



EMPLOYMENT TRIBUNALS

Claimant: Mr S Butler

Respondent: Capita PLC

Heard at: Manchester Employment Tribunal (in person)

On: 15, 16 and 17 December 2025

Before: Employment Judge Dunlop

Representation

Claimant: In person

Respondent: Mr P Lockley (counsel)

JUDGMENT

1. The claim form did not disclose a complaint of 'automatic' unfair dismissal on the grounds of having made a protected disclosure (s103A Employment Rights Act 1996). The claimant was not permitted to amend his claim to add such a complaint.
2. The claimant's complaint of 'ordinary' unfair dismissal (s98 Employment Rights Act 1996) is well-founded.
3. The claimant is entitled to a basic award, but that award is reduced by 50% in view of the claimant's culpable conduct contributing to his dismissal.
4. The claimant is not entitled to a compensatory award. Any compensatory award which would otherwise be due is reduced to nil by reason of the Tribunal's finding that the claimant would inevitably have been fairly dismissed, had a fair process been followed.
5. The claimant's complaints of breach of contract (wrongful dismissal) and unpaid accrued holiday pay are dismissed upon withdrawal.
6. All other complaints having been previously dismissed upon withdrawal, the claim is dismissed.

REASONS

Introduction

1. This was a simple case but a difficult hearing. I made various preliminary decisions which Mr Butler objected to, and told me that he wished to appeal. In the circumstances, I considered that providing a full written Judgment, including the preliminary decisions, was the fairest approach to all parties, and likely to save time in the long run.
2. In brief summary, Mr Butler worked for Capita PLC, the well-known outsourcing company, from July 2019 until he was dismissed, purportedly for gross misconduct, on 4 October 2022. On the respondent's case Mr Butler was dismissed due to having made remarks which were perceived to be racist towards a group of the respondent's own new starters.
3. The respondent's position was that this was a straight-forward misconduct dismissal. The respondent contended that it had a genuine and reasonable belief that the misconduct had been committed, that it had completed a reasonable investigation and that the decision to dismiss fell within the band of reasonable responses. Additionally, the respondent contended that it had adopted a fair disciplinary procedure.
4. Mr Butler accepted, to some extent, that he had made the remarks, although some details were disputed. He also asserted that he had been misconstrued. He said that the dismissal was unfair and seemed, at least at the outset of the hearing, to be suggesting that there were other reasons for his dismissal, linked to grievances and/or disclosures he had made earlier in his employment.

The Hearing

5. Unfortunately, it is necessary to set out the procedural background to this hearing in some detail in order to explain the applications made by Mr Butler at the outset of the hearing. Some of what appears below is taken from the Tribunal file, as not all of the documents appeared in the hearing bundle.
6. By a claim form presented on 9 February 2023 Mr Butler brought claims of discrimination on grounds of age, disability and sex (claim 2402514/2023, hereafter "the first claim") referring to matters that had allegedly occurred between 2020 and March 2022, when Mr Butler was signed off sick with a hernia. There was a brief reference in the "additional information" box about the fact Mr Butler had returned to work on 9 September 2022 and disciplinary action was taken against him, he describes being suspended on 12 September, but there was no claim in respect of dismissal.
7. By a further claim form presented on 22 February 2023, Mr Butler commenced this case (2402941/2023, hereafter "this claim"). Box 8.1 on the claim form indicated that the claim was for unfair dismissal and various money complaints. The brief narrative at 8.2 included the following statement "*I believe I was unfairly dismissed mainly due to resisting*

unreasonable demands to repay wages and making grievances following discriminatory and harassing acts by managers”.

8. In both claim forms, Mr Butler had ticked box 10. That is a box which notifies HMCTS that a claimant bringing a claim involving a protected disclosure wishes the claim to be forwarded to a relevant regulator.
9. The claims were listed separately for hearing, with this claim being listed for a one-day final hearing on 23 June 2023 (later postponed) and the first claim, which included discrimination complaints, being listed for a preliminary hearing for case management on 12 June 2023 (later postponed to 10 July 2023 and then 3 October 2023). On 4 July 2023, before any hearings actually took place, the claimant wrote to withdraw the first claim, and it was dismissed upon withdrawal.
10. Returning to this claim, although the claimant had not ticked any of the discrimination boxes on the claim form, he had referred to '*discriminatory and harassing acts*' as noted above. On 16 May 2023 a letter was sent from the Tribunal, on the instructions of Employment Judge Leach. EJ Leach identified the claims contained in the claim form as being unfair dismissal under s98 of the Employment Rights Act and three money claims (notice pay, holiday pay and unauthorised deduction from wages). He expressed his understanding that no Equality Act claim was being brought, notwithstanding the wording above. Mr Butler was required to confirm whether the claims set out by EJ Leach were the ones he intended to bring, and, if not, explain any additional or alternative complaints, as well as provide some further information about the money claims. (It appears likely that EJ Leach was unaware of the first claim in writing this letter.) On 13 June 2023 the Tribunal prompted the claimant to provide a response.
11. Following correspondence from both parties, on 16 June 2023 the Tribunal postponed the final hearing in this claim, with a view to both claims being considered together at a preliminary hearing for case management.
12. By letter dated 18 June the claimant wrote to the Tribunal "in connection with" the order 16 May. This letter is confusing as it suggests that the Tribunal issued the first claim on 9 February without the knowledge of the claimant. It notes, correctly, that that claim contained complaints under the Equality Act 2010. It is unclear from the letter what the claimant is asking the Tribunal to do. By a further letter on the same date the claimant asked for the unfair dismissal claim to be re-listed for three days.
13. As noted above, the claimant withdrew his first claim on 4 July. In those circumstances (although the file is not entirely clear) the preliminary hearing for case management did not go ahead. A joint final hearing had been listed for five days on 10-14 February 2025. This was later reduced to three days and, in view of the withdrawal of the discrimination claim, changed to be before a Judge sitting alone, rather than a full panel.
14. On 22 November 2023 the solicitors then acting for the respondent applied for permission to amend their response to the claim and filed a proposed amended response. The document which was 'amended' was the Grounds of Resistance that the respondent had submitted in the first claim, rather

than the grounds of resistance which had originally been submitted in this claim. On 30 December 2023 Employment Judge Allen gave the respondent permission to amend their grounds of resistance, accepting the new version provided with the application. He probably did not appreciate in doing so that the amendments he had accepted were broader than those indicated by the tracked changes, as the 'non-tracked' portions of the document were also different from the response originally submitted to this claim. However, none of these changes the substance of the respondent's answer to the unfair dismissal claim, which has remained consistent throughout.

15. In May 2024 the claimant changed his address for service, beyond that, there was no activity on the Tribunal file until 24 December 2024 when the Tribunal sent an enquiry letter designed to prompt the parties to confirm that the matter was ready for hearing. That is a standard letter sent in longer cases to try to ensure efficient use of Tribunal resources. This prompted an abusive response, purportedly from someone writing on the claimant's behalf. The respondent (and indeed the claimant himself) failed to reply.
16. On 9 January 2025 a letter was sent on the direction of Employment Judge Butler (who is unrelated to the claimant) seeking a response to the enquiry letter.
17. The claimant replied on 4 January saying that the only thing that remained for him to do was to update his schedule of loss and that would be provided to the respondent in the next few days. He said that witness statements had been exchanged 'many months ago'. He made no reference to the bundle of documents and, in particular, did not indicate that there were any problems agreeing the bundle, nor with the size of the text in the documents included within it.
18. On 6 February, following a further prompt from the Tribunal, and only a few days before the hearing was due to start, the respondent wrote to the Tribunal explaining that the case had been taken back in-house from the previous representatives in October 2024. Neither the representatives nor the in-house solicitor had informed the Tribunal of that fact, so the enquiry letter had not reached the person with conduct of the case. (The letter further explained that the previous file-handler had left the firm). The writer understood that a hard copy bundle had been provided to the claimant, but sought his address to provide a further copy in view of an email sent by the claimant indicating that he had not had this.
19. The case came on before Employment Judge Cookson for a final hearing on 10 February 2025. The respondent was represented by Ms Rumble i.e. different counsel to Mr Lockley, who appears today. EJ Cookson spent time considerable time discussing 'housekeeping' matters with the parties. Just before she was to start hearing evidence, Mr Butler informed her that he had severe toothache from a filling coming out and that he felt unable to continue. The hearing was postponed until the next day in the hope that Mr Butler would be able to obtain treatment and continue, but he contacted the respondent and informed them that he was not able to do so. In those circumstances, EJ Cookson postponed the hearing. As the evidence had not started, and the hearing had been conducted, in effect, as a case

management hearing dealing with the various preliminary points, EJ Cookson decided that it need not be reserved to her and could be heard by any Judge. She wrote a detailed case management order which was sent to the parties. I will not further lengthen this Judgment by repeating its contents, but I do refer to material parts below. Mr Butler was ordered to obtain medical evidence to (retrospectively) support his successful postponement application.

20. The parties were ordered to provide dates to avoid for the hearing to be re-listed. Mr Butler did so on 27 February 2025, the respondent had to be chased for dates by the Tribunal, but provided them on 19 March. Following this, the Tribunal failed to re-list the hearing. That was an administrative error for which I apologised to the parties during initial discussions as part of this hearing. Unhelpfully, neither party sought to chase this up in the months that followed, until the respondent eventually did so by letter dated 15 September 2025.
21. On 2 October the claimant wrote to the Tribunal making an application for various matters which he contended had been discussed on 10 February to be “recorded” i.e. presumably added to EJ Cookson’s summary and order, for the claim to be listed “forthwith” in front of a Judge and two members. The application is nine pages in total and goes into various matters, largely relating to Mr Butler’s perception of the respondent’s conduct of the case. It makes reference to “fake” documents and “fake” Tribunal orders, without providing any explanation for those references. The letter also appears to imply that the claimant did not obtain any medical evidence in support of the postponement as it complains that *“counsel failed and/or neglected to advise the Judge that such was inappropriate and/or not in accordance with authorities known to her”*. I have not seen any medical evidence as ordered by EJ Cookson, but the respondent has never made any application arising out of any failure by the claimant to comply with the order to provide medical evidence.
22. On receipt of this correspondence the Tribunal’s error in failing to list a further hearing was realised. The case was then listed for 15-17 December 2025. That was an expedited hearing, putting the parties in roughly the same position, in terms of delay, as they would have been in if a listing had been arranged at the time of the February postponement. Of course, it meant they had much less notice of the dates.
23. By letter dated 31 October 2025, EJ Cookson responded to various points raised by the claimant in relation to her 10 February orders. EJ Cookson noted the claimant’s request for the case to be heard by a full panel, but stated that he had not provided grounds for this, and invited him to do so if he wished for the application to be considered.
24. The claimant responded to this letter by a further letter dated 6 November 2025. This letter did not appear in the updated bundle of documents, and I do not know whether it was not sent to the respondent, or whether the respondent omitted it from the bundle. Mr Lockley was unable to help with that. (Mr Butler communicates primarily by post, occasionally using an email address belonging to someone else, this makes it more difficult to track what correspondence has been copied to whom). In the 6 November letter Mr

Butler states “*It is perfectly clear that my claim is a “Whistleblowing” case with discrimination as I ticked the appropriate box and as such the matter was previously properly listed before a panel with lay members.*”

25. Employment Judge Cookson directed a further letter dated 17 November 2025, saying, again, that she did not consider that Mr Butler had made an application for the hearing to be before a full panel, and inviting him to do so. The letter contained the following passage:

However, the discrimination complaints in 240251/23 were withdrawn in July 2023 leaving only complaints in 2402941/23 which before October 2024 would be heard by a judge sitting alone (including a complaint under s103A of the Employment Rights Act, often called a whistleblowing dismissal case).

Two preliminary issues

26. During initial housekeeping discussions two major difficulties became apparent. Firstly, in discussing the complaints within the proceedings, Mr Butler made clear that he was under the impression that a complaint under s103A Employment Rights Act 1996 (i.e. that his dismissal was automatically unfair as he was dismissed on the grounds that he had made a protected disclosure) formed part of his extant claim. Mr Lockley, for the respondent, said that there was no such complaint, and that it would oppose any application to amend to add one. The second major difficulty was that Mr Butler said that he was unable to proceed with the hearing this week and wanted it to be adjourned. He maintained that position even when I explained that adjourning and re-listing the hearing would likely lead to a further delay of around one more year, into late 2027.

Decision in relation to s103A claim

27. Having examined the documents carefully, I was satisfied that the original claim form did not disclose a claim under s103A, nor had any such claim been added at a later date. Although ‘box 10’ was ticked, this is an administrative request to HMCTS staff to forward a claim to a regulator, it is not, of itself, sufficient to introduce a s103A claim. The narrative talked in vague terms about the dismissal being due (in part) to “making grievances following discriminatory and harassing acts by managers” but no alleged protected disclosure was identified. Further, and critically in my view, when Mr Butler was invited to confirm his claims by Judge Leach, he made no mention of a s103A claim, whether in legal or colloquial terms.
28. Mr Butler was adamant that the respondent had “pleaded to” the s103A claim. However, on examining the response in both its initial and amended versions it was clear to me the respondent had not done so. There was reference in the narrative background to the claimant having raised an issue via the respondent’s ‘Speak Up’ channel in August 2021, but nothing in the response to indicate that the respondent understood this to be anything other than background in relation to the present claim.
29. Finally, in the case management order made by EJ Cookson, the claims identified do not include a s103A claim and Mr Butler had never taken issue

with that, prior to his his assertion in his letter of 6 November, that there was such a claim. Whilst I acknowledge that EJ Cookson then made reference to there being such a claim in the context of the discussion about whether the case should be heard in front of full panel, it is evident that she had simply taken Mr Butler's correspondence at face value. That letter does not represent a decision that the claim does include a s103A complaint, nor a decision that the claim should be amended to add one.

30. Having decided that the complaint was not currently part of the claim, I then considered whether to permit an amendment to allow it to be added. I decided it should not and gave my reasons orally to the parties. Mr Butler indicated that he wished to have written reasons in order to appeal. I informed him that written reasons would be incorporated into a final decision. This Judgment should be treated as containing the written reasons.
31. In considering Mr Butler's application to amend I had regard to the principles set out in **Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT**. This identifies that relevant considerations in an amendment application include the nature of the amendment, the applicability of time limits and the manner and timing of the application. The over-arching question is the balance of hardship between the parties and, although time limits are relevant, they are only one factor and not determinative.
32. The case of **Vaughan v Modality Partnership 2021 ICR 535, EAT** confirms that the **Selkent** factors are not a checklist, to be considered mechanically, and that the test of injustice and hardship is paramount.
33. In my view this was a significant amendment as it introduced a new complaint, albeit one which overlapped with the existing unfair dismissal complaint. Whilst time limits are not determinative in an amendment application, I found it significant that the strict "not reasonably practicable" test applies to s103A claims and that the application was being made on the morning of a final hearing some three years after the dismissal had taken place. I noted that there was some potential prejudice to the claimant if the amendment was not allowed, as, if his claim succeeded under s103A, any compensatory award would not be subject to a cap. Against this, he was not precluded from pursuing the unfair dismissal claims itself – he had sufficient service and that claim had been brought within time – so the prejudice lay only in the cap issue. If Mr Butler was able to show that the real reason for dismissal was that he had raised a grievance, rather than his conduct, the respondent would be unable to defend the unfair dismissal claim.
34. In terms of prejudice to the respondent, Mr Lockley pragmatically acknowledged that the respondent would not seek an adjournment, although it may well may required to concede that a particular grievance or complaint amounted to a protected disclosure if it was unable to locate a copy of the document in question, or produce the relevant witness.
35. When I questioned Mr Butler, his answers were vague as to protected disclosures he believed he had made and how these were said to have influenced the dismissal process. He made criticisms of the respondent's

disclosure exercise, but these criticisms appeared unfair in view of my conclusion that this complaint had never been part of the claim until now. I was satisfied that there would be prejudice to the respondent in defending a vague and generalised claim in circumstances where the full hearing was about to start and it would have very limited opportunity to gather evidence. I also considered that allowing Mr Butler to add the complaint would increase the risk of the hearing going part-heard, resulting in a further delay for both parties.

36. Balancing all of these factors, I decided not to allow the amendment.
37. It is worth noting, by way of a coda to this part of the decision, that during the substantive hearing Mr Butler advanced no positive case that he had been dismissed due to having raised grievances either in his questioning of the respondent's witnesses or in his submissions. I did remind Mr Butler that he was entitled to do so as part of the unfair dismissal claim (and, indeed, that he must do so if those were findings he would be inviting me to make). From the perspective of the conclusion of the hearing, I am satisfied that the theoretical prejudice caused to Mr Butler in not allowing the amendment was exactly that. There was, and would never have been, any compensatory award to which the statutory cap could have applied.

Postponement application

38. Mr Butler's postponement application arose out of the short notice that was ultimately provided in relation to the dates of the final hearing (in circumstances explained above). Mr Butler had produced witness statements from two supporting witnesses. That evidence was in the nature of character evidence and, with no criticism intended towards Mr Butler, it was of no real value in determining any of the issues in the case. Mr Lockley had indicated that the respondent did not intend to cross examine any of the witnesses, and was happy for their statements to be taken as read, albeit without formally accepting their contents.
39. Mr Butler expected that if the hearing was postponed, at least one of the witnesses would be available to come and give live evidence. I weighed up the very limited value of having that witness attend in person, against the very real detriment to the quality of the evidence of all the witnesses that would likely be caused by a further delay of a year. I decided that the absence of the supporting witnesses was not a strong reason in favour of a postponement.
40. Mr Butler also wanted to rely on complaints about the bundle of documents as a reason why the hearing should be postponed. He said that the bundle contained an ET3 response which had never been accepted by the Tribunal. Despite trying to engage Mr Butler in discussion about this, I never really managed to understand his complaint. I infer (although I may be wrong) that this arises out of EJ Allen's decision to accept an amended response which was based on the original response in this first claim, rather than the original response in this claim (see above). In any event, responses were accepted to both claims. It has been clear throughout the this respondent is active, engaged and has clear grounds for defending the unfair dismissal claim. To the extent that Mr Butler may have been seeking

a 'gotcha' technical knock-out due to some procedural irregularity, I saw no grounds for such an argument.

41. More broadly, in relation to the bundle Mr Butler said it was overly long, and arranged in a confusing way. He said for the first time in the whole of the proceedings (so far as I can tell) that he would be unable to read some of the documents because the text was too small and the respondent should be ordered to reproduce it in a larger font.
42. The respondent's position was that the bundle was arranged logically and that it would be onerous and unfair to require it to make significant changes now. More importantly, such changes could not be done without postponing the hearing and that would cause the respondent significant prejudice as one key witness had already left the business and the continued cooperation of that witness and their new employer could not be relied upon. More generally, delay would harm the quality of all of the witness evidence.
43. I recognised that where a postponement is required to allow a fair trial to take place, it will generally be necessary for the Tribunal to allow that postponement, however inconvenient or unfortunate. However, I decided that it would be wrong to postpone this hearing for the reasons given by Mr Butler. The reason relating to witness evidence was weak. In relation to the bundle, it is common for there to be complaints about the way one party has put together the bundle. The only potentially serious issue related to Mr Butler's ability to read the documents. I considered it inexplicable that this should have been raised for the first time today, particularly given there had been an ineffective final hearing commenced months ago in front of Employment Judge Cookson. Further, I was satisfied that we could address any genuine difficulty by providing assistance to Mr Butler with various documents as we came to them. In the end this was not requested nor required. Again, I explained my decision orally and Mr Butler indicated that he would require written reasons. These are those reasons.
44. Having dealt with those preliminary issues, the hearing then proceeded, albeit with significant interruption due to Mr Butler feeling unwell at various points. I heard evidence from three witnesses on behalf of the respondent – Miss Hill, Mr Davies and Ms Bates, and heard from the claimant. I admitted two supporting statements on behalf of Mr Butler, from Zunnoorain Shabbir and Taaha Khan. Both parties made oral submissions. The various delays with the hearing meant that I was unable to give a Judgment in the time available and so I reserved my decision. The Christmas holiday period then contributed to a short delay in producing that decision.

The Issues

45. Mr Butler withdrew his remaining money claims at the start of this hearing.
46. The issues in the unfair dismissal claim were as follows:
 - 46.1 What was the reason or principle reason for the claimant's dismissal?
 - 46.2 Did the Respondent genuinely believe the Claimant had committed misconduct?

- 46.3 If the reason was misconduct, did the Respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:
- i. there were reasonable grounds for that belief;
 - ii. at the time the belief was formed the respondent had carried out a reasonable investigation;
 - iii. dismissal was within the range of reasonable responses.

Findings of Fact

47. Mr Butler commenced employment with Capita in July 2019, working as a Banking Agent, which means that he took calls from customers of Lloyds, who were a client of the respondent.
48. From 28 March to 8 September 2022, Mr Butler was absent from work due to sickness. Prior to this, there had been a history of grievances, about which I did not hear evidence. There was also a dispute about the sick pay to which Mr Butler was entitled during his sickness absence.
49. As is common when employees are on long-term sickness absence, particularly in large organisations, the respondent referred the claimant to its occupational health provider. An allegation was made that Mr Butler had been rude to a call handler working for the occupational health provider. Mr Andrew Davies was tasked with conducting an investigation into this allegation. This was not progressed due to Mr Butler being on sickness absence. A further allegation was received in relation to similar conduct on 1 September 2022. The content of these allegations was that Mr Butler had referred to occupational health staff as being, variously, "a pathetic human being", "moronic" and "living in a fucking bubble".
50. Mr Butler's sickness absence ended on 8 September 2022, when he had a return-to-work interview. It was arranged that he would join an induction group completing training the following week in order to refresh his knowledge. It was suggested that Mr Butler should drop in and be introduced to the group who would be together with their trainer on the afternoon of Friday 9 September.
51. The manager conducting the training was Rebecca Hill. The group consisted of around 12 individuals and the majority – agreed to be around 10 out of 12 – were visibly of Asian ethnicity.
52. When Mr Butler joined the group it is agreed that he made a comment about "asylum seekers" referring to the people in the room. As I understand it, Mr Butler's contention is that he made the comment in the context of the training group providing "asylum" or "safe space" from the demands of the job. (I say "as I understand it" because his position appeared to change, with him sometimes describing the comment as deliberately provocative.)

53. The respondent alleges that Mr Butler's remarks included two further comments – one about their being “a lot of Asians” and one asking “did we recruit from a mosque?” These comments are denied by Mr Butler, particularly the mosque comment, which he says he recognises as being offensive, and would never say.
54. Miss Hill was very concerned by the comments. It is agreed that she told Mr Butler “you can't say things like that” – or words to that effect. There is a disagreement about exactly how quickly she did that and, therefore, how much Mr Butler actually had a chance to say. After the session concluded, she contacted Mr Butler's managers, initially by phone, but then with a follow-up email sent at 16.40 to Mr Christopher Grue.
55. The email mentions the “Asylum seekers” comment and the “Asians” comment, it does not mention the mosque comment. It states that many people in the group were upset and that Miss Hill had apologised for the comments.
56. At 17.02 Mr Grue forwarded Miss Hill's email to Mr Davies directing him to include this in his investigation.
57. Mr Davies conducted an investigation meeting with Mr Butler on 12 September 2022. Mr Butler was also suspended from duty and therefore did not join the training group as planned. During the investigation meeting, Mr Butler was questioned about the specific comments he was alleged to have made to the occupational health providers. He was then questioned about the two comments mentioned in Miss Hill's email. He acknowledged speaking about “asylum” and said he was joking and the word had a “double meaning” and then said that Miss Hill had not let him finish talking.
58. Following the investigation meeting, Mr Davies undertook to speak to the individuals who had been in the training group. Interview notes appear in the bundle recording interviews with seven of the group. It is not entirely clear why all of the group were not interviewed – it appears at least one had left employment. Mr Davies referred to having asked if members of the group were willing to give statements, and interviewing those who said they were.
59. From the seven interviewed, all gave a consistent account of comments being made along the lines of those in Miss Hill's email. Five specifically mentioned hearing a comment about “asylum seekers”. Four mentioned hearing a comment referencing “Asians” and two mentioned hearing the “mosque” comment directly, although others mentioned that they had heard it from other people afterwards. Other comments were also mentioned such as Mr Butler having allegedly said “feels like I'm the only white person here.” The interviewees were also asked about their own reaction to the comments, and their responses varied, with most commenting either that they found the comments offensive or that other people in the group had done so. Several people said that they would be uncomfortable with Mr Butler returning to training with the group.
60. By letter dated 15 September 2022 Mr Butler was invited to a disciplinary hearing on 20 September. The letter stated that:

“The purpose of this hearing is to discuss in detail the alleged misconduct and ensure that you are able to fully state your case and inform us of any explanation you feel may support you. Enclosed are copies of all the supporting evidence and witness statements that form the basis of the investigation.”

The letter enclosed copies of Miss Hill's email and the interview notes I have referred to above, as well as emails setting out details of the comments allegedly made to occupational health staff.

61. Further down, the letter informed Mr Butler that the “matter under consideration” may amount to gross misconduct and findings made against him may lead to his dismissal.
62. It is notable that the invitation letter did not clearly specify the actual conduct which the disciplinary hearing was going to consider i.e. it did not itemise the comments which Mr Butler was said to have made, either to the occupational health team or to the training group.
63. The disciplinary hearing duly went ahead and was conducted by Elizabeth Bates. There is no suggestion from the notes of the meeting or anywhere else, of any confusion over the allegations that Mr Butler was facing. Again, Ms Bates talked through both sets of allegations and Mr Butler was able to give his version of events. Ms Bates did not announce a decision during the meeting.
64. By letter dated 4 October 2022, Ms Bates informed Mr Butler that he was summarily dismissed for gross misconduct. The letter stated that:
“I am satisfied that your comments within the meet and greet for new starters on 9th September 2022 were discriminatory, and offended your other colleagues within that meeting.”
There was no specific record of what comments Ms Bates had found Mr Butler to have made, nor was there any reference at all to the occupational health allegations.
65. Ms Bates' evidence was that she had considered the allegations arising out of the training room incident first. She decided that the evidence supported all three alleged comments having been made, that such comments were discriminatory on grounds of race and that they amounted to gross misconduct. Having made those decisions she did not feel it necessary to reach a decision in relation to the occupational health comments, which she viewed as less serious.
66. I accept Ms Bates' account of her own thought-process in reaching her decision as a truthful one. It is supported to some extent by the way in which the dismissal letter was drafted, omitting any reference to the occupational health allegations. It is unfortunate that that thought process is not clearly and overtly set out in the dismissal letter, and that is a point I will return to later.

67. The letter concluded by informing Mr Butler of his right to appeal, stating that if he wished to do so he should inform Ms Bates in writing within seven days of receipt of the letter.
68. In an email sent on 6 October 2022 to Ms Bates, Mr Butler stated simply *"Please fix an appeal date and time"*.
69. I pause to note that the respondent's policy requires employees wishing to appeal to state the reason for their appeal, and this accords with the ACAS Code of Practice which provides that employees should let employers know the grounds for their appeal in writing (paragraph 26). The outcome letter itself did not refer to that requirement.
70. In evidence, Ms Bates confirmed that the email address used by Mr Butler was correct, but stated that she had no recollection of having received his email, and speculated that she may have missed it. There was no suggestion from Ms Bates, not put to Mr Butler in cross-examination, that the appeal email was not genuine and/or had not been sent.
71. By a further letter dated 13 October 2022, Mr Butler noted that the type of discriminatory comments he was found to have made had not been identified and that the occupational health comments had not been mentioned. He stated *"I am unable to articulate an appeal due to the defective nature of your report"*. He went on to say *"As you are aware the evidence is contradictory but you have not indicated or explained the evidence accepted or excluded."* The letter concluded by asking for the basis of the decision to be further explained.
72. A reply to this letter was sent on 1 November 2022 by Sunita Soloman, Operations Manager. The letter asserted that the outcome was clear from the dismissal letter. It then went on to state that, as the business had not received an appeal within 7 days, the window to appeal the decision was closed.

Relevant Legal Principles

73. Section 98 Employment Rights Act 1996 requires the employer to show the reason, or principal reason, for dismissal and that it falls within a potentially fair category (including misconduct under section 98(2)(b)). The Tribunal must then determine, in accordance with equity and the substantial merits of the case, whether the employer acted reasonably in treating that reason as sufficient to dismiss. That assessment is objective and must take account of the employer's size and administrative resources.
74. In misconduct cases, the employer must demonstrate: (i) a genuine belief in the employee's misconduct; (ii) reasonable grounds for that belief; and (iii) that such grounds were established following as much investigation into the matter as was reasonable in the circumstances (**British Home Stores Ltd v Burchell [1978] ICR 303**). The Tribunal's role is not to determine whether the employee in fact committed the misconduct, but whether the employer's belief and the process by which it was reached were reasonable. In considering the reasonableness of the investigation, the context of the misconduct must be considered and the 'band of reasonable responses'

approach applied – an employer is not obliged to pursue every conceivable line of enquiry (**Sainsbury's Supermarkets Ltd v Hitt [2003] ICR 111 (CA)**).

75. Reasonableness also requires consideration of whether the sanction of dismissal fell within the “band of reasonable responses” open to a reasonable employer: **Iceland Frozen Foods Ltd v Jones [1983] ICR 17 (EAT)**. Tribunals must avoid substituting their own view of the merits for that of the employer; the question is whether the decision to dismiss was one a reasonable employer could have reached (**London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220; [2009] ICR 1403**).
76. Procedural fairness is a component of overall fairness under section 98(4). This requires that an employee knows the allegations which he has to meet, and that the reasons for dismissal are made clear. Relevant to this case, an internal appeal is an important safeguard. The absence of an appeal can render a dismissal unfair, particularly where the original decision is imperfect or where an appeal might have cured defects. Equally, however, the absence of an appeal will not necessarily render the dismissal unfair in all cases. The Tribunal must consider the dismissal process holistically.
77. The approach to reduction of compensation following procedural unfairness is governed by **Polkey v A E Dayton Services Ltd [1987] UKHL 8; [1988] ICR 142**. Even where the dismissal is found to be unfair because a fair procedure was not followed, the Tribunal may reduce the compensatory award (including to nil) to reflect the chance that the dismissal would have occurred if a fair procedure had been adopted. The Tribunal must assess, on the evidence, the percentage likelihood of dismissal had the procedure been fair. The Tribunal should make a realistic assessment on the available evidence and is not required to resolve hypothetical events beyond reasonable estimation (see **Software 2000 Ltd v Andrews [2007] ICR 825 (EAT)**).
78. I agreed with Mr Butler and Mr Lockley that the correct approach in this case was to consider whether, in principle, there should be a reduction to any award due to either the ‘**Polkey**’ principle or due to fault on the part of Mr Butler. If there was to be no deduction, or a deduction of less than 100%, we would have to return for a remedy hearing to hear further evidence about Mr Butler’s efforts to mitigate his losses, and to make determinations about the awards.

Submissions

79. Both parties made helpful oral submissions and I am grateful to both Mr Butler and Mr Lockley for the effort that went into their submissions.
80. For the respondent, Mr Lockley submitted that this was a straight forward ‘Burchell’ misconduct case. He noted that there had been, in the end, no suggestion put to any of the respondent’s witnesses of any ‘ulterior’ reason for dismissal and that, in any event, the paper trail surrounding the dismissal was self-explanatory. He invited me to find that the reason for dismissal was conduct, specifically Mr Butler’s comments in the training room. Moving on from that, he submitted that the respondent’s belief in misconduct was

reasonable – the conduct was partially admitted and, where it was not, was amply supported by the interview notes obtained by Mr Davies. In terms of sanction, he said that dismissal was manifestly within the range of reasonable responses for any employer which properly wished to promote tolerance and respect across a diverse workforce. He emphasised the evidence that genuine offence had been caused.

81. In terms of procedure, Mr Lockley accepted that there were certain things which could have been done better. He rejected any criticism of the invitation letter, submitting that the allegations against Mr Butler were straightforward and clear from the accompanying documents. It was clear from the notes of the disciplinary meeting that Mr Butler understood the allegations and was able to provide his response. He also submitted that the dismissal letter was clear in context, but acknowledged that it would have been preferable if there had been an express statement that the occupational health allegations had not formed part of the reason for dismissal. Turning to the appeal, Mr Lockley submitted that the respondent was entitled to set a deadline for appeals to be submitted, and to require employees to include grounds for an appeal. Both of those requirements reflected the ACAS code and general good practice. The 6 October appeal email was defective because it did not set out any grounds. The 13 October letter was out of time, as identified by the respondent at the time. In any event, however, it also did not set out grounds. It was not a genuine attempt to appeal, but rather an attempt to ‘trap’ the respondent, pinning it down to a response which Mr Butler hoped would assist him when it came to litigation.
82. Mr Butler’s submissions concentrated, in part, on the ‘chain of evidence’ relating to the occupational health allegations. He put forward points about apparent discrepancies or deficiencies in how those allegations had come about and how they had been investigated. For example, there was a reference in an email to one comment having been made in “correspondence” from Mr Butler, but no letter or email was produced, and Mr Butler said that all interactions were verbal. I have not lengthened this Judgment by setting out details of the evidence around the occupational health allegations in circumstances where I am satisfied with Ms Bates’ evidence that she reached the decision to dismiss based on the training room allegations and found it unnecessary to consider the occupational health allegations.
83. Mr Butler also submitted that the gravity of his comments in the training room had been over-stated by the respondent. The asylum comment would have been revealed as innocuous if Miss Hill had not cut him off. The other comments were invented by those in the meeting, perhaps unconsciously, as their imaginations ran away with them. He emphasised his own evidence (reflected in at least one of the witness interviews) that he had had a conversation with some of the group in a public area of the building on the Monday, without incident, he said that that showed that the disciplinary action was unnecessary.
84. In terms of procedure, Mr Butler criticised the fact that Miss Hill had not been interviewed after her original email. At times, he appeared to suggest that the interview statements had been fabricated, either fully or in part. He

broadly criticised the failure to set out the allegations in the invitation letter and the related lack of clarity in the outcome letter about the findings made. He was very concerned that the occupational health allegations had simply 'disappeared'. Mr Butler submitted that it was unfair to criticise him for submitting a 'bare' appeal when he had received a 'bare' dismissal letter. His 13 October letter was a genuine attempt to explain that he did not understand the decision and was therefore unable to articulate an appeal. For example, he found it "unbelievable" that the allegations against him had "wandered into recruitment and mosques", but there was no finding by Ms Bates as to whether the mosques comment had actually been made.

Discussion and conclusions

85. I find that the respondent dismissed the claimant for misconduct, and specifically for remarks made during the "meet and greet" with the induction group on 9 September 2022. There was absolutely no evidence of any ulterior motive for the dismissal and, in the end, no real contrary case put forward by Mr Butler.

86. I do have a concern as to the lack of analysis evidenced in the contemporaneous documents about exactly *what* was said by Mr Butler in the meeting. Ms Bates' witness statement sets out the three separate comments ("did we recruit from a mosque", "looks like an asylum seekers' meeting in here", and "there are a lot of Asians in here"). In her analysis in her witness statement she explains that, whilst Mr Butler only accepted he had said 'asylum' or 'asylum seekers' she did not think it realistic that so many other witnesses would have mentioned more than one comment, with a general agreement about the content of the additional comments, if Mr Butler really had only mentioned asylum seekers. All of that analysis appears to be a sound response to the evidence placed before her, and well within the band of reasonable responses. It would certainly not be for me to trespass on Ms Bates' discretion as a decision maker, even if I took a slightly different view as to the strength of that evidence. My worry, however, is that that analysis only came to light in a witness statement prepared 18 months after the events. It does not appear in the outcome letter, nor in any other piece of contemporaneous evidence. The suggestion that there may have been an element of retrospective justification is a difficult one to avoid. Did Ms Bates, in September/October 2022, really engage with the fact that (for example) the evidence about the "mosque" comment appears weaker than the other comments, as it was not mentioned in Miss Hill's original email, and there is quite limited evidence of other attendees hearing it directly? I cannot be confident that she did. This is the difficulty that emerges when allegations are not clearly framed at the outset, in a way which prompts a decision-maker to deal logically with each element of the alleged misconduct and, subsequently, to frame an outcome letter which explains clearly to the employee which parts of the case against them have been proved.

87. However, setting aside that concern about the analysis for a moment, it is clear that Ms Bates reached a broad conclusion that comments (particularly including the admitted reference to asylum/asylum seekers) had been made which were sufficient to prompt Miss Hill to intervene and to escalate the matter to Mr Butler's managers, and which were noted by a large proportion

of the attendees and considered, by broad consensus, to be racially discriminatory and offensive. That conclusion was genuinely held and, on the evidence obtained, it was manifestly reasonable.

88. Turning to the investigation, Mr Butler has not made out, nor come close to making out, that there is any reason to be sceptical about the veracity of the attendees' interview notes. The questions asked were appropriate and the answers ring true in terms of the mixed responses given. There was absolutely no evidence to suggest some sort of wholesale fabrication or collusion. I did have a concern that the numbers interviewed fell short of the numbers in the group as a whole. A 'gold standard' investigation would have attempted to interview all attendees (not simply those who 'were happy' to be interviewed, as Mr Davies suggested at one point) and identified any individuals who were unavailable for interview, recording the reasons (I understand, for example, that at least one of the recruits left employment during the induction process). Again, however, the band of reasonable responses must be applied and I accept Mr Davies' evidence that he interviewed everyone who was prepared to give a statement, not looking to prefer witnesses who implicated Mr Butler over those who might exculpate him. This resulted in a significant proportion of the group giving interviews, and those interviews painted a broadly consistent picture, with only the discrepancies that would properly be expected from a group of people attempting to independently recall a very short verbal exchange.
89. Another plank in Mr Butler's criticism of the investigation was that Miss Hill was not interviewed after providing her initial email. Her evidence was that she was absent from work due to bereavement and Mr Davies' evidence was that he would have interviewed her had it not been for that absence but, in the circumstances, decided that the email was sufficient and there was no need to delay the investigation. Again, I find this evidence credible and I accept it. I reject the suggestion from Mr Butler that the respondent ought to have produced some sort of evidence of Miss Hill's relative's death, and/or her absence records.
90. Overall, I find that this was a reasonable investigation and that the elements of the **Burchell** test are therefore made out.
91. I then turn to the question of whether the sanction of dismissal was within the band of reasonable responses. This can be dealt with briefly – I am satisfied that it was. The incident was serious and by continuing Mr Butler's employment the respondent ran the risk of seriously undermining the confidence the attendees at the training had in the respondent as their employer. Further, the respondent was right to be concerned by Mr Butler's suggestions that he ought to be given the opportunity to 'explain' his 'innocent' use of the term "asylum" to the training group. That approach would present a great risk of inflaming a difficult situation. The respondent was reasonable in taking account of Mr Butler's failure to recognise the problem with his behaviour, and to perceive a risk of a similar situation arising in future.
92. The final issue I must consider is the broad question of procedural fairness, going beyond the simple requirements of the **Burchell** test and considering the process adopted by the respondent, including how it measured up to the ACAS Code and generally accepted standards.

93. I have already identified the problem with the fact that the invitation letter did not properly articulate the 'charges' against Mr Butler. I agree with the respondent that the case he needed to meet was self-evident from the evidence pack, and that there was no material unfairness in that regard. However, the lack of framing of charges led, as I have said, to a lack of robust analysis (or, at least evidence of robust analysis) and a defective decision letter which left it unclear exactly what had been found in relation to the training room comments, and had a complete absence of any finding about the occupational health allegations. In these circumstances, Mr Butler is right to complain that he did not know the exact reasons for his dismissal.
94. That failure to properly explain the reasons for dismissal, then led into further failures in relation to the appeal. The right to appeal is an important part of the disciplinary process, as made clear by the ACAS Code and the legal authorities. A failure to provide an effective right to appeal can make a dismissal unfair, even where there is no unfairness in the dismissal itself. It all depends on the circumstances.
95. I find that Mr Butler wanted to appeal against the decision to dismiss him. That is evidenced by the fact that his initial 'bare' appeal email was sent very quickly after receiving the outcome letter, asking for an appeal to be arranged. I reject the suggestion by the respondent that his wish for an appeal was cynical or performative.
96. The respondent failed to permit the claimant to appeal. The respondent relies on the fact that the claimant had not provided 'grounds' for his appeal, as required by its policy and, indeed, by the ACAS Code (paragraph 26). However, in my view this is not a good answer for several reasons. Firstly, the outcome letter set out the right to appeal but did not mention the need to provide grounds. It is reasonable for the claimant to proceed on the information given in the letter. If necessary, the respondent could accept a timely appeal and ask for grounds to be supplied, but this respondent did not do this. Instead, there was no response at all to the 6 October email.
97. The second reason why the 'lack of grounds' argument does not assist the respondent is that it was not relied on in the letter of 1 November 2022, which rejected the 13 October appeal as being out of time. The respondent did not perceive that there was a lack of grounds in the 13 October letter, it simply refused to engage with it due to the time point. Although Mr Lockley has argued that that letter was not properly an appeal, and was instead a 'refusal to appeal' I reject that argument. The 13 October letter raised very cogent criticisms of the outcome letter – particularly that the occupational health complaint had not been dealt with and seemed to have disappeared. The onus was on the respondent to engage with those legitimate complaints, but it completely failed to do so, relying on the time limit argument and dismissing the claimant's concerns about clarity in a rather high-handed way. The respondent's decision to do that was outside the band of reasonable responses, particularly in circumstances where there had been an earlier 'bare' appeal (I accept this was overlooked, but that itself does not provide an excuse) and where Mr Butler had raised very legitimate concerns very shortly after the expiry of the time limit. (Indeed, one of the respondent's own documents referred to 7 working days, on which view the 13 October would have been in time).

98. What difference would an appeal have made? I find that it is inevitable that Mr Butler's dismissal would have been upheld on appeal, given the severity of the conduct and all of the circumstances of the dismissal which I have outlined already. However, an appeal which was properly conducted would have identified the deficiency in the reasoning and explanation provided in the outcome letter and would have discovered from Miss Bates (i) her exact conclusions as to what had been said in the training room and the fact that she perceived this to include racially discriminatory statements and (ii) the fact that she had 'dropped' the occupational health element of the case and that that formed no part of her reason for dismissal. Those matters could then have been clearly communicated to Mr Butler. It might be naïve to think that that information would have satisfied Mr Butler, or prevented him from bringing this claim, but it would rectify the problem I have found i.e. that he was not given sufficient information to fully understand the reason he had been dismissed.
99. Taking all of that in round, are the problems I have identified sufficient to mean that the dismissal was unfair within the terms of s.98? This is a finely balanced decision. I have found both that the **Burchell** test is made out and that an appeal would have made no substantive difference to the overall outcome. The process must be looked at holistically and the Tribunal will err if it applies a standard of perfection, or allows minor points to assume unmerited significance. On balance, however, I find that there was real procedural unfairness in this case. There was an unfortunate 'snowballing' effect whereby a relatively inconsequential error in failing to frame the allegations led to a much more significant error in producing a decision letter which lacked clarity. Further errors by the respondent meant that a defect which could have been rectified relatively simply in an appeal was not addressed. Mr Butler ought not to have come to Tribunal to understand the reasons for his dismissal and, in those circumstances, I find that his claim of unfair dismissal is well-founded.
100. It flows from my comments above that I also find that it is inevitable that any appeal which the respondent did conduct would uphold Miss Bates' decision to dismiss. Further, the dismissal would have taken effect on the same date. In those circumstances, I am satisfied that any compensatory award which would otherwise have been due to Mr Butler must be reduced by 100%, in accordance with the **Polkey** principle.
101. The **Polkey** principle does not apply to the basic award, but the respondent has also submitted that any compensation ought to be reduced to reflect the claimant's culpable conduct in committing the misconduct in the first place. Such a reduction is permitted to the basic award under s.122(2) Employment Rights Act 1996. The test is whether it is "just and equitable" to reduce the basic award to any extent.
102. I am satisfied that Mr Butler did make racially offensive remarks in the meet and greet, specifically a remark involving the words "asylum seekers" and a remark involving the word "Asians". (I make no finding as to whether he made any remark referring to recruiting from mosques.) The making of those remarks was culpable conduct, giving rise to the possibility of the basic award being reduced. I decline to reduce the basic award by 100% due to the real procedural unfairness I have found, as identified

above. It seems to me to be just and equitable that Mr Butler receives some financial acknowledgement of this unfairness, alongside the finding of unfair dismissal. In all the circumstances, my decision is that the basic award ought to be reduced by 50%.

103. A provisional remedy hearing had been listed to calculate compensation if applicable. In view of the very limited compensation which will be due to the claimant, it is hoped that the parties can agree the relevant sum and that hearing can be quickly vacated. I will write to the parties separately making appropriate case management orders to that end.

Approved by: Employment Judge Dunlop

Date: 7 January 2026

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
6 February 2026

FOR EMPLOYMENT TRIBUNALS

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