EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Isherwood	**V**	**West Midlands Trains Limited**

Heard at: Watford (remotely by CVP) **On:** 5 and 6 May 2022

Before: Employment Judge Wyeth

Appearances:

For the Claimant: Mr P Diamond (Counsel)
For the Respondent: Ms C McCann (Counsel)

RESERVED JUDGMENT

1. The claimant was unfairly dismissed.

2. The claimant contributed to his dismissal by 15 per cent and accordingly there is to be a reduction to the compensatory and basic awards of that amount.

3. The basic award is to be reduced by a further 10 per cent to reflect the claimant's conduct.

REASONS

The claims

1. By way of a claim form issued on 18 June 2021 the claimant brought a complaint of ordinary unfair dismissal contrary to ss94 and 98 Employment Rights Act 1996 ("ERA"). The respondent defended the claim.

The issues

2. Standard directions were sent to the parties with the Notice of Hearing on 8 November 2021 which did not include a direction to produce a list of issues. Helpfully, however, the respondent's representative had prepared a proposed list of issues in advance of the hearing to which the claimant's representative had made amendments. Unfortunately, these were not

agreed. The only area of real contention related to how the Tribunal should approach the matter of the claimant's convention rights under the Human Rights Act 1998 ("HRA"). In all other respects the substance of the list was agreed.

3. At the outset of the hearing I established with the representatives the issues that I had to determine in this matter and I record them below as follows:

3.1 What was the set of facts in the mind of the employer which constituted the reason or principal reason for dismissal (per Abernethy v Mott, Hay and Anderson [1974] ICR 323 (CA))?

3.2 Was this a potentially fair reason for dismissal (by virtue of s98(1) and (2) ERA)? The respondent relies on conduct.

3.3 If so, was the dismissal fair, tested by the provisions of s98(4) ERA? The issues which arise here are:

3.3.1 Did the respondent form a genuine belief that the claimant was guilty of the conduct alleged?

3.3.2 Did the respondent have reasonable grounds for that belief?
The claimant asserts that there was no evidence of serious enough misconduct, no gross negligence and no evidence of serious damage to the respondent's reputation.

3.3.3 At the time that the respondent formed that belief, had it carried out as much investigation as was reasonable?
The claimant asserts that other attendees at the seminar should have been interviewed.

3.3.4 In all the circumstances, did the respondent act reasonably in treating the alleged conduct as a sufficient reason to dismiss?

3.3.4.1 Did the respondent follow a fair procedure (including by reference to its own internal procedure)?

3.3.4.2 Did the claimant know the case against him?

3.3.4.3 Did the claimant know he was at risk of dismissal?

3.3.4.4 Did the claimant have a reasonable opportunity to make representations?

3.3.4.5 Did the claimant have a right of appeal?

3.3.5 Was dismissal an appropriate sanction in that it was within the band of reasonable responses open to the respondent?
In considering this question, the claimant alleges that:

3.3.5.1 the respondent failed to have proper regard to mitigating features (including his remorse/apology; that his comments were aimed at his wife and not intended for others; his length of service and his clean disciplinary record);

3.3.5.2 the decision to dismiss was not consistent with two decisions taken by the respondent not to dismiss employees in relation to disciplinary cases involving race-related comments;

3.3.5.3 the respondent did not have proper regard to alternatives to dismissal.

3.4 In relation to any Convention rights and their applicability when determining general fairness through the prism of s98(4) ERA, insofar as

it might be necessary to do so (as per the guidance in X v Y [2004] ICR 1634 CA):

3.4.1 Do the circumstances of the claimant's dismissal fall within the ambit of Articles 8 and/or 10 of the European Convention on Human Rights ("ECHR")?
3.4.2 If so, is interference with the claimant's Convention rights by dismissal justified?
3.4.3 If not, was there a permissible reason for the dismissal under the ERA that does not involve unjustified interference with the Convention rights?
3.4.4 If so, is the dismissal fair in accordance with s98 in a manner that is compatible with the Convention right(s)?

Remedy
Basic award

3.5 Does the Tribunal consider that any conduct on the part of the claimant before his dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent (s122(2) ERA)? If so, it shall reduce the basic award accordingly.

Compensatory award

3.6 Having regard to any loss sustained by the claimant in consequence of the dismissal (in so far as that loss is attributable to action taken by the respondent), what amount is it just and equitable to award in all the circumstances (per s123(1) ERA)?

3.6.1 Polkey reduction: If the Tribunal finds that the dismissal was procedurally unfair in any respect, should any compensation be reduced to reflect the likelihood that respondent would have terminated the claimant's employment lawfully in any event (per Polkey)?
3.6.2 ACAS uplift: Should the Tribunal increase any award under s207A TULRCA due to any unreasonable failure to comply with the ACAS Code (up to 25%) (s124A ERA)?
3.6.3 Contributory fault: Does the Tribunal consider that the dismissal was to any extent caused or contributed to by any action of the claimant's? If so, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding (s123(6) ERA).

3.7 Is the amount of the compensatory award above the statutory cap (of 52 weeks pay) (s124(1ZA)(b) ERA)? If so, reduce the amount to the equivalent of the statutory cap.

4. It was also agreed that I would consider issues relevant to liability only at this stage (including matters of contributory conduct, breach of the ACAS Code and whether any failure to follow a fair process would have made any difference to dismissal). Other issues relevant to remedy would be resolved after any liability had been established. A remedy hearing was provisionally

listed with the parties for 19 September 2022.

Evidence

5. Prior to the start of the hearing I was provided with witness statements in respect of the claimant's case from the claimant himself consisting of 14 pages, his wife (2 pages) and a Professor Eric Kaufman of Birkbeck College, University of London (11 pages). For the respondent I received witness statements from Mr Steve Roberts the disciplining officer (consisting of 26 pages) and Mr Jonny Wiseman the appeal officer (consisting of 22 pages). I had before me a bundle consisting of circa 253 pages. Page references below are to the relevant pages of that bundle unless otherwise specified. Before Mr Wiseman gave his evidence the respondent's representative raised the fact that he believed that he had considered a different Equality policy to the one provided in the bundle but the parties were agreed that, whilst different in form, the content was substantially the same.

6. At the commencement, Ms McCann for the respondent raised an objection to the claimant's attempt to rely upon the evidence of Professor Kaufman on the basis that this was nothing more than opinion evidence. Having considered the content, I accepted that submission and I gave his evidence no weight. The statement was discursive in nature and amounted to little more than an expression of his theory and critique of the appropriateness of running a course on 'White Privilege' (amongst other things). In any event, it did not assist me with the issues I had to determine in this case. Ms McCann also objected to Mrs Isherwood's statement, maintaining that this was not before the respondent at any time up to and including the appeal stage of the process. I did not accept it was completely irrelevant. It went to the issue of the claimant's conduct that might impact upon remedy, a matter the Tribunal must determine on the balance of probabilities. That said, Mrs Isherwood's statement did not add a great deal as it simply repeated what the claimant was already asserting in his evidence. It was taken as read and I applied weight to it as appropriate. She was not called to give evidence.

7. I heard evidence from the respondent's witnesses first in the following order: Mr Roberts and Mr Wiseman. I then heard evidence from the claimant. The evidence was concluded by the end of the morning on day two. Thereafter I heard submissions on behalf of the claimant and respondent in that order. As I was left with only the afternoon to deliberate there was insufficient time for me to provide an extemporary judgment and reasons. I therefore indicated that I would reserve my Judgment.

Findings of fact

8. I make the following findings of fact on the balance of probabilities from the evidence before me. For the most part there was little dispute in relation to the relevant factual matrix in any event.

9. The claimant commenced his employment with the respondent, a well-known train operating company, on 7 September 2009. In 2015 the claimant was

promoted to the role of Senior Conductor Manager, a management position that he remained in until his dismissal.

10. At the relevant time the respondent had in existence various policies including a Behaviour Matters policy (pp170-181), a Disciplinary Policy (pp182-203), a Code of Conduct policy (pp204-210) and an Equal Opportunities Policy (pp211-214). In evidence before this Tribunal reference was made to particular aspects of those policies as follows:

    10.1. page seven of the Behaviour Matters policy (p176), in which there is reference to various policies including the Code of Conduct along with an outline of some of the key principles and certain expected standards of employees;
    10.2. one example of gross misconduct within the disciplinary policy on p190, namely "Bringing the company into serious disrepute, i.e. where the act of misconduct is known, or has the potential to become known, to external people or organisations and may damage the company reputation";
    10.3. the Code of Conduct on p208, paragraph 1: "Our customers and colleagues expect the highest standards of conduct from West Midlands Trains employees", paragraph 3.2: "all employees must show integrity and professionalism in the workplace", and paragraph 3.7: "All employees should fulfil their job duties with integrity and respect towards customers, stakeholders and the community";
    10.4. the introductory paragraph of the Equal Opportunities policy and the first bullet of section 2: "treating everyone fairly without bias", and section 3: "ignoring or devaluing diversity by pretending that everyone is the same".

11. The claimant voluntarily attended a webinar hosted by East Midlands Trains Limited ("EMT") on 21 January 2021 on the subject of 'white privilege'. Need it be said, the purpose of the course was to promote awareness within the workforce of equality and diversity issues. The webinar took place using Teams and was attended by employees of EMT along with employees of the respondent. Although EMT is its own separate train operating company, it is owned by the same parent company as the respondent and it would seem the two companies were collaborating with one another in the provision of this training. As has become more prevalent following the pandemic, the claimant was attending the course from his home. He was doing so in his own time having worked and finished his shift earlier that day.

12. At the conclusion of the online meeting, unbeknown to the claimant, he had not disconnected from the webinar which he had joined via his mobile phone. While people were thanking the host and gradually logging off the claimant was overheard to say:

    "*I couldn't be arsed because I thought you know what I'll just get fucking angry… You know what I really wanted to ask, fucking mess, do you know what I really wanted to ask, and I wish I had? Do they have black privilege in other countries? So, if you're in Ghana…*"

    Another colleague called the claimant to inform him that he had not properly

disconnected and could still be heard. These remarks were part of a private conversation the claimant was having with his wife in the privacy of his own kitchen. He had no idea at the time of making them that other people could hear him, least of all those attending the course. There was never any dispute about the fact that the claimant did not intend for anyone to hear his remarks or the private circumstances in which the remarks were made.

13. As a consequence of what he was heard saying (as set out above), the claimant was telephoned and suspended from duty on the same day (21st) by his line manager, Jean Teale, pending an investigation.

14. Tawhida Yaacoub, Passenger Information Manager, was appointed to investigate the incident. The course host, Mr Buckley, of EMT was interviewed as part of the disciplinary investigation. He had previously emailed the respondent on 21 and 22 January 2021 after the incident forwarding comments from others who had complained about what they had overheard the claimant saying. According to the evidence before me, despite there being circa 30 to 40 people still not signed off the webinar at the time the claimant made the remarks, only three of the attendees raised any objection to what was said.

15. One complainant (an EMT employee who was one of the three complainants and the only other attendee to be later interviewed by Ms Yaacoub) emailed Mr Buckley, at 2.48pm on 21 January 2022 expressing her view that she: "…*was disgusted by the uneducated and frankly disgraceful comments of the individuals [sic] who came off mute at the end of what was a very informative session. I don't know if anybody else has commented but I was quite shocked by it and want to make a point of raising this directly, as that is exactly the attitude we should be attempting to stamp out amongst colleagues.*" Another attendee added a remark to the chat stating that "*In the spirit of the talk we just had, I want to say that what happened at the end of the call was upsetting to hear and felt damaging to the group conversation we were having. The session was really insightful and provided thought provoking themes and even resources for further reading/study if you wanted to. I hope those equally or more affected by those comments at the end know you are surrounded by allies and support is here.*"

16. According to Mr Buckley's email of 22 January 2021 the only other feedback he received was from another EMT manager who said he was originally angered by the comments but after reflecting on them "suggested further training and discussions may help the individual understand things more so that he was very open minded about the situation."

17. During Mr Buckley's interview with Ms Yaacoub, when asked about the comments he had heard he indicated that he did not recognize who had said them but the reference to black privilege in other parts of the world may have been a valid question to raise during the webinar as it would have opened up a forum for discussion which he said would have been interesting. He added however that he sensed from the language used that it would not be asked with real intent and that "…*perhaps they didn't enjoy the webinar or found [sic] it as inciteful as others*".

18. He went on to indicate that upset was a strong word but he was disappointed that someone who felt so negatively and obviously felt they were under some sort of attack had acted that way.

19. The claimant attended an investigation meeting on 4 February 2021. He told the investigator that the comment including expletives that he made prior to reference to black privilege and Ghana related to a separate matter and not the Webinar. Initially he said that these were remarks he made when talking to his daughter about cooking lunch but in a follow-up email sent on 5 February 2021 he told the investigator that, having discussed the matter with his wife, she recalled that his earlier comments and swearing were in relation to a conversation they were having about a man who was due to come and repair the oven.

20. Insofar as it is relevant I interpose here that I do not accept the claimant's account about this as I regard it as improbable that these remarks were anything other than related to his views of the course subject and its content. It is notable that the claimant has taken up several pages of his witness statement, produced subsequently for the purpose of these proceedings, stating in blunt terms his view of the course (which he regarded as inappropriate and discriminatory in itself) and his disdain for it and yet he has sought to maintain that these remarks in a preceding single sentence could be differentiated from the next sentence about black privilege. I find as fact that it is simply not plausible that the comments made were in two different contexts. Furthermore, the claimant's position at the investigation meeting appears to be at odds with the tenor of his own prepared statement dated 3 February 2021 (at p40) that he read out towards the end of the investigation meeting. He makes no mention in that statement of any conversation with his daughter or about a cooker being repaired but instead he says "On reflection, I understand and accept that my question to my wife was asked in a clumsy manner, including the use of industrial language and for that I apologise again to those who were offended as this was not the intention".

21. By way of a letter dated 26 February 2021, the claimant was invited to attend a disciplinary hearing for alleged gross misconduct in that he:

    - Openly expressed views of a racial nature contrary to the Behaviour Matters policy;
    - failed to act in a professional manner in his participation of the webinar;
    - brought the company into disrepute through his actions resulting in complaints;
    - was heard by external parties using expletive and offensive language.

22. A disciplinary hearing took place on 10 March 2021. Mr Steve Roberts, Head of IT, chaired the disciplinary. The claimant was accompanied by his trade union representative, Mr Harris.

23. At the disciplinary hearing the claimant stated that he was very sorry for what happened and that it had never been his intention to say anything or imply anything that would cause somebody else to become upset. He made reference to the fact that he been employed by the respondent for 12 years, had a clean disciplinary record and had twice won ambassador award for

client service.

24. It was pointed out to the claimant by Mr Roberts during the meeting that he was not being called a racist or being accused of making racist comments. Instead the concern of the respondent was that he had made comments of a racial nature. This appeared to be a significant change of position by the disciplinary officer because, notably, the investigation report (pp43-67) included references to the claimant's remarks being racist in nature. It seems Mr Roberts took the view that these remarks were not as serious as the investigating officer had described them and did not merit the categorization she had used.

25. Although the claimant disputed there had been multiple complaints he accepted that there had been at least one complaint from an attendee. Nevertheless he demonstrated contrition by accepting during the meeting that even one complaint was too many.

26. At the hearing the claimant relied upon numerous witness statements he had obtained in advance from work associates of varying religious and ethnic backgrounds reflecting his good character and indicating that he was not in any way racist.

27. Mr Roberts accepted at the meeting (and during cross examination before this tribunal) that the claimant was very remorseful and that he had an entirely clean record over his eleven years of service. Furthermore, during cross-examination, Mr Roberts specifically accepted that the claimant was not racist in making the remarks nor had he committed any unlawful discrimination.

28. During the meeting there was some discussion about the claimant's use of expletives to his wife and whether this was in reference to the course or was instead, as the claimant maintained, in relation to the oven needing repair. From the evidence before me it is evident and I find as fact that this was only considered relevant in the context of whether or not the claimant's comment about black privilege was said in anger and not in a reasoned manner. The focus was not about whether the claimant was being dishonest in his account.

29. Towards the end, Mr Roberts adjourned the meeting for 40 minutes and returned to give the claimant his decision. Notably, neither the minutes of the meeting nor the outcome letter indicate that the claimant was being dismissed (in part or otherwise) because of any perceived inherent dishonesty in terms the account he had offered to Mr Roberts about the use of expletives. The letter Mr Roberts wrote to the claimant dated 12 March 2021 (pp108-110) confirming the decision to dismiss him, makes no direct reference at all to the claimant being regarded as dishonest in his account. In fact, the only reference to the accuracy of the claimant's account was on the final page in which Mr Roberts states:

"*I discussed this with you whether there is significant enough pause in the words you say, including the correct use of tenses, for this to be an adequate explanation for the subsequent inappropriate sentence where you are heard to use expletive language and pose the question of black privilege. It was the way this question was posed, coupled with your admission that you*

*'couldn't be arsed because you would get f***ing angry" that directly led to the complaints and this was a significant factor in my decision making.*

Whilst uncomfortable for you to hear, we did listen to recording [sic] several times to ensure I had an accurate timeline and script of what you specifically said. It was important for me to have clarity on this when making a decision on your conduct."

30. What is absent from any of this reasoning is the suggestion that because Mr Roberts considered the claimant had given an inaccurate account about this particular aspect of what he said, this in itself was a basis (even if only in part) for his dismissal. Indeed, the letter sets out the alleged conduct under consideration in four bullets on the first page (which do not depart from those included in the disciplinary invite letter) and this is not referred to at all. In his evidence before the tribunal, Mr Roberts asserted that the claimant's perceived dishonesty in his account about the swearing was of itself a significant factor in the decision to dismiss him. I reject that in its entirety. If that had any force, at the very least he would have referred to that as part of his rational for dismissal within the outcome letter he sent to the claimant. Instead, the claimant was dismissed for what he was overheard to have said to his wife in his kitchen at home (including the expletives that appeared to be used in reference to the course) as outlined in paragraph 12 above and the offence this had apparently caused to others and nothing more.

31. At the conclusion of the disciplinary hearing (as recorded in the outcome letter), Mr Roberts confirmed that the claimant was being summarily dismissed for gross misconduct. When asked by the claimant's union representative whether he had considered alternative sanctions to dismissal, according to the minutes of the meeting, Mr Roberts replied that "Gross Misconduct applies so the policy stipulates there that this is the outcome" (p106). There appears to have been no engagement with the claimant about consideration of alternatives to dismissal.

32. In cross examination Mr Roberts accepted that given the claimant's unblemished disciplinary and service record, the character references, his contrition, remorse, full apology, and Mr Roberts' own view that the claimant was not found to be a racist there was nothing more the claimant could have said or done to improve his position. Notwithstanding this, Mr Roberts determined that the claimant was to be dismissed regardless because his remarks were considered offensive to others and that this, in turn, was said to have brought the respondent company into disrepute. When asked what more the claimant could have done to save his job, Mr Roberts replied that it was not for him to say.

33. There was no recognition by Mr Roberts at any stage in the process or in his evidence before this tribunal that these were private remarks the claimant was making to his wife about his opinion of the course, made in the privacy of his own home and inadvertently broadcast to others because of the claimant's error in failing to log out of the Teams call. When asked in cross examination about the fact that the claimant was privately expressing a view to his wife, the rationale offered in response by Mr Roberts was that it was not private because it was heard by around 30 people who had yet to log off.

34. The outcome letter from Mr Roberts refers to the claimant's remarks as being in breach of the respondent's Equality, Diversity and Inclusion Policy and the Code of Conduct

35. The claimant appealed the decision to dismiss him by email on 15 March 2021. His grounds of appeal included amongst other things the severity and inconsistency of the punishment.

36. The claimant, along with his trade union representative attended an appeal meeting chaired by Mr Jonny Wiseman, Customer Experience Director, on 6 April 2021. Much of the discussion at that meeting was a repeat of matters raised at the disciplinary meeting. At this meeting, however, the claimant raised other cases of misconduct involving race discrimination in which the perpetrators had been treated more leniently.

37. In particular, just the month before the claimant's dismissal, a different disciplinary manager of the respondent had decided to issue a sanction less than dismissal (unpaid suspension, a final written warning and a written personal apology) to a fellow employee for describing a dirty toilet being as brown as one of the respondent's employees to his face - conduct that clearly had significant racist connotations (pp249-250). Furthermore, just one week after the claimant was dismissed, that same disciplinary manager again issued a sanction less than dismissal (unpaid suspension, a final written warning and a demotion from driver instructor to driver) to a different employee for making a remark with racist connotations about "farming more Indians" to the same colleague who had been the target of the dirty toilet remark (pp251 to 252).

38. Following the meeting, Mr Wiseman carried out further investigation including interviewing some of those involved, one of whom was Mr Roberts. According to the notes of the interview with Mr Roberts (at pp236 to 239), when prompted by Mr Wiseman, Mr Roberts claimed he had considered sanctions other than dismissal. According to the notes, Mr Roberts came to the decision to dismiss the claimant because "*…it was external, if it was solely internal, a letter of warning would possibly be sufficient. Because it was external and clearly did bring the company into disrepute – summary dismissal was justified.*" Again, there is a total absence of any recognition of the context in which the remarks were made and the fact that they were private thoughts intended to be shared with his wife only and not views he ever intended to broadcast publicly. Furthermore, this only compounds the earlier finding that Mr Roberts did not properly consider alternatives at the time of dismissal but instead adopted a rigid and blinkered approach to the issue of sanction and certainly did not test or explore the appropriateness of alternatives to dismissal with the claimant in any way.

39. Mr Wiseman wrote to the claimant on 5 May 2021 notifying him that his appeal was not upheld (pp163-164). Much of his two-page letter addresses procedural issues complained about by the claimant that were not a feature in the case being advance on the claimant's behalf before this Tribunal. Of relevance is the concluding paragraphs on the second page. Mr Wiseman indicated that he could not conclude absolutely what was or was not being

discussed by the claimant and his wife when he was overhead at the end of the webinar. Nevertheless, he concluded that he had not been presented with evidence that would make him doubt the reasonable belief of Mr Roberts that:

" - whilst representing [the respondent the claimant's] behaviour directly led to complaints being received;
- [the claimant's] comments caused offence to other people in attendance;
- What is heard breaches [the respondent's] Equality, Diversity and Inclusion Policy and Code of Conduct; and
- That [the claimant's] actions brought [the respondent] into disrepute."

For those reasons, Mr Wiseman upheld the decision to summarily dismiss the claimant.

40. Mr Wiseman did not address the alleged inconsistent treatment asserted by the claimant by way of the examples given of other employees receiving lesser sanctions for conduct the claimant perceived to be much more serious than his own. In paragraph 70 of his statement, Mr Wiseman claimed to have no involvement or knowledge of those incidents. Whilst the former may be correct, Mr Wiseman must have had 'constructive' knowledge of those disciplinaries and their outcomes because the claimant was very specific about the detail of these incidents during the appeal meeting (p125). In his evidence to this Tribunal, Mr Wiseman dismissed the relevance of those cases in terms of the claimant's appeal by broadly asserting that each case is decided on its own facts and that no two cases are the same. He also sought to distinguish the relevance of these cases in his statement by suggesting that because these incidents involved comments from one employee to another rather than one that was made on a public forum they were not as serious. I reject that evidence and find it to be not only illogical but wholly unsustainable. In any event, Mr Wiseman also appears to have no regard to the fact that the claimant never intended his remarks to be heard by anyone other than his wife.

41. Mr Wiseman briefly expanded on this reasoning in his evidence before the Tribunal at paragraph 66 to 68 of his statement. In essence he regarded the remarks the claimant was heard to make to be offensive comments which demonstrated negative, disrespectful and hostile views on the subject of white privilege which were contrary to the respondent's policies on inclusion, diversity and equality. He concluded that the expletives used were all part of the same conversation and related to the black privilege in Ghana comment.

42. Like Mr Roberts, Mr Wiseman refers to these being made in a public setting without any acknowledgment or recognition of the fact that they were only ever intended to be private remarks between the claimant and his wife that were never meant to be broadcast.

43. Notably, both in his statement and in evidence given in cross examination, Mr Wiseman accepted that the claimant would not have been dismissed for the swearing and offensive language alone. According to paragraph 72 of his statement, Mr Wiseman maintained that the relevance of the use of expletives by the claimant was that it showed a resistance and derision

towards important principles of equality and inclusion.

Submissions

44. Both counsel went to considerable time and effort to prepare and provide me with comprehensive skeleton arguments setting out the respective cases for each party. I read each of these with great care and considered the content as part of the process in coming to my decision. No useful purpose is served in repeating the content here. Both counsel expanded on their written submissions by way of oral argument at the conclusion of the evidence.

45. I should add that each party was very well represented by their counsel, both of whom argued their respective client's cases with real force and persuasion.

The law

46. The law relating to unfair dismissal is predominantly contained in Part X ERA 1996. The respondent must first demonstrate that the principal reason for the claimant's dismissed was for one of the potentially fair reasons set out in s98 (in this case, misconduct). The tribunal must then consider whether the dismissal was generally fair and, more specifically, whether the employer acted reasonably or unreasonably in treating that reason as sufficient for dismissal. The burden of proving whether or not a dismissal was reasonable is a neutral one.

47. In accordance with the seminal case of British Home Stores Limited v Burchell [1980] ICR 303, the respondent is not required to have conclusive direct proof of the claimant's misconduct, only a genuine belief on reasonable grounds after carrying out as much investigation into the matter as is reasonable in the circumstances.

48. The Tribunal must consider whether the respondent's decision to dismiss was within a range of reasonable responses to the conduct. When deciding the issue of reasonableness, the tribunal must apply the band of reasonable responses test. Consequently it cannot substitute its own view for that of the employer but must instead ask the question as to whether no reasonable employer would have dismissed in those circumstances. Only then will a tribunal conclude that a dismissal fell outside the band of reasonable responses (British Leyland (UK) Ltd v Swift [1981] IRLR 91, CA; London Ambulance Service NHS Trust v Small [2009] IRLR 563 CA).

49. In accordance with the seminal cases of Iceland Frozen Foods Ltd v Jones [1983] ICR 17 EAT and Foley v Post Office [2000] ICR 1283 CA, when applying these tests the Tribunal should allow a broad band of reasonable responses to the respondent. In Iceland Frozen Foods, the EAT reminded tribunals that the starting point should always be the words of [s98(4) ERA] themselves.

50. Section 98(4) ERA states:

> "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the

circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case."

51. Need it be said, the band of reasonable responses test also applies to the extent of any investigation required to be conducted by the respondent in accordance with the third limb of the Burchell test. Again, the tribunal cannot substitute its own view as to what it would have done to investigate the matter but must instead ask itself whether what was done in terms of the investigation fell within what a reasonable employer would have done in those circumstances (J Sainsbury plc v Hitt [2003] ICR 111, CA).

52. The Court of Appeal decision in Newbound v Thames Water Utilities Limited [2015] IRLR 734 serves as a reminder to tribunals and parties that the band of reasonable responses is not an infinite one. It does have boundaries and it is right that the tribunal properly identifies those boundaries. The Court in Newbound emphasized the importance of the requirements of s98(4) ERA, specifically that tribunals must determine whether an employer has acted reasonably or unreasonably in deciding to dismiss in accordance with equity and the substantial merits of the case and that this is not to be regarded as a procedural box-ticking exercise. Similarly, in accordance with the decision of the Court of Appeal in Bowater v North West London Hospitals NHS Trust [2011] IRLR 331, it is for tribunals to establish where the boundary of reasonableness lies notwithstanding that an employer has labelled behaviour as gross misconduct.

53. The ACAS Code of Practice on Disciplinary and Grievance Procedures sets out the basic requirements of fairness that will be applicable in most conduct cases and is to be taken into account by a tribunal when determining the reasonableness of the dismissal in accordance with section 98(4).

54. Article 10 of the European Convention on Human Rights ("ECHR") provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these functions, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

55. Article 8 ECHR provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or

morals, or for the protection of the rights and freedoms of others."

56. If compensation is to be awarded then the tribunal must order the respondent to pay a basic award (calculated on a standard formula) and a compensatory award. In accordance with s123(1) ERA the compensatory award is to be such amount as the tribunal considers just and equitable. Both awards may be subject to reductions for certain reasons. Section 122(2) ERA provides that the basic award may be reduced where the claimant's conduct before dismissal renders it just and equitable to do so. Under s123(6) ERA, the tribunal must likewise consider whether the claimant contributed to their dismissal in some way and if so reduce any compensatory award accordingly. For a reduction to be made for this reason, the relevant action by the claimant (proven on the balance of probabilities) must be culpable or blameworthy; it must have actually caused or contributed to the dismissal; and it must be just and equitable to reduce the award by some proportion. Furthermore, the compensatory award may be reduced where it is evident that the claimant might have been dismissed fairly regardless of any actual unfair dismissal (the Polkey principle).

Applying the law to the facts

57. Turning to the first issue – the reason for dismissal – the respondent's pleaded case (also reflected in the respondent's draft list of issues) was that the claimant was dismissed for the potentially fair reason of conduct. It is unequivocally clear from the facts and not at all difficult to identify what conduct led to the claimant's dismissal. He was dismissed for the comments inadvertently heard by others that he was making to his wife in the privacy of his own home expressing forthright views about the webinar he had attended entitled "white privilege" which included the use of expletives and indicating that he had wanted to ask about black privilege in other countries such as Ghana. There is no dispute that he did not intend anyone else to hear those views and that the only reason they did was because he had failed to switch off his device correctly so as to no longer be connected to the webinar. Indeed, other than the dispute as to whether the claimant's swearing was connected to his view of the course or not there was no dispute of fact between the parties about the relevant conduct that led to his dismissal. There is also no doubt that certain others may and did indeed regard those private views about the course and the general content to be contentious and offensive.

58. Given the relevant context, conduct and circumstances in this case, assessing what is said to have been the *misconduct* has not been entirely straightforward. It simply cannot be right that employees are not allowed to have views that they privately express about courses they attend, however odious or objectionable others might consider them to be if they come to know of those views. Whilst the respondent's conclusion that the expletives used by the claimant added an aggressive or angry slant to what the claimant was saying, and no doubt a dismissive attitude to the course and its value, the aggravating feature of his remarks in this case was his comment about wanting to ask about black privilege in other countries. Indeed, in accordance with the respondent's own evidence (written and oral testimony of Mr Wiseman) the claimant would not have been dismissed for the use of

expletives alone. As for the remarks about black privilege in other countries, the course host, Mr Buckley confirmed that this would have been a valid question to ask during the webinar had it been asked with "real intent".

59. Mr Roberts accepted as part of the process and in his evidence to the tribunal that the claimant had not been racist or guilty of unlawful discrimination because of the remarks.

60. Need it be said, freedom of expression, including a qualified right to offend when expressing views and beliefs (in this case on social issues), is a fundamental right in a democratic society and one that is protected by the Convention rights under the Human Rights Act 1998. In this instance however there is the added significance that these views were being expressed in the privacy of the claimant's home to his wife. They were never intended to be heard by those who attended or ran the course. Insofar as it is relevant, privacy is also a fundamental right in a democratic society and is likewise protected under the 1998 Act. Whilst undoubtedly contentious, the remarks he expressed (albeit in an unguarded fashion because they were made to his wife) were akin to expressions of views not infrequently heard on radio and television or read in some newspapers. A significant section of society may of course disagree with those views, consider them narrow minded and may also take offence at them but undoubtedly there will be another section of society who hold a contrary view. As identified in the facts found and referred to above, Mr Buckley acknowledges that a question of the kind put by the claimant (absent the intemperate language) would have opened up a forum for discussion which would have been interesting.

61. Notwithstanding that the respondent accepted that the claimant was not racist in what he said and did not unlawfully discriminate, on the facts found, the respondent regarded it as axiomatic that the claimant must have been in breach of its Equality and Diversity policy by expressing in an aggressive manner what were intended to be private views that demonstrated a disdain for this particular course and a rejection of the propositions put in terms of the concept it covered.

62. Be that as it may, on the facts of this case, the comments said to have brought the respondent into disrepute were made in circumstances where they were never intended to be heard by others outside of the claimant's home, and were not made in a manner that could be said to be construed as the claimant speaking on behalf of the respondent in some way. The comments were an exercise of his own views and belief in the lack of value in the course that he never intended to be broadcast. That said, the claimant's failure to correctly log out of the webinar caused other colleagues within the respondent and its sister company, EMT, to hear the comments that some people considered to be offensive and which were believed to have brought the respondent into disrepute.

63. Accordingly, the misconduct in this case was the claimant's failure to properly ensure he had disconnected from a work seminar before expressing views about it that others might (and did) find utterly disagreeable and offensive.

64. In terms of the respondent's belief in the misconduct and the reasonableness

of the investigation, the substance of what was said (namely reference to black privilege in other countries) was admitted. As for the matter of whether the claimant's use of expletives and expressing anger was reflective of his attitude towards the course or was instead about a wholly unconnected matter of an oven repair, I am satisfied that the respondent undertook an investigation that was within the band of what would be considered reasonable. Nothing would have been gained by interviewing the claimant's wife or daughter as they would not have departed from anything the claimant advanced himself. Ultimately this involved an assessment of whether the explanation advanced by the claimant (or anyone else on his behalf) was credible. Little rests on this aspect of the conduct in any event. The substance of the conduct was undeniable given that it was recorded. In understanding the relevance or significance of what the claimant said, I am also of the view that little would have been gained by interviewing other attendees or the remaining individuals who complained. I am satisfied therefore that the respondent did have an honest belief as to the misconduct identified above, on reasonable grounds following reasonable investigation.

65. I am, however, not satisfied that the process followed by the respondent was within the band of reasonable responses of a reasonable employer in two respects – both of which impact upon the further issue of whether the sanction was also within the band of reasonable responses. As part of his appeal, the claimant made valid representations about an apparent discrepancy in the treatment he received in comparison to other employees who were found to have discriminated in relation to race. This was particularly significant to the reasonableness of the sanction of dismissal. Mr Wiseman did not properly consider or address this as part of the appeal. This may have been an oversight but it was incumbent upon him to do so and to explain to the claimant any conclusion he had reached in relation to that matter. Instead he sought to downplay the significance of that issue by dismissing the relevance of it in his evidence by way of a broad and vague assertion that no two cases are ever the same. On the face of it, there was significant disparity in treatment between the claimant and two of his colleagues and the claimant was entitled to know why, or, at the very least, why such apparent disparity was not deemed relevant or inconsistent. No reasonable employer would have failed to address that issue on appeal given its importance in terms of the appropriateness of the sanction imposed and to that extent the procedure followed fell outside the band of what was reasonable.

66. Furthermore, on the evidence before me and the facts found, Mr Roberts did not properly consider, or engage in any discussion with the claimant or his representative about, alternatives to dismissal at any stage during the disciplinary meeting, and specifically at its conclusion when the matter was raised by the claimant's representative. Instead, he moved direct to dismissal without any proper consideration of alternatives, seemingly because "Gross Misconduct applies and so the policy stipulates there that this is the outcome" and notwithstanding what he later stated when asked by Mr Wiseman.

67. On the undisputed facts listed below, no reasonable employer would have failed (at the very least) to give an employee in the claimant's circumstances the opportunity to comment on: a) the appropriateness of a warning and whether he would have heeded it; and/or other alternatives to dismissal such

as the possibility of b) engaging in further equality training or c) making a wider apology to those who were offended. Instead, Mr Roberts concluded that dismissal had to be the only option and Mr Wiseman simply endorsed the decision of Mr Roberts.

68. Turning then to what is really the crux of this case, namely whether the decision to dismiss fell within the band of reasonable responses of a reasonable employer, I am in no doubt that it did not. Leaving aside any Article 8 or Article 10 Human Rights Act issues, on the evidence and factual findings (most of which were agreed) this is a case that falls outside the band of reasonable responses of any employer on an ordinary reading of s98(4) ERA. Need it be said, I am acutely aware of the importance of not substituting my view for that of a reasonable employer and I reach that conclusion on the following basis.

69. Notwithstanding that the respondent concluded that the claimant's comments caused offence to some who heard him and believed they had brought the company into disrepute, I have concluded that both Mr Roberts and Mr Wiseman acted well outside of the band of reasonable responses of a reasonable employer in deciding to dismiss the claimant in the following undisputed circumstances:

    69.1. The claimant was expressing a private view about the course he had attended to his wife in the privacy of his own kitchen;
    69.2. The claimant never intended for those remarks to be heard by anyone else;
    69.3. The comments were not found by the respondent to be discriminatory or racist or generally unlawful in any way;
    69.4. The course host indicated that the question about black privilege in other countries would have been valid had it been asked with intent or in a meaningful way;
    69.5. As recorded in the investigation, one of the three complainants had, himself, suggested that further training and discussions may help the claimant and yet this was something that neither the dismissing officer or appeal officer considered or chose to explore with the claimant;
    69.6. The claimant would not have been dismissed for being heard swearing only;
    69.7. EMT and the respondent were closely associated such that the course was being run for their joint benefit, no members of the public were present or heard the remarks;
    69.8. The claimant was remorseful, apologetic and embarrassed for what others had heard him say;
    69.9. The claimant had an unblemished disciplinary record over an 11 year period of service and there were no previous concerns of any kind about his attitude to equality and diversity.

70. Furthermore, as stated above, no reasonable employer would fail to engage with the claimant about alternatives to dismissal and address the apparent disparity in treatment in comparison to other employees who were found to have discriminated that he identified as part of his appeal. These failings only compound the already strong conclusion that no reasonable employer would have dismissed its employee on the facts found in the claimant's case.

71. On any reasonable view, the degree of culpability on the part of the claimant was extremely limited. In essence he was culpable by failing to properly disconnect from the webinar.

72. Reference has already been made to the fact that Article 8 and Article 10 rights are in issue in this case. For the avoidance of doubt, I have determined that dismissal of the claimant fell well outside the band of reasonable responses of a reasonable employer on a straightforward and ordinary interpretation of s98(4) ERA without any need to place any reliance on s3 HRA and I have not needed to engage it. Need it be said, the position would have been no different if it had been necessary to rely upon any such interpretive obligation. On the contrary, it would have served to strengthen the conclusion reached.

73. Given the conclusion I have reached as to the inappropriateness of the sanction of dismissal and that such a decision would have been the same irrespective of two procedural failings identified, there is no basis for making a *Polkey* reduction. Indeed, if the respondent had followed a fair procedure in relation to those matters, there was even less (and certainly not more) chance that the claimant would have been dismissed. Considering alternatives to dismissal and offering the claimant the chance to comment on those would have provided for meaningful engagement and consideration of that issue. That did not happen.

74. Turning to the issue of contributory conduct, the culpable and blameworthy conduct in this case was the failure of the claimant to properly disconnect from the webinar before expressing private views to his wife about the course that others might find offensive. There is no doubt that such conduct did contribute to his dismissal. When determining the proportion by which it would be just and equitable to reduce any award of compensation this Tribunal is mindful of the limited culpability in that regard and considers that it warrants no more than a minor reduction of 15 per cent. That reduction should, however, be applied to both the basic and compensatory awards.

75. However contentious or odious some might regard the claimant's comments to be, the expression of his private view of the course to his wife in the confines of his own home was not blameworthy or culpable conduct that could amount to contributory conduct.

76. I have also considered whether the claimant's account that the swearing was unconnected to his views on the course that I have found to be unsustainable on the balance of probabilities should result in a contributory fault reduction, particularly as the respondent also believed that account to be untrue. On the facts found, the respondent considered the accuracy of the claimant's account as to the swearing to be relevant to the context of the black privilege remark and whether this was said in anger or with disdain. On the evidence, I have found that dishonesty in itself was never identified as a basis for his dismissal. Indeed, if one of the factors in Mr Roberts' decision to dismiss was the claimant's dishonesty per se, then this would have been unfair and outside the band of reasonable responses as this basis that had never been put to the claimant even when notifying him of the reason for dismissal. As

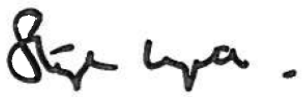
there is no causal link between any dishonesty of itself and the decision to dismiss the claimant as required by s123(6) ERA, I make no reduction to the compensatory award in this regard. The wording of s122(2) ERA is different however and does not require any blameworthy or culpable conduct to contribute to the dismissal before any reduction might be considered on a just and equitable basis to the basic award. I have found that on the balance of probabilities the account the claimant gave about his swearing was not an accurate one. Even though his deliberate inaccuracy of itself was not a factor in his dismissal I regard it as blameworthy and culpable conduct on his part. Nevertheless, in the context of what is just and equitable and accounting for the claimant's remorse, embarrassment and apologetic stance during the disciplinary I consider it would not be appropriate to make anything other than a minor reduction for that element of his conduct and I order a further 10 per cent reduction to his basic award.

77. Finally, I make no adjustment under 207A TULRCA (ACAS uplift). Despite the substantive defects in the decision reached, I consider that the respondent followed the spirit of the Code and did not act unreasonably in terms of the general process applied so as to justify any form of uplift.

78. For all the above reasons, the claimant was unfairly dismissed. There is to be a reduction to the claimant's compensatory award of 15 per cent and his basic award of 25 per cent by reason of his conduct.

79. In the event that the matter of remedy cannot be resolved by agreement between the parties, the provisional hearing listed for **19 September 2022** will proceed by CVP as planned.

80. By way of a post script, as a matter of courtesy to the parties I wish to apologize for the fact that this reserved decision has taken a few weeks longer to produce than I had indicated. This is due to personal circumstances that have intervened. I had drafted the findings of fact shortly after the hearing but finalising the decision has been somewhat delayed.



Employment Judge Wyeth
Date: 22 July 2022.
Judgment sent to the parties on

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For the Tribunal office