EMPLOYMENT TRIBUNALS

Claimant: **Miss S Fisher**

Respondent: **Sheffield Teaching Hospitals NHS Foundation Trust**

Heard at Sheffield **On: 6 and 7 November 2023**

Before: **Employment Judge Brain (sitting alone)**

Representation

Claimant: **In person**
Respondent: **Miss M Sharp, Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that the complaint of unfair dismissal is not well-founded. The claimant was fairly dismissed. The complaint of unfair dismissal fails and stands dismissed.

REASONS

Introduction and preliminaries

1. This case was heard over two days on 6 and 7 November 2023. After hearing the evidence in the case, the Tribunal received helpful submissions from the parties. The submissions concluded late in the afternoon on 7 November 2023. Accordingly, the Tribunal reserved judgment. The Tribunal now gives reasons for the decision that has been reached.

2. The claimant presented her claim form on 16 November 2022. She brought a complaint of unfair dismissal. Although no particulars of any discrimination claim were set out in the claim form the respondent's solicitors made reference to possible discrimination claims in paragraphs 24 and 25 of the grounds of resistance.

3. The case benefited from two preliminary hearings. The first of these was held on 22 May 2023 before the Employment Judge who heard the case. The claimant

made an application to amend her claim to include complaints under the Equality Act 2010. Given the late presentation of her amendment application the Tribunal ruled that the matter should be determined at a subsequent preliminary hearing. This came before Employment Judge Cox on 20 July 2023. She refused the claimant's application to amend her claim to include complaints of discrimination pursuant to the 2010 Act. Employment Judge Cox gave case management directions. She then set out in an annex to her case management order a summary of the issues in the claim. This is at page 43 of the hearing bundle.

4. The claimant was employed to work for the respondent as a medical secretary. Her dates of employment with the respondent were between 11 September 2017 and 7 November 2022. She worked in the cardiology department. The claimant was dismissed without notice by the respondent on the latter date. It is the respondent's decision to dismiss the claimant which has given rise to the claim.

5. As recorded by Employment Judge Cox in the annex at page 43 the issues in the claim of unfair dismissal are:

5.1. What was the reason or her dismissal?

The respondent says it was a reason related to the claimant's conduct, namely that she had made racially discriminatory comments. She says it was her sickness absence record.

5.2. If the reason for the claimant's dismissal was related to her conduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason for dismissing her? In particular:

(a) Did the respondent have a genuine belief that she had made the comments, based on reasonable grounds after a reasonable investigation? and

(b) Was the decision to dismiss her, rather than impose some lesser disciplinary sanction, within the range of possible reasonable responses in all the circumstances?

5.3. The claimant makes the following specific criticisms of the decision to dismiss her:

(a) It was unreasonable to accept the evidence of the person who raised the allegation against her (Leanne Roberts) and the person who gave evidence against her at the disciplinary hearing (Jennifer Bain) because they were biased against her since an incident in the summer when the claimant had refused to give a fan to Sarah Kenney. Ms Kenney, Ms Roberts and Ms Bain made up a clique who were hostile towards the claimant.

(b) It was unreasonable to prevent the claimant contacting anyone in the department during the course of the investigation.

(c) It was unreasonable to take into account the contents of record sheets completed by Michelle Wild that the claimant had not agreed as accurate or signed.

(d) The decision to dismiss the claimant was inconsistent with the decision not to dismiss another employee who was also found to have made a racist comment (in or around October 2020) but was not dismissed.

6. The name of the other employee referred to in paragraph 5(d) with whom the claimant contends she was treated inconsistently was cited in Employment Judge Cox's case management order. The hearing before her on 20 July 2023 was in private. Accordingly, that Order was not placed upon the Register of Employment Tribunal Judgments which is freely accessible to the public. In contrast, this Reserved Judgment will find its way on to the public register. As we shall see, the employee in question was exonerated of having made a racist comment (and also of making a homophobic comment). It is potentially damaging of her reputation for her name to be linked to those allegations and in the circumstances the Tribunal will anonymise her in these reasons. There can be no prejudice to the parties in the Tribunal doing so. The parties are fully aware of the identity of the individual in question and the matter was fully aired at the hearing.

7. In paragraph 6 of her case management orders (page 41 of the hearing bundle) Employment Judge Cox directed that it was anticipated that the hearing to be held on 6 and 7 November 2023 would decide only whether the claimant was unfairly dismissed. She went on to say that *"If the Tribunal considers that it might also be appropriate to deal with some limited matters relevant to remedy (that is, to whether re-employment should be ordered and to the amount of compensation to be awarded) that will be discussed with the parties at the hearing. Further directions may be necessary to prepare the claim for a further hearing to deal with remedy."*

8. This issue was discussed with the parties during the hearing. The claimant was reminded of the contents of the note made by the Employment Judge in his case management summary prepared after the hearing on 22 May 2023. At paragraph 5 of the note to that summary, the point was made that in deciding whether an employee was unfairly dismissed the Tribunal has a reviewing function. The question when deciding the merits of an unfair dismissal case concerning conduct is not whether the claimant committed the conduct alleged but rather whether the respondent had a reasonable belief that the employee did so. In paragraph 9 of the note, the Tribunal reminded the parties that primary findings of fact upon the claimant's conduct may arise at remedy stage. In other words, should the Tribunal find the claimant to have been unfairly dismissed, then it may be necessary for the Tribunal to make primary findings of fact as to whether the employee committed the conduct in question. This is because it is open to the Tribunal to make a reduction to any monetary award if it is just and equitable so to do on account of the employee's conduct. Further, the claimant in this case is seeking the remedy of re-engagement. The question of conduct can arise where the Tribunal is considering a re-engagement order as it goes to the question of whether re-engagement is practicable.

9. Following discussion of this issue with the parties, the Tribunal directed that no primary findings of fact would be made at this stage of the case. The Tribunal directed that the merits of the unfair dismissal case shall be determined, and the Tribunal would then give directions for a remedy hearing should the complaint succeed. These could then include directions for evidence going to the question of conduct.

10. On the first morning of the hearing, the respondent made an application for permission to rely upon the evidence of Emma Joel. She holds the post of nurse director for South Yorkshire Regional Services. She held the claimant's appeal against her dismissal. The claimant had no objection to the respondent's application provided she be given sufficient time to prepare her cross-examination of Mrs Joel. The Tribunal therefore directed that Mrs Joel would give her evidence on the second day of the hearing to enable the claimant to have the late afternoon and evening of the first day of the hearing to prepare.

11. The respondent also made an unopposed application to introduce some additional documentation into the hearing bundle. The bundle with which the Tribunal was presented runs to 637 pages. The additional material was therefore inserted into the bundle at pages 638 to 644.

12. On behalf of the respondent, the following witnesses were called:

    12.1. Amy Moreman. She holds the post of operational manager in the cardiothoracic department of The Royal Hallamshire Hospital in Sheffield.

    12.2. Angela Nicholls. She holds the post of deputy performance and information director with the respondent. She was the investigating manager in this case.

    12.3. Lisa Johnson. She holds the post of interim operations director with the respondent. She chaired the disciplinary panel which heard the claimant's case.

    12.4. Mrs Joel. As has been mentioned, she chaired the appeal panel.

13. The Tribunal also heard evidence from the claimant.

The relevant law

14. The Tribunal considers that, in this case, it is helpful to set out the relevant law at the outset. The Tribunal will then make relevant factual findings. Once that has been done, the relevant law will be applied to those factual findings to arrive at a determination of the issues identified in the annex to Employment Judge Cox's case management order cited above in paragraph 5.

15. The Tribunal is obliged to Miss Sharp for the very helpful summary of the relevant law in paragraphs 9 to 15 of her written submissions.

16. As Miss Sharp properly submitted, the starting point is to look at the provisions of the Employment Rights Act 1996. By section 94(1) of the 1996 Act, an employee has the right not to be unfairly dismissed by their employer. There is no issue in this case that the claimant has the right to complain that she was unfairly dismissed. She has the necessary qualifying service. There is no issue that she was not an employee.

17. Miss Sharp has set out section 98 of the 1996 Act in paragraph 9 of her submissions. The Tribunal shall not repeat this here. Suffice it to say that in deciding whether the dismissal of an employee is fair or unfair, it is for the

employer firstly to show the reason (or if there is more than one reason, then the principal reason) for the dismissal. The dismissal must be for one of the reasons in section 98(2) or alternatively for a substantial reason of a kind such as to justify the dismissal.

18. Section 98(2) sets out the permitted reasons for dismissal. Permitted reasons include those which relate to the conduct of the employee and the capability of the employee to carry out the work of the kind for which the employee was employed to undertake.

19. The reason for the dismissal is the set of facts known to the employer, or the beliefs held by the employer, which caused the employer to dismiss the employee: **Abernethy v Mott, Hay and Anderson** [1974] ICR 323.

20. It is for the employer to show that they had a permissible reason for the dismissal. If no permissible reason is demonstrated, then the dismissal will be unfair. If the employer discharges the burden of proving that they had a permissible reason, then the Tribunal will in broad terms go on to consider whether the decision to dismiss was a reasonable one. On the question of reasonableness, there is no burden of proof upon the employer. It is for the Tribunal to decide whether the decision to dismiss fell within the band or range of reasonable responses of a reasonable employer.

21. Miss Sharp drew the Tribunal's attention to **Iceland Frozen Foods Limited v Jones** [1993] ICR 17. This established that the correct approach for an Employment Tribunal to adopt in answering the question posed by section 98(4) of the 1996 Act is as follows:

    21.1. The starting point should always be the words of the statute;

    21.2. In applying the section an Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair;

    21.3. In judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

    21.4. 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, another quite reasonably takes another;

    21.5. The function of the Employment Tribunal is to determine whether in the particular 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 the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

22. In deciding whether the dismissal of the employee falls inside or outside the band of reasonableness, the Tribunal must have regard to the size and administrative resources of the employer's undertaking. The Tribunal must also have regard to the equity and substantial merits of the case.

23. In cases where an employee is dismissed because of their conduct, the case of **British Home Stores Limited v Burchell** [1980] ICR 303 stands as authority for the proposition that the Employment Tribunal must apply a three stage test. The first question is whether the respondent believed the claimant was guilty of the misconduct for which the employee was dismissed. The second question is whether the employer had reasonable grounds upon which to sustain that belief. The third element of the test is to ask whether the employer formed that belief having carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

24. The Tribunal, when assessing fairness, should look at the employer's handling of the matter overall. In other words, the Tribunal needs to examine the process carried out by the employer from start to finish and determine whether the overall process was fair notwithstanding any deficiencies at any early stage. Authority for this proposition may be found in the cases of **Whitbread & Co Plc v Hall** [2001] IRLR 275 CA and **Taylor v OCS Group** [2006] IRLR 613 CA.

25. The range of reasonable responses test applies to all of the procedural and substantive aspects of the decision to dismiss a person from their employment for a conduct reason. The Tribunal therefore shall consider whether the investigation process fell within the band of reasonableness as well as whether the actual decision to dismiss did so. Authority for this proposition may be found in **Sainsbury's Supermarket Ltd v Hitt** [2003] IRLR 23 CA. Where there is an allegation of misconduct and there are conflicting accounts as to what has occurred, a reasonable response demands that the evidence be tested. That this is the case was confirmed by the Court of Appeal in **Salford Royal NHS Foundation Trust v Roldan** [2010] IRLR 721.

Findings of fact

26. The Tribunal now turns to the factual findings. The events ultimately leading to the claimant's dismissal began on 27 July 2022. On that day, Mrs Moreman was made aware of two complaints against the claimant. Michelle Wild, operational support manager, reported to Mrs Moreman that she had received a complaint from Albert Adefuye (assistant operational manager). At the time, Mr Adefuye was line managed by Michelle Wild who in turn was line managed by Mrs Moreman.

27. Mrs Wild informed Mrs Moreman that Mr Adefuye had told her (Mrs Wild) that Leanne Roberts (medical secretary) had informed him (Mr Adefuye) of upsetting remarks made by the claimant. Mr Adefuye complained that the claimant had said that he had only got his job as assistant operational manager because he is black. Mr Adefuye also complained to Mrs Moreman that Leanne Roberts had reported to him that the claimant had gone on to say that Angela McIntosh (another medical secretary) would no longer be able to "*play the race card".* Mrs Moreman said in paragraph 7 of her witness statement that this remark was *"alluding to the fact that Ms McIntosh is also from an ethnic minority background."*

28. Ms Roberts and Mr Adefuye were asked to make written statements. Mr Adefuye's statement is at pages 95 and 96 of the hearing bundle. That from Ms Roberts is at pages 98 and 99.

29. Mrs Moreman did not meet with Ms Roberts, Mr Adefuye or the claimant to discuss the matter. As she says in paragraph 7, *"The matter was taken out of my hands and I was informed that advice from HR was that they would get someone from outside the directorate to investigate under the Acceptable Behaviour at Work Policy (pages 460 to 475). Angela Nicholls (deputy performance and information director) was appointed to investigate. The claimant was transferred to work in the renal department on 8 August 20222."*

30. A copy of the Acceptable Behaviour at Work Policy is in the hearing bundle. (It in fact commences at page 441). Miss Sharp took the claimant to passages within the policy. The claimant accepted that the making of racist remarks would be in contravention of the Acceptable Behaviour at Work Policy and also of the Equal Opportunities Employment Policy (which is within the bundle commencing at page 457).

31. Paragraph 4 of the Acceptable Behaviour at Work Policy mentions the respondent's core values. These are referred to as *"PROUD" behaviours*." The acronym PROUD stands for *"Patients First, Respect, Ownership, Unity and Delivery".* These are set out in the document at page 245.

32. The claimant accepted that she was familiar with the PROUD behaviours. The claimant was also taken to the respondent's disciplinary policy which commences at page 468. The claimant did not dispute that harassment related to race was an example of behaviour which the respondent would class as gross misconduct (by reference to page 481).

33. There is no factual dispute that Amy Moreman directed that the claimant was to transfer from working in the cardiology department to the renal department with effect from 8 August 2022. In her witness statement (at page 8) the claimant referred to this as a suspension. The claimant accepted Miss Sharp's suggestion that she was simply transferred and was not suspended at this stage. That said, the claimant maintained that Amy Moreman had said to her that she was suspending and moving her out of the cardiology department. Whatever may have been said in the discussion between Mrs Moreman and the claimant, it is clear that the claimant was not suspended from work at this stage but was simply transferred into a different department.

34. Angela Nicholls was asked to investigate the complaints raised against the claimant by Mr Adefuye and Ms Roberts. The complaints in fact went beyond allegations of making racist remarks. There was a more general allegation that the claimant was displaying intimidating behaviour towards the administrative team in the cardiology office.

35. Mrs Nicholls quickly got on with her investigations. These culminated in the disciplinary investigation report. This is in the bundle at pages 84 to 89. It was accompanied by the appendices at page 90 to 257. The index of the appendices is at page 90. This lists the investigation interviews carried out by Mrs Nicholls with relevant witnesses between 12 August 2022 and 13 September 2022. The Tribunal shall refer to some of these in due course.

36. The first tranche of investigation interviews was carried out by Mrs Nicholls between 12 August and 22 August 2022. She says in paragraph 19 of her

witness statement that *"I determined that the allegations in relation to the racist comments were so serious that they should be investigated under the respondent's disciplinary policy given that at least one of the alleged comments had been corroborated by a second witness. I took HR advice and given that the allegation of unlawful discrimination was one of potential gross misconduct, I decided it was necessary to suspend the claimant. HR asked Amy Moreman (operational manager) to suspend the claimant on full pay pending the outcome of my investigation. The claimant was therefore suspended on 22 August 2022 and this was confirmed in writing on the same day (pages 146 to 157). The terms of reference for the investigation were prepared by Mrs Moreman and sent to me on 22 August 2022 (pages 82 to 83)."* The evidence given by Mrs Nicholls in paragraph 19 of her witness statement was not disputed by the claimant and can therefore be treated as a factual finding.

37. For her part, Mrs Moreman says in paragraph 9 of her witness statement that she *"was asked to draft the terms of reference for the disciplinary investigation. I did so with the help of Julie Bye (HR Manager) on 22 August 2022, based upon the statements given by Ms Roberts and Mr Adefuye. The terms of reference were sent to Julie Bye and Angela Nicholls on 22 August 2022. A copy of the terms of reference can be found at pages 92 to 93."* Again, this is uncontroverted evidence and may be treated as a factual finding. (*Mrs Moreman's reference is in fact incorrect. The terms of reference are at pages 82 and 83).* The terms of reference record by way of background that after Mrs Nicholls had conducted an informal fact finding exercise, Mrs Moreman determined that the allegations raised relating to the claimant's conduct required formal investigation and that the claimant was informed of this on 22 August 2022. The terms of reference record the fact of the claimant's suspension with effect from that date.

38. Mrs Nicholls was directed to investigate the following allegations:

    38.1. That the claimant made a racist comment by telling Leanne Roberts that the only reason why Albert Adefuye was hired is because he is black and that then Angela McIntosh could not use the race card to get what she wants.

    38.2. That the claimant had displayed intimidating, unacceptable behaviour towards the admin team working in the general cardiology office.

39. Following further interviews and investigations carried out after 22 August 2022, Angela Nicholls met with the claimant on 9 September 2022. The claimant was accompanied at this interview by Gareth Cannetti-Sharpe of Unison.

40. Mrs Nicholls invited the claimant to comment about the allegations around her behaviour (upon the allegation at paragraph 38.2). After having given the claimant that opportunity, Mrs Nicholls confirmed that she was not proposing to take that allegation further. She was satisfied that the matters had been managed within the department. She proposed to make recommendations to address the issues.

41. Mrs Nicholls confirmed her findings upon the issue at paragraph 38.2 in the report of 22 September 2022 (at page 88). She found there to be no case for the claimant to answer but made recommendations of action to be taken going

forward. It being the case that no action was taken against the claimant arising out of alleged intimidating and unacceptable behaviour it is not necessary for the Tribunal to make factual findings about such matters which in general had no bearing on the disciplinary action that was taken against the claimant.

42. However, Mrs Nicholls found there to be a case to answer in relation to the matters reported by Leanne Roberts (upon the matter referred to in paragraph 38.1). She therefore recommended that disciplinary action be taken against the claimant.

43. On 3 October 2022 Mrs Nicholls sent a copy of her disciplinary investigation report to the claimant. She informed the claimant that Amy Moreman was now to consider and take forward the recommendations from the report. A copy of the report was also sent by Angela Nicholls to Gareth Cannetti-Sharpe.

44. Mrs Moreman decided to accept Mrs Nicholls recommendation and move the matter on to a disciplinary hearing. On 24 October 2022 a letter was sent to the claimant to confirm that she was required to attend a disciplinary hearing which was arranged for 7 December 2022. The claimant was informed that she was entitled to be accompanied by her trade union representative or by a work colleague.

45. The claimant was informed that the purpose of the hearing was for the disciplinary panel to consider the following allegations:

That she used offensive, inappropriate and racist comments within a conversation that occurred with other staff members stating that the reason that Albert Adefuye, assistant operational manager had been hired because he was black and that a colleague, Angie McIntosh, could not use the race card to get what she wanted.

46. The claimant was informed that the panel was to be made up of Mrs Johnson, Richard Maxstead, operations director and John Ashton, HR business partner. The respondent's case was to be presented by Mrs Nicholls. The claimant was also informed that Leanne Roberts and Jennifer Bane were to attend as witnesses.

47. The disciplinary hearing went ahead on 7 November 2022. In the event, Leanne Roberts did not attend. Within the bundle is an email from her dated 27 October 2022 (pages 262 and 263). This is addressed to Mrs Nicholls and Julie Bye. Essentially, for health reasons, she felt unable to attend the disciplinary hearing.

48. Arrangements were made for Jennifer Bane to give her evidence by Microsoft Teams. As Julie Bye explained in her email of 31 October 2022 addressed to the panel and Mrs Nicholls (pages 265 and 266), Mrs Bane *"raised concern regarding attending the hearing and sitting in the same room as [the claimant] due to previous behaviours displayed by her."* The Tribunal makes no finding as to whether Jennifer Bane had well-founded concerns about the claimant. For the purposes of the unfair dismissal claim, it suffices to record that arrangements were made for Jennifer Bane to give evidence remotely.

49. The notes of the disciplinary hearing are at pages 271 to 277 of the bundle. The claimant was accompanied by Mr Cannetti-Sharpe. Mrs Nicholls attended to

present the respondent's case and, as we have seen, Jennifer Bane attended via Microsoft Teams as a witness.

50. After Ms Bane had given her evidence, the claimant had her opportunity to present her case. She was given the opportunity of summing up after a brief adjournment.

51. The panel then adjourned again at 11.50am in order to deliberate. The decision was taken to summarily end the claimant's contract of employment with the respondent. This was confirmed in a letter sent to the claimant by Lisa Johnson on 11 November 2022 (pages 278 – 281). The panel were satisfied that the claimant had used offensive, inappropriate and racist comments. Mrs Johnson recorded that the normal sanction for such behaviour is dismissal. The panel's conclusion was that there was insufficient mitigation around the claimant's length of service and clean disciplinary record. A decision was therefore taken to dismiss her from employment with immediate effect.

52. As was said earlier, for the purposes of section 98 of the 1996 Act, the reason for the dismissal is the set of facts known to the employer, or the beliefs held by them, which caused them to dismiss the employee. The essential questions for the Tribunal to address therefore are what was the material before the employer at the time the decision to dismiss was taken, whether the employer believed the claimant to be guilty of the misconduct for which she was dismissed and whether the respondent held a reasonable belief on reasonable grounds when making that decision. Coupled with that is the question of whether the respondent carried out a reasonable and proper investigation into the matter.

53. The Tribunal must therefore look at what it was that the panel had before them. As was said at the case management hearing of 27 May 2023, the Tribunal's function when deciding upon the merits of an unfair dismissal case is to review the quality of the material before the employer and decide whether it fell within the range of reasonable responses for the employer to decide that there was sufficient material to satisfy themselves that the employee had committed the act of misconduct in question.

54. The panel had before them the *"complaint statement"* prepared by Leanne Roberts on 11 August 2022 (pages 98 and 99). This was the first of a number of complaints raised in that document by Ms Roberts about the claimant. She said that the claimant *"made a comment regarding Albert Adefuye previously stating 'the only reason he has been hired is because he is black, then Angie (colleague) can't use the race card to get what she wants.'"*

55. Leanne Roberts was also interviewed by Angela Nicholls on 15 August 2022. That interview is appendix 6 of Angela Nicholls' disciplinary investigation report. This was also before the disciplinary panel. The interview with Leanne Roberts is at pages 113 to 117. The relevant exchanges are now set out:

"AN: Your first comment in your statement is that Sara [the claimant] said to you about your manager Albert "the only reason he has been hired is because he is black and Angie can't use the race card to get what she wants." When was this said?

LT: [This is Ms Roberts' speech a she went by the name Thompson at the time]. This was around February when Albert was recruited, I wish I had done something at the time but I didn't want the backlash.

AN: Was anybody else witness to this statement?

LT: Jennifer Bane was there and I think Lisa Senior might also have been in there.

AN: Did you react to the statement at all?

LT: Yes, I told her she shouldn't be saying things like that. She laughed as if it was a joke. I didn't take it any further. I have my own health conditions. I had a heart attack two years ago and I have anxiety. I think this was more about my health. I am leaving the Trust in September and it has been bothering me so I don't want to leave it. "

56. Mrs Nicholls also interviewed Jennifer Bane. The notes of that investigation are at appendix 10 of Mrs Nicholls report. The notes of the investigation interview with Ms Bane are at pages 133 to 136 of the bundle. Again, this interview was before the disciplinary panel. The Tribunal now sets out the relevant exchanges:

"AN: I'm going to be specific with my next question as you have been named as a possible witness to an allegation made against Sara Fisher, this is that Sara was in conversation with Leanne and Sara said the only reason why Albert has been hired is because he is black, then Angie can't use the race card to get what she wants. Can you confirm if you witnessed this conversation?

JB: I did hear some of this conversation, it was about the appointments of the three AOMs. I heard the part about Angie can't play the race card to get what she wants, I could only assume this was aimed towards the appointment of Albert."

57. Mrs Nicholls conducted a second interview with Leanne Roberts on 13 September 2022 (pages 233 to 235). This was in an effort to pinpoint precisely when the remark had been made. This issue arose as the claimant had contended that the remark had been made not by her but by Lisa Senior who is another medical secretary in the cardiology department. The claimant had said in her interview with Angela Nicholls that the remark was made around Easter time. (The Tribunal refers to page 201 which is part of the record of the interview of the claimant by Angela Nicholls of 9 September 2022 to which reference has already been made).

58. Mrs Nicholls therefore resolved to test Leanne Roberts' account further and see whether she could pinpoint the approximate date when the remark was made. These are the following exchanges:

"AN: We are meeting again to clarify a specific point from our last meeting in relation to the racist comment you said was made by Sara towards Albert. Can you confirm that you said that this was just before the time Albert started that this conversation took place.

LR: I think this was around the time he started; I think he started in February.

AN: Can you reiterate who was there.

LR: Me, Sara and Jenny [Bane]. I think Lisa [Senior] was there but can't be sure Lisa was.

AN: Was it a conversation you were all having and was anyone sat with headphones on?

LR: I remember her saying that we were discussing Albert starting and about management style and what this might be like. It was definitely Sara that said this. As soon as she said it, I was gobsmacked, I challenged her about what she had said.

AN: Have there been any other conversations when this might have been discussed?

LR: Not that I am aware of.

JB [Julie Bye, HR manager]: you said that Jennifer [Bane] was there, do you think that Jennifer would have heard the whole conversation?

LR: I think so we were discussing him starting.

JB: Why didn't you report this at the time?

LR: It was more about the knock on effect this was due to my own mental health …"

59. Within the *proforma* template for the notes of investigation interview is a *"points of accuracy"* section. The purpose of this is to enable the employee to make any corrections or additions by way of clarification. There, Leanne Roberts said this:

"We were discussing Albert starting in the role and wondering what kind of manager he would be in terms of style of management. That was when Sara made the comment and I said that she can't say things like that. I'm unsure if there was anyone else there with headphones on, people regularly come and go in the office so it is hard to remember everyone who was there that day."

60. Mrs Nicholls also carried out a second interview with Jennifer Bane. This is in the bundle at page 604. It was conducted on 13 September 2022. The following records the relevant exchanges:

"AN: In your original meeting [of 17 August 2022] you said you were in the office when the conversation relating to the appointment of Albert took place and you reported that you had heard the back end of a conversation in which Sara [the claimant] had said "this was so that Angie couldn't play the race card and get her own way". I need to ask who was there.

JB: Me, Sara, Leanne [Roberts]. It was that long ago. Jamie might have still been in the office at the time and potentially Lisa but I couldn't be 100% certain about Lisa. [The reference to 'Jamie' is to James Sleney].

AN: When was this?

JB: I would say February some time as this is when Albert started. We have been receiving emails to see who our new managers were going to be.

AN: Was this on the back of Albert being allocated to your team?

JB: Yes, I don't feel that he had actually started. The new managers were copied in to the email and there was a picture of Albert on his email. I wasn't paying full attention. I was probably typing. I had one headphone in and one out. We had been discussing what the management style might be like and the bit of the conversation I heard was that Angie couldn't play the race card anymore.

AN: On the back of this, as a conversation had already been happening which you hadn't heard could it have been possible that what you heard from Sara was a question following someone else making this statement.

JB: The words I heard and the tone were definitely out of Sara's mouth. This was a statement not a challenge to somebody else.

AN: I am struggling because from my point of view you are half in and half out of the conversation, can you confirm that you are saying definitely that it was Sara that said this and Sara couldn't have been challenging somebody else saying this.

JB: From me it was Sara saying this. In my opinion it did sound like a statement of fact not a challenge from somebody else.

J Bye: Did you hear anybody challenge Sara?

JB: No.

AN: So you didn't hear Leanne challenging Sara?

JB: No.

J Bye: I'm struggling to understand why you wouldn't have heard the challenge by Leanne which was directly after you heard Sara make the statement. Can you confirm that you didn't hear this challenge from Leanne?

JB: No I understand this but I was dipping in and out of the conversation. I was pretty new I definitely heard this and I thought it was out of the ordinary, out of the blue."

61. In *the 'point of accuracy'* section of the *proforma*, Ms Bane has added that, "*I didn't hear the challenge from Leanne. I was dipping in and out of the conversation as I was trying to work, the reason I clearly remember the statement from Sara was that it was a statement out of the blue and out of the ordinary which made it stick in my mind."*

62. In her witness statement (at page 14) the claimant set out a very helpful and well-drawn plan showing the layout of the general cardiology office. This was produced only for the benefit of the Employment Tribunal. The claimant did not produce this plan (or anything along these lines) at any point during the

disciplinary process. The claimant identifies the occupants of the general cardiology office on 15 February 2023 as:

- Heather Fox.
- Jennifer Bane.
- Lisa Senior.
- Leanne Roberts.
- Anne Price.
- James Sleney.
- The claimant herself

63. During the course of her investigation, Angela Nicholls interviewed everybody identified on the claimant's plan and named in paragraph 62. The claimant at no stage (whether during the disciplinary process or before the Employment Tribunal) identified anybody able to provide material evidence and who was not interviewed by Angela Nicholls or anybody else within the respondent.

64. No one (except Leanne Roberts or Jennifer Bane) heard the claimant make the impugned remarks. It is right to say that Lisa Senior was told about the matter by Leanne Roberts but said that she did not hear anything herself (page 142). She said that she did not think she was in the office that day. Similarly, none of the other witnesses involved in the matter who did not work in the general cardiology office heard the remark either. Mrs Nicholls interviewed Albert Adefuye, Angela McIntosh and Sarah Kenney (who works in the heart failure nurse team administration). None of these three heard the claimant make the impugned remarks. Mr Adefuye was only able to relay what he had heard second hand from Leanne Roberts. Angela McIntosh appears to have been unaware of the remark altogether and Mrs Nicholls made a judgement call not to inform her of it.

65. In addition to gathering witness evidence, Mrs Nicholls investigated whether there was any documentation which may corroborate matters one way or the other. She says in paragraph 29 of her witness statement that, *"I checked the date of the email about the new line manager, which was dated 15 February 2022, against the rota for that date. It was the only date when the claimant, Ms Roberts and Ms Bane were in the office on the same day during the period 30 January to 1 May 2022. Despite checking the rota for the dates around Easter, I couldn't find any corroboration for the claimant's account of events."*

66. One of the documents introduced into the bundle by the respondent on the first day of the hearing is an email dated 15 February 2022 (page 638). This was sent by Michelle Wild to a number of recipients including the claimant, Jennifer Bane and Leanne Roberts (named as 'Thompson' in the email). This followed on from the morning's huddle. It confirmed that the line management of the recipients of the email was to be Mr Adefuye with effect from that date.

67. The claimant says that there was another email sent on the same day which contained a photograph of Mr Adefuye. The Tribunal accepts the claimant's account which is corroborated by what was said by Jennifer Bane in her second interview of 13 September 2022 (page 604). A copy of that email was not produced for the benefit of the Tribunal. At all events, the claimant did not deny that she also received the email at page 638 in any case.

68. A copy of the rota was contained within Mrs Nicholls' disciplinary investigation report at appendix 22. It is at pages 237 to 243 of the hearing bundle. Significantly, this shows that the only day in the three months' period between 31 January and 1 May 2022 when the claimant, Jennifer Bane and Leanne Roberts were present in the office together was Tuesday 15 February 2022.

69. It was part of the claimant's argument that although not shown as present on that day, it is possible that Lisa Senior was there because it was her practice to come and go. This proposition was fairly accepted by Mrs Johnson when she gave evidence before the Tribunal. There also appears to be no signing in and signing out system. Mrs Johnson therefore fairly accepted when it was put to her by the Employment Judge, that it was possible that Lisa Senior was present in the office on 15 February 2022.

70. As has been said, Leanne Roberts did not attend to give evidence at the disciplinary hearing. This was due to health issues. Jennifer Bane was called as a witness. The record of her evidence is at pages 273 to 275 of the bundle.

71. The following are the salient exchanges:

Q: on 17 August you state you only heard some of the conversation.

A: yes.

Q: where in the room do you sit?

A: mid-way down the side wall. They sit at the end of the office.

Q: how far in between.

A: there is one computer station between us, maybe two metres.

Q: so said you heard part of quote - playing race card.

A: yes.

Q: and that you were in and out of conversation?

A: yes.

Q: but Leanne [Roberts] states you were all having conversation.

A: I was also doing my work. Not part of conversation.

Q: did you hear race card comment clearly?

A: yes.

Q: so you would have heard a challenge.

A: I didn't hear that statement.

Q: but Leanne says she challenged straightaway.

A: I didn't hear that. I was part in part out of conversation, was trying to do work. I was sat at my desk.

72. The relevant exchanges then go on as follows:

Q: Are you confident that conversation took place in February?

A: As confident as I can be because it was at the time [Albert Adefuye] was appointed.

73. The claimant's account given to the disciplinary hearing is at pages 275 to 277. The claimant said by way of introduction that she recalled receiving the email announcing the appointment of Mr Adefuye as the assistant operations manager. She says that this prompted a conversation. It is not entirely clear whether the claimant says that the conversation took place when the email came out or subsequently as she mentions a discussion taking place on a Thursday (whereas the emails in question were dated Tuesday 15 February 2022). The claimant says that it was after a team meeting *"that the discussion took place. I think it was topic of conversation. If I had perceived that that was a racist comment against Albert I would have raised that myself because I am not a racist person, but I perceived it as a dig at management. I do believe it was Lisa [Senior] who said Angela can't play the race card. Kelly Cooke – manager who was doing a good job had gone for that position – was really upset about it. I was discussing it with her and on the back of her not getting one of those positions she went and applied for more band 5 positions and got all four – raise the question of whether appointing was some management tactic. That is maybe why the comment was made – put across in a way as a management tactic rather than the colour of his skin. It really upset me when I read Albert's statement. Must have been really upsetting to hear that".*

74. The claimant was then asked what she meant by *"management tactics".* The claimant replied, *"Historically we have had husbands working in department [with] daughters, nieces so rather of a tactic it's been a bit of a conversation and they have been scared to manage Angela [McIntosh] because she can be volatile and the question was has Albert been brought in to manage that. I perceived it as a tactic."*

75. It was then put to the claimant that *"what you are saying is management tactic – are you saying they brought someone in because they are of a similar ethnic background."* The claimant replied, *"I didn't have my own personal view but perceived it as to manage that challenging behaviour."* The questioning of the claimant went on to ask, "*because of Albert's skill or the commonality with [Miss McIntosh]."* The claimant replied, *"probably commonality."*

76. The claimant then went on to say that the allegation against her was, she thought, a consequence of a dispute or argument that had arisen between the claimant on the one hand and Leanne Roberts, Jennifer Bane and Sarah Kenney on the other around the allocation of fans during the very hot weather in July 2022. The claimant said that she feels "*there has been some collusion going on since that juncture"* and that this was *"a kind of tactic to get me out."* The claimant then reiterated her view several times that the appointment of Mr Adefuye to his position was a management tactic. There is reference to this at both pages 276 and 277.

77. By way of mitigation, the claimant said that she had worked for the respondent for 20 years. She felt distraught that others were lying about her. *(The reference to 20 years of service includes the time that the claimant spent working for another NHS Trust in addition to the period for which worked for the respondent*).

78. The claimant did refer in her mitigation statement to being unwell. In the helpful timeline which she set out on page 8 of her witness statement; she refers to having received two stage 4 capability warnings. These were issued on 16 September 2021 (pages 544 to 549) and 7 March 2022 (pages 550 to 552) respectively. It is the claimant's case that she was dismissed at least in part because of her ill health absence record. This point was not put before the disciplinary panel (either by the claimant or by her trade union representative).

Discussion and conclusions at disciplinary stage

79. It is right to observe that the only person who gave a first-hand account against the claimant of witnessing her make the remark that Mr Adefuye was appointed because he is black was Leanne Roberts. The question which arises is whether the respondent could reasonably have formed the view that the evidence of Ms Roberts was to be preferred to that of the claimant.

80. Ms Roberts was interviewed twice. She was consistent in her accounts and in the timing of when the conversation took place. That is corroborated by the email announcement of Mr Adefuye. The email was dated 15 February 2022. There is also circumstantial evidence (in the form of the rota) which places Ms Roberts, Ms Bane and the claimant together that day (and not on any other occasion including over the Easter break of 2022).

81. It is right to observe that the claimant was deprived of the chance of questioning Ms Roberts. This is because Ms Roberts was unfit to attend the disciplinary hearing through ill-health. There was no evidence to suggest that the claimant or her trade union asked for an adjournment in order that Ms Roberts could attend personally to give evidence.

82. It is not incumbent on an employer to carry out a quasi-judicial investigation into an allegation of misconduct with cross-examination of witnesses. Whilst some employers might consider that necessary or desirable, an employer who fails to do so cannot be said to have acted unreasonably. Authority for the proposition may be found in the case of **Ulster Bus Ltd v Henderson** [1989] IRLR 251 NICA. It is right to observe that there may be cases in which it will be impossible for an employer to act fairly and reasonably unless cross-examination of a particular witness is permitted. The question in each case will be whether the employer

fulfils the test laid down in **British Home Stores v Burchell** and it will be for the Tribunal to decide whether the employer acted reasonably and whether or not the process was fair.

83. Before the disciplinary panel were two interviews by Ms Nicholls of Ms Roberts, the rota and the claimant's remarks made during the disciplinary hearing. The Tribunal accepts that the claimant did not initiate the suggestion there was "*commonality"* between Mr Adefuye and Mrs McIntosh. This suggestion was made to her by the respondent. It is clear that the disciplinary hearing note at pages 272 to 277 are not a *verbatim* account. That said, these are the respondent's notes and it is plain that the first individual to use the word *"commonality"* was somebody on the respondent's side.

84. Lisa Johnson said in paragraph 17 of her witness statement that the claimant considering that Mr Adefuye's appointment was a management tactic leant credence to the allegation that she had made the impugned remark the subject of the disciplinary charge and demonstrated the claimant's mindset. Mrs Johnson goes on to say that it was more likely than not that it was the claimant who made the impugned remark and not Lisa Senior particularly as the claimant had the remark as being made at Easter time 2022 rather than 15 February 2022. Given that Ms Bane, Ms Roberts and the claimant were not working together on any day other than 15 February 2022 this told against the incident happening over Easter. The claimant at no stage disputed that Ms Roberts and Ms Bane were with her on 15 February 2022.

85. In contrast to Ms Roberts, Ms Bane did attend the disciplinary hearing. Her evidence was tested (or at any rate the claimant's trade union representative had the opportunity to test it). She maintained the position in her two interviews with Mrs Nicholls. She therefore gave a consistent account on all three occasions when she was asked to say what had happened.

86. Further, Ms Bane did not seek to embellish her account. She always maintained that she had only heard part of the conversation (around Mrs McIntosh no longer being able to play the race card).

87. The set of facts known to the employer at the time of the dismissal was ascertained by Mrs Nicholls during her investigation and the evidence emanating from the claimant and Jennifer Bane at the disciplinary hearing. The Tribunal considers that the respondent believed the claimant was guilty of the misconduct for which she was dismissed. There is nothing to suggest that the respondent had no genuine belief and was simply seeking to use the incident of 15 February 2022 as a pretext to dismiss the claimant for capability reasons.

88. The Tribunal finds that the respondent held a reasonable belief on reasonable grounds when making the decision to dismiss. Plainly, there was evidence against the claimant upon both limbs of the allegation which she was facing. This was corroborated by documentary evidence (particularly in the rota). The claimant's expression of the view that the appointment of Mr Adefuye was a management tactic was also consistent with the allegation and it was a reasonable conclusion to reach that it cast light on the claimant's mindset and lent credence to her making the impugned remark. That was coupled with the claimant's uncertainty over the date the incident took place and the lack of

corroboration that Jennifer Bane, Lisa Roberts and the claimant herself were physically together over Easter 2022.

89. Lisa Johnson and her panel's decision to dismiss the claimant was reached after the carrying out by the respondent of a reasonable and proper investigation into matters. Angela Nicholls interviewed all relevant witnesses (and in fact interviewed some of them twice in order to test their evidence as required by the case authority of **Roldan**). She obtained the relevant documentary evidence. The claimant was furnished with Angela Nicholls' report. some five weeks' ahead of the disciplinary hearing. The claimant was told in clear terms the allegation against her. She was given the opportunity of being represented by her trade union representative which opportunity she took up. There was no one else relevant whom Angela Nicholls could have interviewed and the claimant did not suggest any such witnesses.

90. It formed part of the claimant's case that Lisa Senior may have been in the office on 15 February 2022. This in itself is of course inconsistent with the claimant's assertion that the incident took place at Easter 2022. However, leaving that aside, merely placing Lisa Senior in the office that day would not avail the claimant in the absence of any evidence that it was she who made the remark.

91. As the Tribunal has said, it was no part of the claimant's case that there was procedural unfairness in the failure of Leanne Roberts to attend before the disciplinary hearing due to ill health. There was no application by the claimant or her trade union to adjourn matters on that account.

92. It follows therefore that the decision to dismiss the claimant was reached in circumstances where the respondent had reasonable grounds to believe that she had committed the impugned conduct and that this was reached after carrying out a fair and reasonable procedure. The next question which arises is whether the disciplinary panel's decision to dismiss was one which fell within the range of reasonable responses.

93. Lisa Johnson's panel took the view that the nature of the allegations amounted to gross misconduct and did not align with the respondent's desire to maintain high standards. The claimant fairly did not dispute that an allegation of this nature fell within the definition of gross misconduct within the respondent's disciplinary procedures.

94. Mrs Johnson says that the claimant had refused to undergo equality, diversity and inclusion refresher training in the past. There was a concern that she lacked insight into her comments by reason of what had been said at the disciplinary hearing.

95. Mrs Johnson took into account that the claimant had (according to paragraph 18 of her witness statement) refused to undergo equality, diversity and inclusion ('*EDI'*) refresher training in the past and *"we had no confidence that an instruction to undergo further training would be well received or completed."* The claimant's appraisals, counselling records and other matters from her personnel file were contained within Angela Nicholls' report at appendix 16. On the topic of equality, diversity and inclusion training, the Tribunal was taken to page 58 of the bundle. This shows that the claimant underwent such training on 11 September 2017 and

25 March 2021. Michelle Wild told Angela Nicholls (during her interview) that she recommended the claimant to do her EDI training following an incident involving Mr Sleney. Michelle Wild told Angela Nicholls that there was a resistance on the claimant's part to redoing her EDI training. The Tribunal refers to page 120. In evidence given under cross-examination, the claimant said that she thought that Michelle Wild was being untruthful about this matter.

96. The Tribunal was taken to the counselling record at pages 189 and 190. Again, this forms part of the disciplinary investigation report prepared by Mrs Nicholls. This shows that on 20 September 2021 Michelle Wild referred to the incident involving Mr Sleney coupled with the recommendation that she re-do her equality, diversity and inclusion training. The note refers to Michelle Wild arranging for her to *"undergo further … training".* This suggests that it was not left to the claimant to arrange her training but rather that it would be arranged for her.

97. Upon this issue, the Tribunal finds that it was left that the respondent would arrange the training as evidenced in the contemporaneous note at page 190. It was not left for the claimant to arrange it herself. The Tribunal finds that Michelle Wild did have concerns about the claimant's conduct necessitating her re-doing the EDI training. To that extent, therefore, the Tribunal rejects the claimant's case that Michelle Wild was not being truthful about matters. However, the Tribunal finds that it was no fault of the claimant that further EDI training was not arranged. The claimant gave unchallenged evidence that EDI training was not mandatory. The note referred to in paragraph 96 says that the EDI training was to be arranged by the respondent for the claimant. The Tribunal finds that she was not resistant to it and that it was not open to the respondent as a reasonable employer to conclude this to be the case.

98. This only gets the claimant so far as the fact remains that she underwent EDI training as recently as 25 March 2021, within a year of the incident of 15 February 2022. To that extent, therefore, the Tribunal's judgment is that Lisa Johnson and her panel could reasonably reach the conclusion that the claimant had not taken heed of the EDI training and lacked insight and that such mitigation as the claimant was able to offer by reason of the respondent not having arranged EDI training (leaving her unclear as to the respondent's expectations) was therefore unconvincing and ought to be rejected.

Factual findings upon the appeal

99. The claimant exercised her right of appeal. Her grounds of appeal are in the bundle at pages 284 to 286.

100. The appeal was in fact lodged by the claimant outside of the respondent's timescales. From the claimant's email of 9 January 2023 (pages 282 and 283) this appears to have been on account of confusion between the claimant and her trade union. The claimant sent the grounds of appeal to the trade union who did not in turn pass them on to the respondent. This notwithstanding, the respondent allowed the claimant to exercise her right of appeal in any case. (The claimant will appreciate that the Tribunal has no jurisdiction to adjudicate upon any issue between her and her trade union about the quality of the representation she received in connection with this matter).

101. The claimant's grounds of appeal are lengthy and well written. They are fairly summarised in paragraph 47 of Ms Sharp's submissions as:

(a) The rotas should not have been assumed to be accurate.

(b) The claimant had four witnesses who had not heard the comments.

(c) The behavioural issues (which had not been pursued as an allegation of misconduct) formed part of the decision for the second allegation.

(d) The panel based their findings on Mr Adefuye commenting that the claimant should have her contract terminated.

(e) Jennifer Bane's evidence was not to be trusted.

(f) The words the claimant used were not conveyed in the outcome letter correctly.

(g) The allegation raised by Ms Roberts was only aired after an office dispute over fans.

(h) The claimant enjoyed a good working relationship with Mr Adefuye.

102. The appeal was dealt with by Mrs Joel. She sat on a panel accompanied by Lisa Walton (operations director) and Jodie Booker (HR manager). Mrs Johnson presented the management's response to the claimant's appeal. This is at pages 292 to 314.

103. On 29 March 2023 the claimant sent a number of documents to the respondent for consideration as part of her appeal. These are set out in paragraph 6 of Mrs Joel's witness statement. There are three character references. The claimant also enclosed a large number of text messages with five individuals (amongst who were Lisa Senior, Leanne Roberts and Jennifer Bane).

104. The appeal hearing was held on 5 April 2023. The notes of the appeal hearing are at pages 423 to 431.

105. The claimant was not represented at the appeal hearing by her trade union. She was accompanied by a companion from an advice centre. As he was not a trade union representative or an employee of the respondent he was not allowed to participate in the discussion.

Discussion and conclusions upon the appeal

106. Emma Joel wrote to the claimant on 8 June 2023 with the disciplinary appeal outcome. This is at pages 433 to 440. In answer to each of the claimant's points in turn referred to in paragraph 101 above Emma Joel's conclusions were:

(a) It was accepted that Lisa Senior may have been working on Tuesday 15 February 2022. Mr Ashton (who accompanied Lisa Johnson to present the respondent's case) accepted that Ms Senior's presence that date could not be ruled out. Nonetheless, there is no evidence to support the claimant's case that it was Lisa Senior who had made the comments about Mr Adefuye.

(b) Emma Joel accepted that there were others in the office who had not heard the remark. The fact remains however that both Leanne Roberts and Jennifer Bane had heard the remarks (or some of the remarks) made by the claimant. Mrs Joel also dealt with the text messages produced by the claimant. This was to demonstrate that a good relationship had been enjoyed with Jennifer Bane and Leanne Roberts which, on the claimant's case told against them making such a serious allegation against her. This of course may be viewed as somewhat double edged from the claimant's point of view. If there was a good relationship then what would motivate the witnesses to give evidence against the claimant in circumstances where she had not made the remark? The claimant's case before the Tribunal was that the text messages showed a good relationship until the incident with the fans the previous summer. Her case was that there was collusion to get back at her over this incident. In the Tribunal's judgment, the respondent acted within the range of reasonable responses in rejecting this submission. Firstly, if there was collusion then one may have expected Jennifer Bane to have claimed to be a witness to both impugned remarks as opposed to only one of them. Secondly, Leanne Roberts advanced a reasonable justification for her delay in reporting matters, feeling that she was only able to report the case in circumstances where she was about to leave the respondent.

(c) Mrs Joel found that there was no evidence that the disciplinary panel had allowed Angela Nicholls findings about the behavioural issues in the first allegation to seep into the panel's findings about the second allegation regarding Mr Adefuye. The Tribunal has seen no evidence to suggest that Lisa Johnson's panel was in any way influenced by Angela Nicholls' investigation findings about alleged generalised inappropriate behaviour on the part of the claimant. This was therefore a reasonable conclusion.

(d) It is right to say that Mr Adefuye was distressed and purported to recommend that the claimant's employment be terminated. We can see this in the final paragraph of his witness statement at pages 95 and 96. However, it was not of course a decision for Mr Adefuye to take. Mrs Joel determined that the panel was uninfluenced by Mr Adefuye's wishes and reached their own judgment upon the evidence presented. Again, this was a reasonable conclusion. There was no evidence to the contrary.

(e) Upon the question of Jennifer Bane's evidence, the claimant contended that she was sitting four metres away from the claimant rather than two metres away. The claimant's contention was that this would have affected Ms Bane's hearing. The claimant sought to expand upon this issue before the Tribunal by alleging that there was a lot of background noise in the office with music playing, printers running, and people coming and going. Mrs Joel had to weigh the evidence about the reliability of Ms Bane on the one hand against the consistency of her evidence throughout the process. It is difficult, frankly, to see how somebody seated four metres from the claimant would not be able to hear what she said whereas somebody seated only two metres away would. Again, the question for the Tribunal is whether Mrs Joel reached a reasonable decision within the range of reasonable managerial responses in preferring Ms Bane's evidence to that of the claimant. On any view, given the consistency of Ms Bane's account and that she had been liable to have her

evidence tested before the disciplinary panel, a reasonable conclusion was reached by Mrs Joel.

(f) Upon this issue, the claimant is correct, as has been said, to say the word *"commonality"* was used first by the panel and not by her. That said, it is clear from the disciplinary note that the words *"management tactic"* first emanated from the claimant herself. Even if the Tribunal is wrong upon this, then it was a phrase adopted by the claimant throughout the rest of the disciplinary panel hearing. The claimant did not face a separate charge of referring to *"commonality*" or *"management tactics"* at the disciplinary hearing. Had that been treated as a separate allegation in addition to those faced by the claimant then there plainly would have been procedural unfairness as it was not put to her in terms of an allegation during the process. The disciplinary panel chaired by Lisa Johnson took the view that he claimant's adoption of the concept of "*commonality"* between Mr Adefuye and Mrs McIntosh and her submission that Mr Adefuye was appointed as a management tactic (presumably to better manage Mrs McIntosh) was properly weighed in the balance by the disciplinary panel as corroborative of the fact that the claimant made the impugned remarks. Again, this was a reasonable decision made by Mrs Joel. It gives credibility to the allegation of making the impugned remarks as talking in terms of Mr Adefuye's appointment being a *'management tactic'* because of *'commonality'* between him and Mrs McIntosh is entirely consistent with the sentiment behind the impugned remarks with which the claimant was charged as a disciplinary offence.

(g) Mrs Joel found there to be no evidence of collusion amongst colleagues in order to make a false complaint about the claimant. This has been covered already in paragraph 106(b) above. Again, this was a reasonable conclusion.

(h) Mrs Joel found that the claimant did enjoy a good working relationship with Mr Adefuye. However, the relationship was irreparably broken once he knew about the claimant's remarks.

107. In her appeal letter, the claimant repeated her mitigation. The respondent took no issue with the claimant's contention that she had not been subjected to any kind of disciplinary action (whether involving racist behaviour or otherwise). The fact remains however that the respondent reasonably took the view (as was accepted by the claimant) that racist behaviour was properly classified by the respondent as gross misconduct and under the disciplinary process was liable to lead to an employee's summary dismissal. It is right to say that some employers may have been more inclined to leniency than was the respondent. However, the claimant will appreciate that the Tribunal may not substitute its view as to the right course for that of the employer. The Tribunal's task at this stage is to ask whether the respondent's response fell within the range of reasonable managerial responses. It cannot be said to fall outside the range of reasonable managerial prerogative for an employer, satisfied an employee has made remarks of this kind, to decide that the employer-employee relationship is irreparably damaged and summarily terminate the employment relationship.

108. As was identified in paragraph 5 above, the claimant made four specific criticisms of the decision to dismiss her. Those at paragraph 5.3 (a) and (c) have already

been dealt with. The Tribunal shall now deal with the other two specific contentions raised by the claimant.

109. The first of these is that it was unreasonable to prevent the claimant from contacting anyone during the course of the investigation. It is right to say that a term of her suspension was that the claimant was not permitted to contact the respondent's employees or any external partners connected with employment (with the exception of her trade union, Angela Nicholls or Amy Moreman) without express permission until her suspension comes to an end. The claimant was concerned that this may prevent her from obtaining supportive evidence. However, it was open to the claimant to ask the respondent to interview witnesses other than those identified in Mrs Nicholls' investigation report. The claimant did not make any such request. Further, it was open to the claimant to seek Mrs Moreman's permission to approach witnesses in any case. Again, neither the claimant nor her trade union sought to do so. The Tribunal cannot see there to be any unfairness in the suspension terms. These are terms which are frequently encountered in such situations. There is nothing unusual in them and, as has been said, it is overstating the case to say that this precluded the claimant from obtaining supporting evidence.

110. The other issue raised by the claimant is that of the consistency of treatment between her and employee X. In a very helpful table set out in page 11 of her witness statement, the claimant sets out the difference in treatment between her and X.

111. It is right to say that in truly parallel circumstances, evidence as to decisions made by an employer may be sufficient to support an argument that it was not reasonable to visit a particular employee's conduct with dismissal and that some lesser penalty would have been appropriate in the circumstances. One of these circumstances may arise where there is disparity of treatment. Such disparity may go to the equity and substantial merits of the case and forms an essential part of the inquiry under section 98(4) of the 1996 Act. In order to succeed with a consistency argument, it must be shown that the circumstances of the cases are truly similar or sufficiently similar to afford an adequate basis for that argument. Authority for this proposition may be found in the case of **Hadjioannou v Coral Casinos Limited** [1981] IRLR 352 EAT.

112. The Tribunal had the benefit of the relevant papers relating to allegations made against X. These are at pages 484 to 517 of the bundle. An investigation was conducted in relation to the conduct of X. None of the witnesses interviewed were able to corroborate allegations against X that she made racist comments, used racist language or made or used homophobic language. No further action therefore was taken against her.

113. Upon that basis, the Tribunal concludes that the circumstances of the claimant's case and that of X are not truly parallel or similar. There was a reasonable basis for the respondent's belief that the claimant had made the impugned remarks. That feature was absent in X's case. Therefore, it follows that there was no inconsistency of treatment.

114. The claimant was also aggrieved that X was allowed to remain within her department for a period whereas the claimant was moved to another unit on 8

August 2022 and then was suspended 14 days later. Again, the cases are not truly parallel. The claimant was only suspended on 22 August 2022 when it was reported to Amy Moreman by Angela Nicholls that there was a *prima facie* case against the claimant warranting moving matters on to a formal investigation. This feature was absent in X's case. The respondent's account is that X was moved to another department as was the claimant. To that extent, therefore, they were treated the same.

115. Upon the authorities of **Taylor** and **Whitbread Plc** (see paragraph 24 above) the Tribunal's task is to assess fairness across the whole of the disciplinary process (from investigation to appeal stages). In the Tribunal's judgment, the respondent carried out a reasonable process. At all stages, the claimant was informed of the position and was given the opportunity to fairly present her case. She was made aware of the allegations made against her. The basic requirements of natural justice were adhered to (as is required in such cases upon the authority of **Khanum v Mid Glamorgan Area Health Authority** [1978] IRLR 215 EAT).

116. The claimant was dismissed by reason of conduct. She was not dismissed by reason of her capability to undertake her role. (This was not an issue raised by the claimant either at the disciplinary or appeal hearings). The respondent had reasonable grounds to sustain the belief that she had made the impugned remarks. They reached that belief after having carried out a reasonable and proper investigation into matters. The process carried out by the respondent fell within the range of reasonable management responses to the situation. The respondent tested the key witnesses' evidence by undertaking a second interview and, in the case of Jennifer Bane, by her attending the disciplinary hearing. The decision to dismiss fell within the range of reasonable responses notwithstanding the claimant's length of service and hitherto unblemished record. This is because the claimant's behaviours infringed the Acceptable Behaviour at Work Policy, the Equal Opportunities Policy and fell within the ambit of gross misconduct in the disciplinary policy.

117. It follows therefore that the respondent's decision to dismiss the claimant was fair. The unfair dismissal complaint therefore fails. In the circumstances, it is unnecessary and otiose for the Tribunal to make factual findings as to whether or not the claimant in fact made those remarks. That is an issue which only arises in an unfair dismissal case if the Tribunal reaches remedy. As the unfair dismissal complaint raised by the claimant fails upon its merits the Tribunal makes no findings of fact as to whether or not the claimant made the remarks in question.

Employment Judge Brain

Date: 12 December 2023