EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Timothy Jeffries	**v**	**Apple Retail UK Limited**

Heard at: London Central
On: 15 - 19 April 2024

Before: Employment Judge G Hodgson

Representation

For the Claimant: Ms T O'Halloran, counsel

For the Respondent: Mr M Humphreys, counsel

JUDGMENT

1. The claim of automatic unfair dismissal (contrary to section 152 Trade Union and Labour Relations (Consolidation) Act 1992) is dismissed on withdrawal.

2. The claim of unfair dismissal is well founded and succeeds.

REASONS

Introduction

1.1 On 25 May 2023, the claimant brought proceedings in London Central employment tribunal alleging the respondent had unfairly dismissed him.

He also alleged automatic unfair dismissal on grounds related to trade union membership or activity.

The Issues

2.1 At the hearing, it was agreed that the claim of automatic unfair dismissal, pursuant to section 152 Trade Union and Labour Relations (Consolidation) Act 1992 was withdrawn and should be dismissed.

2.2 It was agreed that there remained a claim of ordinary unfair dismissal. It was the respondent's position that the claimant had been dismissed for a reason related to conduct.

Evidence

3.1 The claimant gave evidence.

3.2 For the respondent I heard from Mr Joe Pegram, a store leader, who dismissed the claimant and Ms Elaine Shapland, a store leader who dealt with the appeal.

3.3 I received a bundle of documents.

3.4 Both parties gave written and oral submissions.

Concessions/Applications

4.1 There were no specific applications to record.

4.2 The claim of automatic unfair dismissal was withdrawn and dismissed.

The Facts

Introduction

5.1 The respondent is a subsidiary of Apple Inc. The respondent provides a retail outlet for Apple products, including computers, iPhones, iPads Apple watches, and accessories. The respondent employed the claimant from 18 December 2010 until his dismissal on 3 February 2023. He worked supporting customers who have product issues. He was employed in the role of "'Genius." The support team was known as "the Genius Bar."

5.2 The claimant was dismissed for allegedly breaching the respondent's policies and procedures on two occasions. At the time of his dismissal, he had been subject to no previous disciplinary proceedings, and it is common ground his record was unblemished.

5.3 The respondent relies on two procedures: first, the harassment and bullying procedure, and second the business and conduct policy.

5.4 The most relevant parts of the harassment bullying policy are as follows:

> **Bullying**
> **Bullying is repeated, unreasonable verbal or nonverbal behavior toward an individual that may be perceived as insulting, intimidating, abusive, or offensive, and functions to undermine, humiliate, or demean the recipient.**
>
> **Harassment**
> **Apple also prohibits harassment and sexual harassment of any kind. Examples of harassing conduct include but are not limited to, slurs, jokes, statements, written or electronic communication, pictures, drawings, posters, cartoons, and gestures. Examples of prohibited sexual harassment include but are not limited to unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical acts of a sexual nature.**
>
> **An employee may be found to have harassed — whether sexually or based on any protected characteristics — or bullied an individual, even if that was not the intent. Harassment and bullying are not about individual intent, but how the behavior affects another person.**
>
> **Any such behavior, whether isolated or repeated, may be subject to disciplinary action up to and including termination of employment.**

5.5 The business conduct policy provides -

> **Harassment and Discrimination**
> **Apple is committed to providing a workplace free of harassment (including sexual harassment) or discrimination based on a personal trait. Personal traits include race, color, ancestry, national origin, religion, creed, age, mental and physical disability, sex, gender, sexual orientation, gender identity or expression, medical condition, genetic information, marital status, military or protected veteran status, or any other characteristic protected by law.**

<u>The alleged incidents of misconduct</u>

5.6 On 13 December 2022, the claimant was returning from his break, when he saw a co-worker, Mr Webster, talking with his colleague, Ms Liu.

5.7 Mr Webster had previously been on secondment starting in 2019, which had been prolonged because of the pandemic. He was due to leave on another extended secondment. The claimant joined the conversation, intending to says his farewells. By way of farewell, the claimant said, "See you in nine months." Ms Liu is of Chinese heritage. She and the claimant were good friends. The claimant turned to Ms Lui and said, "As long as you lot don't release another deadly disease on the world." He intended it as a joke and he states Ms Lui laughed. His evidence is that racial stereotypes were often joked about within the Genius Bar team, and he knew that Ms Lui would understand the joke intended. He did not intend to offend. Mr Gormley was present when the comment was made, as he was part of the conversation. It was also overheard by manager, Mr Webster.

5.8 Ms Lui made no complaint. It appears that Mr Webster made a complaint on 13 December 2022, which he followed up with an email. It is clear this followed a conversation, but I have no details of that conversation or of any notes. He reported he had overheard the comment. He reported that Ms Liu looked shocked and that he had spoken to her. She indicated she would give feedback to the claimant. She asked Mr Webster not to take it any further.

5.9 Mr Gormley sent an email on 13 December 2022 which states he is "Sharing a witness statement from series of events this evening." The email is consistent with his being a witness and not a complainant, albeit the respondent's witnesses treated him as a complainant.

5.10 It was the comment made to Ms Lui on 15 December 2022 which formed the basis of allegation one.

5.11 There was a further incident on 16 December 2022. Mr Marsh reported to Ms Jessica Hurley an alleged comment made by the claimant, which had caused him concern.

5.12 It appears the claimant was talking with a number of colleagues on 16 December 2022. It is not clear if Mr Marsh was part of the conversation, and it is the claimant's evidence that Mr Marsh overheard the general conversation. The conversation centred on the continuing failure of one team member, Mr Flenna, to progress past the CV screening phase when applying for promotion to the role of lead genius. During that conversation, the claimant relayed a conversation he had had earlier that day with another colleague, Mr Gabriel. Mr Marsh's email of 17 December 2022 recorded the following allegation:

> **There were a number of team members present in the room at the time constantly leaving and entering the room. I can confirm that Tico, Neil, Shay, Gael, Budkhuu, Tim and myself were present at one time or another. There may have been others too.**
>
> **Between approximately 2000 - 2100 (Friday 16/12) Neil Flenna was discussing with me that he had recently found out that he was unsuccessful in his application for Lead Genius and did not get through the CV screening process. Tim Jeffries then announced to the room that Nick Gabriel had applied for a role, his CV was rejected so he "resubmitted the CV with the same wording and he just added I had Jamaican heritage and it got through. . . or Asian ".**

5.13 The claimant has not disputed that he repeated Mr Gabriel's comments . He does not take issue with Mr Marsh's record.

5.14 Neither Mr Marsh's specific allegation, nor Mr Martin's email, was given to the claimant during the investigation. The claimant did not see the complaint until after the first disciplinary hearing. By that time his memory was less reliable and he had been ill, having had what he describes as a full breakdown and on New Year's Day. He had experienced an epileptic

seizure for the first time in several years. I accept his evidence that this illness subsequently limited his recall of events on 16th December.

The investigation

5.15 The investigation was undertaken by Ms Issy Hussain a senior manager from the Regent Street store. This investigation concerned the first allegation. Ms Hussain interviewed Mr Gormley, Mr Webster, Ms Lui, and the claimant. The claimant accepted he had used the words. He stated he was "stupid" and that he regretted the comment as soon as he said it.

5.16 Ms Hussain did not make it plain that there was no complaint from Ms Lui. When it became clear that Ms Hussain was asking questions about his comment to Ms Lui, the claimant assumed that there had been a complaint from Ms Lui. The claimant was asked if he had spoken to Ms Lui. He explained that he had but she had indicated no unhappiness. He believed she had laughed at the comment. He explained they had a good relationship that she called him "her bestie." He stated they had a lot of jokes together.

5.17 The claimant was asked about his perception of the impact on Mr Webster and Mr Gormley. He stated they may have heard it and could have thought it inappropriate. He reiterated that he should not have said it and that he felt "ashamed." Throughout the interview, the claimant acknowledged his feelings of shame and accepted the joke could have caused offence and it was inappropriate to say it. He described a close relationship between colleagues and referred to there being much banter. As to the nature of the banter he said "It is pretty much everyone giving as good as they get." He noted that there were a lot of difficult customers and there was a degree of letting off steam in a safe environment in a light-hearted and jokey way.

5.18 The claimant was asked about hypothetical situations concerning how an individual who did not know him, and who was of a different heritage, might have received the comment. The claimant accepted that someone who did not know of his close friendship with Ms Lui might have thought that he was being racist. The claimant continued to recognise that it was an inappropriate comment. He continued to express his regret for saying it.

5.19 Following the second complaint, Ms Hussain met with the claimant again on 22 December 2022. She failed to make it clear there had been a second complaint. She did not give the claimant Mr Marsh's email containing the complaint. She did not set out the detail. Ms Hussain asked the claimant about the events of 17 December. She gave the wrong date. Mr Marsh's complaint was about events on 16 December. Ms Hussain failed to ask the claimant about the events of 16 December, at all.

5.20 Coincidentally, the claimant had been in a conversation with colleagues on 17 December. This conversation concerned Mr Flenna being turned down for promotion. The claimant's statement confirms that Mr Gabriel, on 17 December, "shared his story that a similar thing had happened to him." The claimant's statement is consistent with the notes of the investigation. Mr Gabriel, on 17 Decembr, recounted that he had had difficulty gaining promotion, and his CV had been rejected, but that the same CV was accepted when he changed it to refer to his Jamaican heritage.

5.21 The claimant was aware that Mr Flenna had undertaken a DNA heritage test which had revealed "3% Chinese heritage." The claimant had said words to the effect of "Hey, maybe you should mention your 3% Chinese DNA."

5.22 No one complained about the claimant's comment on 17 December 2022. The events of 17 December were was not subject to any investigation. The investigation was concerned with the complaint about the events of 16 December. Ms Hussain assumed that this comment on 17 December related to related to the events of 16 December and that confusion, unfortunately, continued to permeate the investigation and subsequent disciplinary proceedings.

5.23 As for the second allegation, Ms Hussain interviewed the claimant and Mr Marsh. I have received no evidence from Ms Hussain. it appears she failed to interview any other relevant witness , albeit I recongnise her note keeping appears to have been poor.

5.24 Ms Hussain produced her investigation report. It failed to exhibit all relevant documents. In particular, it did not exhibit the complaint made by Mr Marsh. The report records the following documents and witnesses.

> **Documents and witnesses interviewed**
> **As part of my investigation process I have interviewed the following people:**
> **• Ran Liu, Genius at White City**
> **• Leo Webster, Manager at White City**
> **• Statement from Steve Gormley Senior at White City**
> **• Statement from Brenton Marsh Lead Genius at White City**
> **and reviewed the following documentation:**
> **• Bullying & Harassment Policy**
> **• Diversity, Inclusion, Equal Opportunity & Accommodations**
> **• Business Conduct**

5.25 The report does not identify, adequately, the documents sent to the claimant.

5.26 Whilst there was an email from Mr Marsh, there is no evidence he was interviewed by Ms Hussain, and there is no note of an interview with Mr Marsh at the investigation stage. (Mr Marsh was interviewed at the later disciplinary stage by Mr Pegram.)

5.27 There was an investigation meeting with Mr Webster and with Ms Lui (albeit the record of her interview is wrongly dated 15 January 2023).

5.28 The investigation notes record Ms Lui confirmed that she was not offended and that she would joke with the claimant. She stated that she would copy his English accent as a joke. English is not her first language. Ms Lui was asked to speculate about how other people might have felt hearing the comment and the potential impact on others. She accepted that others may have found it uncomfortable, if they had been around. She was asked whether others were made to feel uncomfortable and she said "Not really. I don't think so. We joke a lot." Ms Lui stated there was reference on occasions to race. She stated that customers had referred to products made in China as being “cheap”. In response she commented, "I’m made in China too." She considered this to be a joke.

5.29 The investigation went beyond the incidents that involved the claimant. Ms Lui was asked about jokes about Coronavirus generally. Ms Lui referred to previous occasions when colleagues had referred to Coronavirus as being "from you guys." She denied that was a comment from the claimant, who she did not know well at the time.

5.30 When asked whether she saw the claimant's words as harassment she said "Me personally? No, if it’s from Tim."

5.31 Mr Webster was interviewed on 15 December 2022. He confirmed the use of the words forming allegation one. He stated the claimant was sometimes "a little basic in his thought process and how he approaches things, maybe hasn't looked at things from all angles." When asked if the claimant had previously used inappropriate language he stated "Never, which is why it took me aback a little bit. I think he knew it too, because he went flushed, started to stutter, he knew he had made a mistake." It is clear that Mr Webster made no complaint and he did not feel harassed, albeit he believed the comment was inappropriate.

<u>The investigation report</u>

5.32 The investigation report contained a number of findings about allegation one and allegation two. I will record those that are relevant when I consider my conclusions. The investigation report did not focus clearly on facts. It did not set out the context of the first allegation adequately or at all. It did not set out context of the second allegation adequately or at all. It contained a number of assertions which appear to be opinion, and which were unjustified. It referred to the claimant excusing his behaviour and failing to understand the potential impact on others. In relation to allegation one it stated that he appear to have breached the bullying and harassment policy. However, the basis for that breach is not set out. Allegation two is identified as being from 17 December 2022. The report states that he appeared to have breached the bullying and harassment policy and had failed to respect "diversity and inclusion commitments."

The report fails to identify any specific part of any policy which it is said he breached.

The disciplinary process

5.33 By letter of 6 January 2023, the claimant was invited to a disciplinary hearing. The alleged misconduct was identified as follows:

> **Alleged misconduct**
>
> **The hearing will consider your alleged involvement in:**
>
> **• An incident that took place on 13th December 2022 in the break room at the White City store involving Ran Liu (Genius). During this alleged incident Steve Gormley (Senior Manager) and Leo Webster (Manager) were also present. During the conversation which took place in the break room area which is an open area where other team members may have been present, you made a comment which is implicit of racism.**
>
> **• On 17th December 2022 you were involved in another incident which took place in the Genius Repair room. You were having a conversation with Neil Flenna (Genius) who shared that his application for Lead Genius had been unsuccessful at the CV screening stage. You shared that you had responded to Neil Flenna by sharing with him that Nick Gabriel (Genius) had gone through a similar experience and had resubmitted his CV, the same CV which had been previously unsuccessful, and had added in his Jamaican heritage and he had been successful as a result. Your comment implied that career progression at Apple is based on what a person's cultural heritage is.**

5.34 The letter failed to refer to any policy. It failed to identify any breach of any section of any policy.

5.35 The disciplinary was undertaken by Mr Joe Pegram, who was a store leader based in Brighton. He held an initial disciplinary hearing on 13 January 2023. The claimant read, initially, his prepared statement. The claimant accepted that the first allegation contained a comment which could be seen as "vile and offensive" if taken out of context. The claimant referred to the second allegation. At this time he still believed the complaint to be about the events of 17 December. He reported that he had spoken to Mr Marsh, who was not offended, and he did not believe that there was harassment of Mr Marsh.

5.36 His prepared statement concluded by saying

> **In conclusion, then, I'd point out that what the investigation has ended up with is one incident where the sole relevant individual has said multiple times she wasn't offended and doesn't want the issue followed up, and a second incident where there is no documented evidence either that the joke was itself racist or that anybody has felt it to be. As a consequence of those two events, we've then had an investigation that has both failed to gather the evidence correctly and failed to report it correctly.**

5.37 The claimant complained about minimal investigation.

5.38 Mr Pegram then conducted his interview. He referred to Apple's definition of bullying (see above) in the context of allegation one. The claimant did not accept he had bullied Ms Lui.

5.39 Mr Pegram referred to Apple's "definition of harassment."

5.40 During this hearing, Mr Pegram failed to identify that allegation two concerned an event on 16 December but the complaint, wrongly, referred to 17 December. The claimant accepts that he did not believe Ms Lui was due an apology, as it was clear that she was not offended. However, he did not seek to resile from the position he took in the investigation.

5.41 Mr Pegram adjourned the disciplinary hearing to consider matters further. Mr Pegram spoke to Mr Webster on 16 January 2023. Mr Webster confirmed he had not been personally offended.

5.42 Mr Pegram spoke to Mr Gormley who also confirmed that whilst he was a bit speechless and thrown off, he was not offended. He confirmed that the repair room culture was in general "relaxed with explicit language being used." He denied hearing any "racial language."

5.43 Mr Pegram spoke with Mr Marsh on 16 January 2023 about the second allegation. It is unclear when Mr Pegram saw the email from Mr Marsh of 17 December 2022. However, at the start of the interview Mr Pegram referred to an incident on 16 December 2022. The email of 17 December 2022 was not in the investigation report sent to the claimant.

5.44 Mr Pegram's witness statement reports that Mr Marsh had been offended by the inference he drew from the claimant's comment, as his wife was Asian and worked in the same team as the claimant. The interview notes do not suggest that Mr Marsh took serious offence. Mr Marsh said -

> **The incident appears to be minor, but the subtext is not good. I just felt at the time, and my responsibility as Lead Genius is to make sure everyone feels comfortable, it's my job to set that standard.**

Later he states

> **I basically said to him everything I just said, I stand by everything I've just done, and I found it offensive. He said yeah it was stupid I shouldn't have said it. I told him that my intention is not to see you in an immense amount of trouble, but you have to know the responsibility I have in this team. You shouldn't have said it, it was offensive. He did seem fairly remorseful, and he did apologise to me. But it's a weird situation, it's not about me as such. But we did sort it out.**

5.45 Mr Pegram went on to say that his opinion was the claimant did not understand or acknowledge his comment. In response, Mr Marsh stated that he knew the claimant was not "a bad guy" and that he "didn't mean that" (presumably to be offensive.) To the extent Mr Marsh was upset he explained it as follows:

> **The comment is literally saying that people I care about deeply aren't qualified to do their job. It didn't explicitly say that, but it was the inference. It's just completely unacceptable, no matter how you dress it up. The inference is that people like my wife don't deserve their jobs or that they aren't as qualified as me (white). That kind of casual conversation is corrosive, we've got two new Lead Genius's coming into the store, and having those kind of conversations is dangerous and undermines peoples experience.**

5.46 At some point, prior to the disciplinary reconvening, the claimant was sent Mr Marsh's email of 17 December. At that point, the claimant, for the first time, understood that allegation two referred to events of 16 December 2022.

5.47 Mr Pegram also spoke with Ms Hussain and asked her to explain her further approach to the investigation. He says in his statement, "I challenged Issy on the fact that Steve, Ran and Leo had stated that they were not personally offended by the First Comment, and how this had influenced her."

5.48 The disciplinary hearing reconvened on 21 January 2023. At the hearing, Mr Pegram acknowledged that reference to 17 December was incorrect (albeit that he started the interview by referring to the incident on 17 December 2022). He appeared to view the events of 17 December and 16 December as the same incident and referred to a "mistake" in the investigation report. No written correction was provided.

5.49 At the start of the hearing, the claimant read a prepared statement. He noted that the allegation appeared to concern the events of 16 December. In relation to that allegation, he referred to Mr Marsh's email and stated, "Having read it, though, I don't quite understand what I'm being accused of." He explained he had simply repeated Mr Gabriel's words. He noted he could not remember exactly what he had said, and he could not confirm that Mr Marsh had accurately reported Mr Gabriel's words. He went on to say, "I'd like to make it clear that I absolutely understand why Brenton felt upset hearing about Nick's experience." He stated "Any form of discrimination, be it positive or negative, has no place in Apple's hiring system." The claimant's prepared statement continued, "that implication of positive discrimination didn't come from me." He stated that he felt in hindsight "bad for pointing it out." He stated he did not see how it could "possibly breach Apple's harassment and bullying policy."

5.50 The claimant noted that there was occasional joking which referenced stereotypes and he gave the following example in his written statement:

> **To take one example, a few days ago a technical specialist was in the repair room wanting advice about booking in a phone for repair, and whether the display was too damaged. The three people who were in there couldn't come to an agreement, and when I walked in I got asked for my opinion, as the most experienced technician around. It was quickly pointed out that, as it turned out, she'd turned to the only white person in the room to get the definitive answer. This was of course entirely coincidental, but people laughed because of how awkward it could have seemed to anybody**

> **overhearing. That's joking about racial stereotypes, that's the sort of joke that gets made occasionally.**

5.51 Mr Pegram accepted the claimant appeared remorseful. Mr Pegram explained what he believed to be his role and stated the following-

> **I need to be clear Tim, my job as the disciplinary manager is to make a decision in relation to the two allegations that have been made against you. As a reminder, this can be anything from 'No further action' up to and including 'Dismissal.'**
>
> **I also need to consider the level of risk you impose long term given your behaviour and comments. There is no room for behaviour like this in Apple at all - we have a zero tolerance. What is your response to this?**

5.52 Mr Pegram did not explain the reference to zero tolerance.

5.53 Mr Pegram decided to dismiss the claimant. He sent a letter of dismissal dated 3 February 2023.

5.54 The letter repeats the allegations as set out in the invitation to the disciplinary. It fails to correct the reference to 17 December in allegation two.

5.55 The relevant part of the dismissal letter reads as follows:

> **The reasons for your dismissal are as follows:**
>
> **• As part of the disciplinary hearing we explored the first incident that took place on Tuesday 13th December 2022 involving you, Ran Liu (Genius), Leo Webster (Manager) and Steve Gormley (Senior Manager). You confirmed in our meeting and again within your written statement that you used the phrase "…that's if you lot don't invent another disease" towards Ran Liu in response to Steve Gormley returning to Apple White City after his career experience ends. To clarify, Ran Liu is of Chinese origin. You go on to describe the language within your comment as vile, offensive and cite that this would be an outrageous thing to say to any random person however you describe Ran as a friend and colleague and somebody in which you have a great working relationship with. You explained to me that Ran took the comment in the exact way that you intended it which was as a joke. I asked you to reflect on the journey we have all been on over the past two years as Apple employees in relation to race inequality and injustice and as a response to several global social movements such as 'Black Lives Matter.' You told me that you have learnt that everyone should be treated equally, regardless of race, gender or sexuality. You went on to say that any form of treating people differently or potentially joking if interpreted in the wrong way can be bad thing. It is clear from your reflections that you understand what is expected of you and how you should behave in line with Apple's policies.**
>
> **• I confirmed with you that your learning was underpinned by completing several mandatory training modules provided by Apple, more specifically, Apple's Business Conduct training, Apple's Unconscious Bias training as well as 'Respect at Apple' training. These training modules are designed to inform every team member about Apple values and our policies prohibiting workplace harassment, how to listen and respond in a way that creates trust, and how we all contribute in fostering a respectful environment**

consistent with Apple values. Within your written statement you shared with me that you did not accept that you had breached Apple's Bullying & Harassment policy and cited that harassment and bullying are not about individual intent, but how the behaviour affects another person. You went to explain that as your comment had not personally affected anybody else, that you felt that you hadn't done anything wrong. Whilst I have considered this point as part of my decision making, I do not agree that you did not breach Apple policy because Ran, Steve and Leo were not personally impacted by your comment. It is clear that you used inappropriate language towards another team member. This was a discriminatory comment which is at odds with our Diversity and Inclusion commitments and amounts to gross misconduct under our Disciplinary Policy: Examples of gross misconduct include but are not limited to, the following: Any act of discrimination, bullying, or harassment of colleagues, customers, or any other person.

• Within our meeting on Saturday 21st January 2023 we discussed the second allegation that was made against you — this was in relation to a conversation that took place in the Repair Room at Apple White City on Saturday 17th December 2022. It is alleged that you were in conversation with another Genius about their CV not being selected as part of a Lead Genius hiring process. It is alleged that you suggested for them to add their cultural heritage to their CV which would give them a better result in the hiring process and that your comment implied that career progression at Apple is based on a person's cultural heritage. We explored a statement that was submitted by Brenton Marsh (Lead Genius) as well as the transcript of the conversation I had with Brenton. I asked you to consider the impact that your comment had on him (given that his wife who used to work at Apple White City as a Lead Genius and is of asian descent) as he considered that your comment inferred that promotions at Apple and her promotion were based on cultural heritage and not a persons ability to perform in the role. Brenton described a follow up conversation he had with you where he told you that the comment you made was inappropriate and offensive towards him, he told me that you agreed it was and you appeared remorseful. I find it deeply concerning that this incident took place only 2 days after your initial investigatory conversation with Issy Hussain (Senior Manager) on Thursday 15th December 2022 in relation to the first allegation. Even though the initial investigation was adjourned and your behaviour and conduct was being called into question, you still chose to make a comment which implied cultural heritage played a part in Apple's hiring processes and as a result of your comment offended Brenton Marsh. You told me that you were not suggesting that somebody add their cultural heritage to their CV but instead was stating a fact about one of you peers and their experience with their CV. Essentially you were quoting somebody's experience not suggesting anybody actually do it. Whilst your intent may have been to only state somebody else's experience, your comment clearly offended a team member which I deem to be unacceptable. I see this as a further example of discriminatory conduct, which, as outlined earlier on, is inconsistent with Apple values, our Diversity and Inclusion commitments

• Taking everything into consideration I deem your actions to be in breach of Apple's policies: Apple's Business Conduct policy and the Bullying and Harassment Policy as discussed with you during the meeting. In relation to Business Conduct policy the breaches are specifically related to trust and respect — you have made inappropriate comments on two separate occasions and I do not have the confidence that you will not repeat this behaviour in the future. As outlined above, I consider your actions to be discriminatory. Any act of discrimination, bullying, or harassment of

> **colleagues, customers, or any other person is considered by Apple to be gross misconduct.**
>
> **• Whilst I have considered your tenure and clean record as part of my decision making, your actions have amounted to gross misconduct and in these circumstances I believe the appropriate outcome is dismissal.**

5.56 It his statement, Mr Pegram explains further his reason for dismissing the claimant. He states at paragraph –

> **In my view, this comment was contrary to Apple's expectations around standards of behaviour particularly with regards to equally.**

At 68 he says -

> **Tim's position was that he had not harassed anyone, or done anything wrong, because no one had been offended by his comment. However, it was clear to me that Tim had used inappropriate language towards a work colleague, and this amounted to discriminatory conduct.**

As for the second allegation, he says this at paragraph 69 -

> **It was of deep concern to me that Tim had made this comment so shortly after the initial investigation meeting with Issy. Whilst Tim's position was that he had merely stated a fact, this comment had implied that cultural heritage played a part in Apple's recruitment process. It also offended Brenton.**

At paragraph 70 he says-

> **I was satisfied that the Second Comment was a further example of discriminatory conduct which was inconsistent with Apple's policy.**

As to the relation between the two, he says this paragraph 72 -

> **I also remained very concerned about the proximity of the First Comment and the Second Comment, which demonstrated that he had not taken any learnings from the First Comment and the initial investigation meeting with Issy**.

5.57 At no time did Mr Pegram address the claimant's contention that he had reported evidence of potential positive discrimination.

<u>The appeal</u>

5.58 The appeal was dealt with by Ms Elaine Shapland, a store leader from Exeter. The claimant lodged his appeal on 6 February 2023. His position can be summarized briefly. He alleged that the decision was "not a logical and reasonable response to the facts presented." He denied that he used discriminatory words in the second incident. He referred to the remorse that he had shown for the unintended distress caused. He alleged he demonstrated a firm commitment to inclusion and diversity and had shown a clear understanding of the bullying and harassment policies. He

complained that Apple procedures were not followed, he identified various breaches.

5.59 I should note that the claimant raised issues about the dismissal being related to his union activity. This is not been pursued and I need consider it no further.

5.60 I have considered in detail the appeal outcome report. It is not necessary for me to set it out in full. It is a confusing document; much of the treatment is superficial. It is clear Ms Shapland concluded that allegation one was a breach of the bullying and harassment policy, but she does not explain why.

5.61 She stated that the claimant failed to provide "further evidence in support of your view that the sanction applied was disproportionate." She states that it is clear that his "behaviour amounted to gross misconduct." She does not explain how. She states that the original disciplinary hearing "applied the policies correctly."

5.62 Ms Shapland considered the investigation process. Ms Shapland failed to identify any difficulties with the investigation and, implicitly, accepted the investigation was appropriate.

5.63 She rejected the assertion that the claimant should be given advance notice of the investigation meetings.

5.64 She rejected the dismissal being connected to union activity.

5.65 She addressed the claimant's contention that the stress had caused an onset of an epileptic seizure. She concluded "Whilst we are incredibly sympathetic to your condition, going by the evidence presented to me I cannot see that the process induced the seizure." It is unclear what importance she attached to this. It is unclear on what she based her opinion.

5.66 The appeal hearing did nothing to identify any breaches of procedure.

5.67 Ms Shapland also proceeded on the basis that Apple had a policy of zero tolerance, as confirmed in her oral evidence. In oral evidence she made it clear that she did not believe there was any mitigating circumstance which was relevant.

5.68 Ms Shapland’s evidence demonstrated that she had limited understanding of the respondent’s policies or their application. She appeared confused about her role and confused about how she should approach it. She appeared confused as to what circumstances could constitute mitigation. In her oral evidence she appeared confused as to what could amount to a mitigating circumstances and referred to the respondent's policy of zero tolerance. She appeared to suggest that zero tolerance was inconsistent

with mitigation, but she had no clear concept of what was meant by zero tolerance or where it came from.

5.69 The outcome of the appeal was subject to significant delayed. It was not sent until 5 April 2023.

The repair room culture

5.70 It is apparent that there were investigations into the repair room culture. I have limited details.

5.71 At page 194 of the bundle there is a chain emails from Ms Katie Mabbett.

5.72 The purpose of these emails is unclear. However, they do reference individuals making various allegations. For example, one employee, during a conversation, stated his Italian background had been referenced negatively.

5.73 This correspondence is not concerned with any allegation against the claimant. It appears there was some investigation into general concerns about the use of racial stereotypes in the repair room. This led to a senior manager, Ms Liz Da Silva addressing the team about expected standards of behaviour. The script for that meeting, which occurred around 9 February 2023 is in the bundle. In her email of 9 February, Ms Da Silva stated

> **Given the current circumstances surrounding the behaviour/conduct at the Genius Bar in White City, I feel compelled to address and realign my entire team so there is a clear understanding of the basic expectations (surrounding business conduct) and to mitigate further instances of this pattern reoccurring.**

5.74 I note the following parts of the script which are particularly relevant:

> **For this reason I want to be explicitly clear in my message, any language used or conduct that singles out a group of people for their protected characteristics e.g race, sexuality, religion etc is not considered "banter" and it goes against Apples Values, against Apples Business Conduct policy and is considered gross misconduct.**
>
> **...Unfortunately the nature of banter that we've become aware of, does not foster positive, mutually respectful and inclusive culture that strive for. Apple has got 0 tolerance policy when it comes to harassment and bullying, discrimination or discriminatory language. Even if it does not cause offence in the moment, to those around you - any form of discriminatory language is not accepted at Apple.**

The law

6.1 Under section 98(1)(a) of the Employment Rights Act 1996 it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a

kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

6.2 In **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 the Court of Appeal held -

> **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.**

6.3 In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in **British Home Stores v Burchell** [1980] ICR 303, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the EAT in **Sheffield Health and Social Care NHS Foundation Trust v Crabtree** EAT/0331/09.

6.4 In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones** [1982] IRLR 439 and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal consider the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision, for that of the respondent, as to what was the fair course to adopt. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

6.5 The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (see **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**.)

6.6 **Taylor v OCS Group Limited** 2006 ICR 1602 CA makes it plain that procedural fairness is not separated from other issues arising. The

procedural issues must be considered along with the reason for dismissal. It follows that not all procedural imperfections will lead to a finding a dismissal was unfair. Each case must be considered on its merits. The question is one of fairness under section 98(4) Employment Rights Act 1996.

6.7 Pursuant to section 207 Trade Union and Labour Relations (Consolidation) Act 1992 the ACAS Code on Disciplinary and Grievance Procedures 2015 ('the Code') is admissible in any employment tribunal proceedings, and the tribunal is obliged to take into account any relevant provisions of the Code. A failure to observe any provision of the Code shall not in itself render that respondent liable to any proceedings.

Conclusions

The reason for dismissal

7.1 I first consider the reason for dismissal.

7.2 The reason for dismissal is a 'set of facts known to the employer, … or of beliefs held by him, which [caused] him to dismiss the employee.'[1]

7.3 Mr Pegram's reason for dismissing was a mix of facts and beliefs. The complexity of his reasoning is illustrated by the length of his explanations. It is necessary to identify the key elements in some detail.

7.3.1 He considered allegation one. He believed the claimant had said to Ms Lui "As long as you lot don't release another deadly disease on the world." This being the factual allegation underpinning allegation one.

7.3.2 He considered allegation two. It is less clear what he believed in relation to allegation two. There were two completely separate incidents, on different dates. The confusion was not about the date of a single incident. Mr Pegram failed to make a clear distinction. He confused and elided the facts which related to both. During his evidence before the tribunal he remained unclear that the reference to "3% Chinese DNA" occurred on 17 December, and was no part of the allegation against the claimant. Nevertheless, Mr Pegram concluded the claimant had said words to the effect Mr Gabriel had "resubmitted the CV with the same wording and he just added I had Jamaican heritage and it got through. . . or Asian " and that those words were said either to Mr Marsh or in his presence. He believed allegation two was made out.

7.3.3 In relation to allegation one, he did not believe that any of those individuals present had been offended or significantly offended by the claimant's comment.

[1] Cairns LJ in *Abernethy v Mott Hay and Anderson* [1974] IRLR 213.

7.3.4 In relation to allegation two, he believed Mr Marsh had been offended by the claimant's comment.

7.3.5 He believed the respondent operated a zero tolerance policy.

7.3.6 He believed the claimant was in breach of the respondent's procedures.

7.3.7 His evidence is unclear as to whether he believed either comment amounted to bullying or harassment, or was a direct breach of the policy. In relation to allegation one and allegation two he referred to them as discriminatory conduct.

7.3.8 He believed the claimant appeared remorseful at the second disciplinary hearing, but that he had not demonstrated remorse at the first disciplinary hearing.

7.3.9 He believed the claimant had acknowledged the seriousness of allegation, particularly at the investigation stage.

7.3.10 He believed that the proximity of the second comment demonstrated the claimant had failed to learn from the first comment. He believed the claimant was unwilling to admit his mistakes and that he had inappropriately focused on justification.

7.3.11 He had no confidence that the claimant would not repeat the behaviour in the future.

7.4 It was a totality these beliefs that led to the dismissal. His belief was honestly held and the reason is established.

<u>The investigation stage</u>

7.5 It was not necessary for the respondent to notify the claimant that it intended to investigate his conduct. However, when the investigation started, the failure to make it plain who had complained caused confusion and misled the claimant.

7.6 In the second investigation meeting, there was a failure to identify the relevant further allegation at all. The claimant was misled by being told that the investigation concerned events of 17 December 2022. It did not. The claimant was not given Mr Marsh’s email, or informed adequately of its content. The claimant answered questions only about events of 17 December, which were not under investigation. It follows there was no investigation at all of the events of 16 December.

7.7 The purpose of an investigation having regard to the ACAS code is to establish the facts of the case.[2] The guidance[3] makes it plain that the investigation should be fair and reasonable and should be approached with an open mind looking for evidence which supports the employee's case as well as evidence against. This is consistent with the respondent's policy.

7.8 There were significant deficiencies in this investigation, particularly as regards allegation two.

7.9 The investigation went beyond establishing facts. There were speculative questions seeking opinions and some inappropriate leading questions which were not concerned with fact-finding. Ms Hussain did not adequately explore whether anyone was offended, or the reasons why they were not offended. The extent of the questioning about culture may have distracted her focus from establishing the facts surrounding the alleged incidents.

7.10 It is unclear why witnesses were asked about the general culture, but there was no follow-up in relation to it by interviewing members of the team generally.

7.11 The key witnesses for allegation one were interviewed. However, the same cannot be said for allegation two. First, the allegation was not adequately identified to the claimant, and Ms Hussain failed to ask him about the events of 16 December. Ms Hussain failed to interview any other witness. It follows she reached conclusions based on an email from Mr Marsh which concerned events on 16 December and evidence from the claimant about 17 December. As she failed to interview any other relevant witnesses, she failed to establish the context. The context was likely to support the claimant’s case and this evidence was ignored. It follows the investigation failed to establish the facts in relation to allegation two and failed to identify evidence that might assist the claimant.

7.12 The investigation report was poor. The report is a mix of fact, assertion, and conclusion based on inadequate evidence. It failed to exhibit all relevant documents. If failed to identify adequately what was the breach of the policy.

7.13 The ACAS code envisages that an investigation is a process of fact-finding which should be undertaken in a neutral way which identifies evidence both for and against the employee. In this case, it was not approached in a neutral manner. The allegations were not properly identified. The potential breaches of policy were not identified, and therefore were not put to the claimant. The report failed to set out the facts adequately and set out the investigator's opinion.

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[2] See para. 5 of the code.

[3] Disciplinary and Grievance at work- The ACAS Guide 2020. Breach of the guidance cannot be taken into account directly, but it may be relevant in considering the interpretation of the 2015 code.

7.14 The report is unbalanced. In particular, the claimant had made it plain that the joke was on was ill judged any demonstrated remorse. This was not highlighted

7.15 Managers are not necessarily trained investigators. It is not every shortcoming which will lead to a finding of unfairness. However, the shortcomings in this case were serious. The essence of an investigation is to identify the appropriate facts relevant to appropriate allegations. In relation to allegation two, the investigation almost wholly failed. The investigation was better in relation to allegation one, but it focused on evidence against the claimant.

7.16 I accept the claimant's submissions that the investigation report contained misrepresentations. It was unfair to suggest the claimant has said Mr Gabriel had been successful as a "result" of mentioning his Jamaican heritage. The claimant did not say that. The claimant did not say that Mr Flenna should put on his CV that he was Asian.

7.17 Taken in isolation, this investigation was not one open to a reasonable employer. Mr Pegram did recognise there were difficulties and sought to remedy some of the shortcomings. I will consider that further below.

<u>The disciplinary stage</u>

7.18 The claimant accepts that Mr Pegram believed the claimant committed misconduct in relation to both allegation one and allegation two. I accept that the respondent has established a reason for dismissal and that reason relates to conduct.

7.19 It is necessary to consider whether there were grounds to sustain the belief, and whether at the time that belief was formed, those grounds were supported by an investigation which is open to reasonable employer.

7.20 The reason for dismissal contains a number of elements and it is important to consider whether there are grounds for each of those, and whether each was supported by an investigation which was open to a reasonable employer.

7.21 I will consider each of the key beliefs which underpinned the dismissal. However, when considering whether the dismissal was fair or unfair, I have regard to the totality of the process and the cumulative effect.

7.22 It was common ground that the claimant had made an inappropriate joke on 15 December 2022 and he said words to the effect " If you lot don't release another deadly disease on the world." The investigation established this. The claimant admitted it.

7.23 The investigation in relation to allegation two was wholly inadequate, for the reasons I have set out. If failed to identify the relevant allegation

adequately. The investigating officer failed to question the claimant. The claimant answered questions about an incident which was not under investigation. Mr Marsh was not interviewed at the investigation stage. It is not clear why. No other witness was interviewed.

7.24 Mr Pegram identified, correctly, that the investigation was inadequate and he did seek to investigate further. His own investigation was flawed by confusion as to the nature of allegation two, which was underpinned by confusion about the date. Nevertheless, he did undertake some relevant investigations. He spoke to Mr Marsh. However, as he failed to identify the allegation adequately prior to the second disciplinary hearing, he failed to identify adequately other witnesses and did not interview them and therefore had limited understanding of the context. The context was important because it provided evidence in favour of the claimant, and omitting it from the investigation seriously undermined the fairness and integrity of the process.

7.25 Mr Pegram was unreasonable in failing to review Mr Marsh's email of 17 December. He should have realised that there was significant confusion. Failure to bring that to the claimant's attention was unreasonable. Mr Pegram did not appear to realise the difficulty until after the claimant pointed it out in the second disciplinary hearing. At that point, it should have been obvious that he had not undertaken careful or adequate investigation. He failed to clarify the allegation two adequately and failed to undertake an investigation open to a reasonable employer. I accept that the claimant did have an opportunity to give some explanation, but it is apparent that Mr Pegram remained confused as to which fact related to events of 16 December and which related to 17 December; this undermined his ability to analyse the matter fairly.

7.26 The claimant did accept that he had used words to the effect Mr Gabriel had "resubmitted the CV with the same wording and he just added I had Jamaican heritage and it got through. . . or Asian. "

7.27 It follows that there were grounds on which that belief could be sustained, but the investigation in relation to the surrounding circumstances was poor and incomplete.

7.28 The evidence demonstrated that those individuals present at the first allegation had not been offended or significantly offended by the claimant's comment.

7.29 In relation to allegation two, Mr Pegram believed Mr Marsh had been offended by the claimant's comment. The evidence for this was contained in Mr Marsh's interview statement. In his evidence before the tribunal Mr Pegram alleged that Mr Marsh had been seriously offended. I do not accept the investigation demonstrates such a significant degree of upset. Nevertheless, there was some evidence of some unhappiness, albeit Mr Marsh's focus was about his general responsibility to uphold Apple's policies.

7.30 Mr Pegram had little or no ground to believe the respondent operated a zero tolerance policy; his belief was not founded on any investigation or consideration of any document. It was, in essence, his own opinion or interpretation. He could point to no policy. He referred generally to a discussion with human resources, but could identify no email. His statement repeatedly refers to Apple having a zero tolerance approach or a zero tolerance policy. There is no such policy. There is no good reason for Mr Pegram to focus on his own perception of a zero tolerance policy rather than the wording of the policies which the claimant was said to have breached. This approach was arbitrary, unfocused, and inconsistent with the actual policies. It seriously undermined the fairness of his approach.

7.31 Mr Pegram had grounds for believing that there were policies that were relevant. However, the investigation failed to identify what part of each policy was breached by each allegation. Mr Pegram came to a general conclusion that there had been discrimination in relation to both allegations. His approach was unjustified and needs to be considered further.

7.32 The harassment and bullying policy treated bullying and harassment as distinct. There were no grounds for finding that allegation one amounted to bullying. I have regard to the respondent's own definition. The behaviour was not repeated. It was not perceived as insulting or otherwise intimidating. Ms Lui saw it as a joke, and one which occurred in the context of a relationship which embraced such jokes, including her mimicking of the claimant's accent. There were no grounds for concluding that the two other witnesses were bullied.

7.33 There is no specific definition of harassment in the respondent's, policies, perhaps a surprising omission. The respondent's position, to the extent it is defined, is not inconsistent with the statutory definition. Intent is not necessary. However, the policy envisages a range of seriousness by noting that any such behaviour, presumably behaviour that could be seen as harassment, "may*"* be subject to disciplinary action.

7.34 The disciplinary procedure gives examples of gross misconduct. It is said any act of discrimination, bullying, or harassment may be gross misconduct. It does not say every act must be treated as gross misconduct. To interpret it otherwise would be in conflict with the bullying and harassment procedure.

7.35 The policy makes it clear that it is how the behaviour affects another person which must be considered. This is consistent with the statutory definition, which considers effect. For allegation one, the three individuals who heard the comment did not consider they had been harassed and they did not support action against the claimant. There were no grounds to conclude that he had harassed them.

7.36 To some extent Mr Pegram appears to have realised that an allegation of bullying or harassment could not be sustained. Instead he fell back on a more general consideration of discrimination. He may have had in mind the business conduct procedure, which refers to harassment and discrimination and states that Apple is committed to providing a workplace free of harassment and discrimination. However, he did not refer to that expressly. He came to the conclusion that the simple use of the words "you lot" were race specific and therefore discrimination. However, if that was the intended allegation against the claimant, it was never made plain. Moreover, he appears to have had no appreciation that the use of race specific words will not in all contexts be race discrimination.

7.37 I accept Mr Pegram was concerned that if the comment had been overheard, it may have caused offence. However, it was not overheard by anyone who was offended. Moreover, the claimant fully accepted, at all times, that the comment was inappropriate and could have caused offence had it been overheard by others. Mr Pegram did not have any reason to believe that the claimant did not understand the gravity. We had no reason to believe that the claimant would repeat the comment. The claimant's remorse and understanding was clear from the investigation.

7.38 Mr Pegram's approach was hampered by the failure to set out the allegation clearly. His approach was based on shifting sands. He reached conclusions on the basis of his assumption of discrimination, which was unjustified. He had in mind a policy of zero tolerance, which at best was his interpretation of some other policy, but it was not set out in the respondent's relevant policies. This was not an approach open to a reasonable employer.

7.39 As for allegation two, Mr Pegram relied on the offence caused to Mr Marsh. In that sense, he appeared to have viewed the claimant's comments as one of harassment or bullying.

7.40 Mr Marsh accepted it was not the claimant's intention to offend. Mr Pegram had no adequate understanding of the definition of harassment or of any other type of discrimination under the Equality Act 2010. In the absence of intent, he did not understand the need to consider the effect of an action in determining if it was an act of harassment. This perhaps reflects a deficiency in Apple's policies and a deficiency in the training provided by Apple. He did not understand that when considering the effect, and whether it amounts to harassment, it may be necessary to consider whether it could reasonably be said to have that effect.

7.41 Mr Pegram did not have a wider understanding of discrimination law. He did not understand the difference between harassment, direct discrimination, and victimisation.

7.42 The claimant, in his statement for the second disciplinary, made it plain that he had repeated the words of Mr Gabriel. He identified that Mr Gabriel's reports may demonstrate positive discrimination. The claimant,

correctly, identified that positive discrimination is not allowed under the Equality Act 2010. Mr Pegram had no regard to this. Mr Pegram failed to appreciate that the claimant's comments were a potentially a protected act, as he had no understanding of the concept of victimisation. Under section 27(2)(d) making an allegation (whether or not express) that there has been a contravention of the Equality Act 2010 is protected. It will only cease to be protected if the evidence or information given is false and is made in bad faith. However offended Mr Marsh was or was not, he was being offended by the claimant reporting an account given to him which could have amounted to an incident of positive discrimination. The possibility of the claimant's statement being a protected act, should have been obvious, not least of all because it was highlight by the claimant. If it was to be rejected as a protected act, it would be necessary to investigate whether the allegation was false and whether it was made in bad faith. However, Mr Pegram did not engage with this.

7.43 Mr Marsh may have been offended. He may have held the belief that Apple could not have undertaken positive discrimination. Mr Pegram appears to have considered the concept so outrageous that he did not entertain the thought that it could be true, instead he treated the claimant as being guilty of race discrimination for raising it at all. Mr Pegram was not justified in doing so.

7.44 It appears Mr Marsh was not offended by the comment itself. Instead, he interpreted the comment as being a specific allegation that the claimant believed that individuals gained promotion not on merit but because of ethnicity, and hence the claimant was attacking the competency of those promoted. Mr Marsh's interpretation was extreme. Even if there were positive discrimination, it said nothing about the competency of the individuals promoted. M Gabriel's account was consistent with a potential conclusion that ethnicity may be a factor in gaining an interview.

7.45 Viewed objectively, it could not be said that Mr Marsh was reasonable in believing, if he did, that the claimant's comment amounted to harassment. On the evidence before Mr Pegram, the conclusion that repeating the comment was race discrimination was unjustifiable. No reasonable employer could have reached that conclusion.

7.46 Mr Pegram's criticism of the claimant in relation to the first disciplinary interview for not showing remorse was unjustified. The claimant had made his position clear in the investigation. He was entitled to put forward arguments as to why allegation one did not amount to harassment. The claimant's argument was well-founded and justified. Mr Pegram ignored the reasonableness of the argument and instead treated it as showing a lack of remorse. That fed into his ultimate decision to dismiss. He was not justified in dismissing the claimant's reasonable argument.

7.47 It follows there were no reasonable grounds for concluding that the claimant's comments were discriminatory. There were grounds for concluding that allegation two was a protected act, but that was not

considered. No reasonable employer would have failed to consider the possibility.

7.48 As there were no grounds for believing the claimant had done anything wrong in relation to the second allegation, there was no basis for believing that the proximity of the second comment was relevant. Mr Pegram relied on the second comment for concluding that the claimant may, in some manner, undertake further acts of discrimination. He was not justified in doing so.

7.49 There were no grounds on which Mr Pegram could conclude, reasonably, the claimant would repeat the alleged discriminatory conduct, or harass anyone.

7.50 Ultimately, Mr Pegram did not have appropriate grounds based on an investigation open to a reasonable employer for key beliefs he formed.

7.51 There may be occasions where it is within the range of reasonable responses to dismiss someone for making a racially specific joke in circumstances where it does not amount to harassment. If an employer wishes to do that, the policy should be clear.

7.52 In this case there was ample evidence that there was a culture in the repair room which embraced explicit language and some jokes which may be considered inappropriate, whether they referred to race or other sensitive issues. The claimant was not the only person who made inappropriate comments. That much was apparent from the interview with Ms Lui. It was also revealed by the general investigation which appeared to be going on in the background. The respondent formed the view that the culture need to be addressed and hence the meeting which took place later.

7.53 No reasonable employer would dismiss somebody by relying on the application of a zero tolerance policy which does not exist. If Apple wishes to impose a zero tolerance policy that is for Apple to consider and justify. Any policy should set out clearly the nature of that policy and the consequences if breached.

<u>The appeal</u>

7.54 I need say little about the appeal.

7.55 There were serious errors in the original investigation. There were serious errors in Mr Pegram's approach. Mr Pegram had relied on the policy which was not set out in writing and he applied some form of personal interpretation. He had not identified adequately which policies had been breached or how they been breached. He had reached conclusions about discrimination which were questionable and unsupported by evidence. There were no reasonable grounds for concluding that the 15 December incident was one of harassment or bullying. The claimant's comment on

17 December was potentially a protected act, and any detrimental treatment of the claimant, including disciplinary proceedings, could have been victimisation of the claimant.

7.56 Ms Shapland failed to recognise any of this. Her approach to zero tolerance was, if anything, more muddled than Mr Pegram's. She failed to engage adequately or at all with the inadequacies of the original procedure and her own conclusions were inadequately reasoned. The appeal did nothing to recognise, consider, or correct the deficiencies in the investigation, the disciplinary procedure, or the sanction. This was not an appeal process open to a reasonable employer.

7.57 The dismissal was outside the band of reasonable responses. In the circumstances, I find that the dismissal was unfair.

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Employment Judge G Hodgson

Dated: 30 May 2024

Sent to the parties on:

5 June 2024
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For the Tribunal Office