific reference to the incident on 10 March 2022. The claimant did not attend the appointment as he tested positive for Covid on return from holiday.

29. Mr. Edwards concluded his investigation without taking a statement from the claimant. However, his written investigation report refers to the fact that whilst he had not formally interviewed him, the claimant did not deny that he lost his temper and either kicked or threw his bump cap. Mr. Edwards concluded that the claimant had a disciplinary case to answer and that the matter should proceed to a disciplinary hearing.

30. Mr. Buckenham arranged a further occupational health appointment for the claimant on 19 April 2022. This was cancelled and re-arranged for 25th April.

31. On 11 April 2022 Mr. Buckenham wrote to the claimant inviting him to attend a disciplinary meeting on 15 April 2022 after the claimant's current sickness certificate ended. The letter confirmed the allegations of misconduct and confirmed that the allegations (if proven) would constitute gross misconduct as a serious breach of health and safety requirements.

32. The claimant was given the opportunity to be accompanied to the meeting by work colleague or union representative and was informed that he could put forward his account of events and any mitigation at the meeting.

33. Although it is not mentioned in the letter, the parties agree that the claimant was sent a copy of the investigation report and minutes of the interviews with witnesses. These were sent with the letter.

34. Before conducting the disciplinary meeting, Mr. Chatten reviewed the investigation report and evidence.

35. The disciplinary meeting took place on 15 April 2022. Neil Chatten chaired it. A note taker was present. The claimant attended with Jon Clarke (a work colleague). The claimant's immediate response to the allegations was to say, "*I owned up to it, I pleaded guilty so to speak*." He went on to confirm "*I lost my rag, got a short temper*." He referred to having had toothache that day,

being hot and bothered and the work area being in a mess. He accepted the allegations save that he denied that the computer monitor had been broken when his cap hit it. The claimant referred to the incident being out of character for him; describing the incident as “*an outta body experience, reactional, it was like a Will Smith moment*” (a reference to Will Smith having hit a compere at the Oscars presentation).

36. Mr. Chatten asked the claimant what he would do differently if he was to come back to work. The claimant’s response was that “*you would have to take the ignition or the flammable away*” (a reference to Melanie Rolfe).

37. Mr. Chatten asked the claimant whether he wanted to see the company doctor. The claimant did not take this offer up, referring to feeling better by coming to talk about the incident at the meeting.

38. The claimant also referred to historic and unrelated incidents. It was apparent that he was still aggrieved about the 2019 incident involving Ms. Rolfe that resulted in his previous disciplinary warning.

39. The claimant was given a full opportunity to respond to the disciplinary allegations at the meeting. The meeting was adjourned for Mr. Chatten to consider matters.

40. Mr. Chatten considered matters. He concluded:

    40.1 the claimant had acted, as alleged, on 10 March 2022. He had kicked his bump cap out of his team leader’s hand, then thrown it at the office and then thrown it again into the office in the direction of Melanie Rolfe. Mr. Chatten concluded that these actions were dangerous, threatening and aggressive and were a serious breach of health and safety requirements. He concluded that the claimant’s actions were wholly inappropriate and dangerous in an active factory environment with heavy machinery;

    40.2 the claimant’s mitigation about being hot and bothered, tired, having toothache and his frustrations about previous issues with management did not justify or excuse his conduct.

41. Mr. Chatten considered the appropriate sanction. He took into account the claimant’s long service and the fact that the claimant was one of the respondent’s most skilled and experienced workers. Mr. Chatten was particularly concerned that the claimant showed no remorse, or willingness to take responsibility for his actions or their consequences. Nor had he shown any insight into the impact his actions had upon others.

42. In the circumstances, Mr. Chatten concluded that the claimant’s actions amounted to gross misconduct and the appropriate sanction was summary dismissal.

43. On 20 April 2022 Mr. Chatten telephoned the claimant to confirm that a decision had been made. At the claimant’s request, he confirmed his decision to the claimant by phone.

44. On the same day Mr. Chatten sent a letter to the claimant confirming the

decision to summarily dismiss him for gross misconduct. The letter gave detailed reasons for the conclusions reached and confirmed the claimant's right to appeal.

45. Mr. Buckenham cancelled the outstanding occupation health appointment as the claimant had been dismissed.

46. Typewritten notes of the disciplinary hearing were sent to the claimant on 25 April 2022.

47. On 27 April 2022, the claimant sent a letter of appeal. The points raised in support of his appeal were:

    47.1 He had been tired, hot and bothered on 10 March 2022. This led to him failing to put his bump cap back on;
    47.2 He was not given a fair opportunity to see the occupational health doctor;
    47.3 The disciplinary hearing was rushed (i.e., it took place too soon and at a time when the claimant was signed off sick with work related stress);
    47.4 He took issue with the evidence but only in respect of the witnesses exaggerating the damage to the computer monitor;
    47.5 Mr. Chatten could not provide an impartial disciplinary hearing as the claimant had criticised him in the past;
    47.6 Others who had been guilty of similar conduct in the past had not been dismissed.
    47.7 The sanction was excessive given the claimant's long service.

48. On 3 May 2022 Mr. Buckenham wrote to the claimant to invite him to an appeal meeting on 6 May 2022. This was later postponed to 17 May so that the claimant's chosen work colleague could attend.

49. Mr. Pedder chaired the appeal meeting. A note taker was present. The claimant attended with Jon Clarke. The meeting lasted about 1 hour 20 minutes. The claimant was given a full opportunity to put forward all points in support of his appeal.

50. Mr. Peddar considered the claimant's appeal. Effectively he treated it as a rehearing. He reached the same conclusion as Mr. Chatten. His letter confirming the outcome of the appeal shows that he understood the claimant's grounds of appeal and carefully considered each point before reaching a conclusion. Mr. Peddar concluded that the events had taken place as alleged by the witnesses and admitted by the claimant. He concluded that the claimant had behaved aggressively towards a work colleague, throwing equipment at her. He concluded that such behavior was completely unacceptable. He was clearly swayed by the claimant's reluctance to take responsibility for his actions or to offer an apology. He also concluded that if he were to reinstate the claimant a further incident was likely to occur.

51. Mick Pedder wrote to the claimant on 24 May 2022 to confirm the outcome of the appeal. His letter shows that each ground of appeal was carefully considered and sets out conclusions on each.

Discussion/Conclusions/Applicable Law

52. Applying the law to the facts of this case my conclusions on the various issues are as follows.

53. There is no dispute that the claimant was dismissed. There is no dispute that the claimant has the right not to be unfairly dismissed. Nor is there any dispute as to whether the claim form was presented in time.

54. This case turns on an assessment of the fairness of the claimant's dismissal.

55. Once a claimant has shown a dismissal, the burden of proof rests on the Respondent to satisfy the Tribunal on the balance of probabilities that the reason for dismissal was a potentially fair reason within the meaning of Section 98(1) and 98(2) Employment Rights Act (ERA). Once that burden is discharged, the Tribunal must judge the fairness of the dismissal by applying the statutory test of fairness in Section 98(4) ERA.

56. It is not enough for the employer to have a reason that is capable of justifying dismissal. The Tribunal must also be satisfied that in the circumstances, the employer was justified in dismissing for that reason. In applying the test of fairness, the Tribunal must not substitute its own factual findings, nor impose its own view of the appropriate sanction. The law recognises that employers often have a range of reasonable responses open to them in a particular set of circumstances. The law recognises that different employers may reasonably make different decisions.

57. The test of fairness addresses this by the so called 'band of reasonable responses' approach. This requires the Tribunal to ask itself whether the employer's action fell within the band or the range of reasonable responses open to the employer in a particular set of circumstances. If the employer's action falls within the range, dismissal will be fair. It is only where the employer's action falls outside that range that dismissal will be found to be unfair.

58. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure followed by the employer.

59. In assessing the fairness of the procedure, the Tribunal should also consider the employer's own procedures and any applicable statutory procedures.

60. Bearing all that in mind, and taking the various issues in turn, I conclude as follows:

<u>What was the reason for the claimant's dismissal?/Was it a potentially fair reason to dismiss?</u>

61. The reason for dismissal was plainly the claimant's conduct on 10 March 2022.

62. The claimant suggested that the reason for dismissal was "*unfair treatment, discriminatory behavior from the investigatory/disciplinary managers*." These are matters which go to the fairness of the decision and the process rather than the reason for dismissal. I accept the respondent's evidence that the claimant's conduct on 10 March 2022 was the reason for his dismissal.

63. In the circumstances, the respondent has discharged the burden of proving that the reason for dismissal related to the claimant's conduct and, as such, was a potentially fair reason to dismiss under s98(2) ERA.

Was the dismissal fair?

64. The tribunal must consider whether the dismissal was fair by applying the test of fairness in s98(4) ERA. That test requires the tribunal to consider whether, taking into account equity and the substantial merits of the case, in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating that conduct as sufficient reason for dismissal.

65. In a conduct case that will normally require the tribunal to consider:

65.1 Whether the respondent had reasonable grounds for their belief;

65.2 Whether, at the time that belief was formed on those grounds, the respondent had carried out a reasonable investigation;

65.3 Whether the respondent acted in a procedurally correct manner;

65.4 Whether the dismissal was within the range of reasonable responses.

66. Taking these in turn, my conclusions are:

1. Whether the respondent had reasonable grounds for their belief

67. The respondent plainly had reasonable grounds to conclude that the claimant had committed the misconduct concerned. The evidence of the various witnesses was clear. Further, the claimant admitted the conduct concerned. By the appeal stage, the claimant had asserted that the evidence over the damage to the computer monitor was exaggerated but otherwise he still accepted the witnesses account of events.

2. Whether, at the time that belief was formed on those grounds, the respondent had carried out a reasonable investigation.

68. The respondent plainly carried out a reasonable investigation. The disciplinary investigation involved interviewing all relevant witnesses and included giving the claimant an opportunity to provide his account of events. Further, a fair and full disciplinary process was followed before the decision was made. The claimant had every opportunity to respond to the allegations before decision was made. The claimant did not identify anything more the respondent could have done.

3. Whether the respondent acted in a procedurally correct manner.

69. Most of the claimant's challenges to the fairness of the dismissal fall under this heading. Taking the specific issues raised by the claimant in turn:

(a) *The respondent failed to follow the ACAS code of practice. There was not full and fair disciplinary hearing; during this time, the claimant was off with work related stress.*

70. The respondent followed the ACAS Code of Practice on disciplinary issues. The claimant did not identify any specific failing in this regard. Further, it is not correct that the claimant was signed off sick with work related stress at time. The sick notes show that the claimant was signed off sick until 14 April 2022. The disciplinary hearing took place on 15 April 2022 (i.e., the day after the claimant's sickness absence ended). It was not until the claimant was assessed by his GP again on 21 April 2022 that he was retrospectively signed off sick from 15 April to 2 May 2022.

71. At the time of the disciplinary meeting the claimant was not signed off sick. In any event, was open to the claimant to request that the meeting was postponed due to illness. The claimant plainly chose to proceed.

(b) *The claimant did not see occupational health on Friday 25th March 2022 and April 4th 2022.*

72. It is troubling that the respondent did not go through with an occupational health assessment. The evidence available to the respondent indicated that the claimant had behaved irrationally and explosively. Most of the witnesses (including the claimant himself) said this was out of character (i.e., the claimant had previously had "*blow ups*" but this one stood out). The claimant had referred to his mental health at the disciplinary meeting. Further, the respondent was aware that the claimant had been signed off by his GP with work related stress. There was an obvious line of enquiry open to the respondent to explore whether there were mental health related reasons for the claimant's conduct. The respondent chose not to peruse this. This was a failing on part of the respondent. I take into account that Mr. Chatten had offered this option to the claimant at the disciplinary hearing and the claimant had declined. That significantly reduces the severity of the respondent's failing. However, I consider that a reasonable employer would have perused this further in the circumstances given the seriousness of matter and the potential for it to end the claimant's career.

(c) *The claimant was signed off for work related stress at the time of his dismissal.*

73. This was not the case. I refer to my earlier comments.

(d) *The minutes from the disciplinary hearing were poorly stated.*

74. The claimant's criticisms on this issue were minor. His specific criticisms were that the notes were of poor quality and contain mistakes. However, the claimant identified no significant errors and did not give any evidence

as to the notes being incorrect in any material respects.

(e) _The claimant did not sign the disciplinary hearing notes, which he did not receive until after he was dismissed._

75. Again, this is a minor criticism. It would have been good practice to ask the claimant to sign the notes. However, he was provided with the notes and had opportunity to correct them before the appeal meeting had there been any significant or material errors. He did not do so.

(f) _Melanie Rolfe's comment within her statement that the cap broke her computer stand. Section 2 of witness statement, I quote "It hit the computer on the other side of the desk and knocked my monitor down flat". Section 12, "He hit the screen on Lee's computer which pushed my screen back. I couldn't get it to stay after that so Brad had to come and change the arm."_

76. This is also a minor issue. This is the only aspect of the evidence relied on by the respondent that the claimant took any significant issue with. He suggested that Ms. Rolfe exaggerated the damage. It was reasonable for the respondent to have accepted Ms. Rolfe's evidence. In any event, the disciplinary allegations turned on the claimant's behavior and not the exact extent of damage caused. There was no dispute that the claimant threw the cap with some force towards Ms. Rolfe. The claimant did not take issue with any other aspect of the evidence or suggest that this point showed that Ms. Rolfe or any other witnesses were exaggerating their accounts in any other material respects.

(g) _Two other employees not being dismissed for similar health and safety incidents:_

A bump cap thrown in anger over a refusal to wear it by Richard Smith in approximately 2021.

An electrician Steve James over a serious health and safety matter. He was standing on the side of a cherry picker basket at height in approximately 2021.

77. Mr. Smith's conduct was of a different character to the claimant's conduct. Mr. Smith repeatedly failed to comply with reasonable management instructions to wear his bump cap. Mr. Smith had not acted aggressively and violently toward colleagues in the way the claimant had. It is not an example of unfairly inconsistent treatment on the part of the respondent.

78. Mr. James' conduct was also of a different nature to the claimant's conduct. He had stood on a guard rail while working at height. He had been given a final written warning and was not dismissed. However, Mr. James had not acted aggressively and violently towards his work colleague in the same way as the claimant.

79. I am satisfied that the conduct which resulted in the claimant's dismissal was of a more serious nature to the conduct of Mr. Smith and Mr. James and that the respondent had good reasons for the difference in treatment.

These are not examples of an employer who was unreasonably applying their disciplinary procedure in an inconsistent way.

80. Taking a step back, the only significant criticism I have upheld against the respondent is their failure to follow through with the occupational health referral and to obtain such evidence before dismissal. I would have dealt with matters differently. However, the law does not permit me to substitute my own views. I must consider whether the respondent behaved reasonably. Looking at the procedure as a whole, taking into account the size and admin resources of the respondent I ask myself - was their procedure reasonable? – did it fall within the range of reasonable responses open to a reasonable employer? I conclude that it did. Perfection is not required. Overall, the procedure followed by the respondent was fair and reasonable. That is all the law requires. The respondent complied with their own disciplinary procedure and the applicable ACAS Code of Practice. The procedure followed by the respondent fell well within the range of reasonable responses.

4. Whether the dismissal was within the range of reasonable responses

81. The respondent's decision was at the harsher end of the range of reasonable responses. The claimant's conduct was serious. However, his length of service, his value to the business and his clean disciplinary record may have led some employers to give him a last chance by imposing a final written warning as opposed to summary dismissal. However, the test of fairness requires me to consider whether the respondent's decision was within the range of reasonable responses. It plainly was. It may have been at the harsher end of that range but it certainly was not outside it.

82. For all these reasons the claimant's dismissal was fair. The claim is dismissed.

Employment Judge **Mr. A. Spencer**

Date: 4 December 2023

REASONS SENT TO THE PARTIES ON

4 December 2023

FOR THE TRIBUNAL OFFICE