



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr William Clark

**Respondent:** Central Extrusions Limited

**Heard at:** Birmingham by CVP                      **On:** 5 & 6 June 2023

**Before:** Employment Judge Gilroy KC

## Representation

**Claimant:** In person

**Respondent:** Ms Tracy Shaw, HR Consultant

## JUDGMENT

The judgment of the Tribunal is as follows:

- (1) The Claimant was unfairly dismissed.
- (2) The Tribunal will determine matters of remedy at a hearing on 30 June 2023, commencing at 10.00 am.

## REASONS

### Introduction and Background

1. This is an unfair dismissal claim. Dismissal was admitted by the Respondent. The Respondent contended that the reason for dismissal was the potentially fair reason of conduct, and further that dismissal was fair in all the circumstances. It was established at the beginning of the hearing that notwithstanding the content of his claim form, the Claimant was not seeking a redundancy payment.
2. As dismissal was admitted, the Respondent presented its case first.
3. At the beginning of the hearing, it became apparent that the Respondent was not intending to call as a witness Mr Robert Thorpe, director (and essentially owner) of the Respondent, notwithstanding that on the Respondent's case it was Mr Thorpe who made the decision to dismiss the Claimant. Upon enquiry, Ms Shaw indicated that it was proposed that she would be giving evidence as to the reason for dismissal. It was pointed out

to Ms Shaw that a failure to call Mr Thorpe as a witness may well have certain consequences in terms of the Tribunal's ultimate decision on the Claimant's claim. She indicated that Mr Thorpe was available and could give evidence. However, the Tribunal referred to the fact that there had been a preliminary hearing on 12 December 2022, at which directions had been given for the exchange of witness statements, and no statement had been prepared on behalf of Mr Thorpe. After discussion, the Tribunal agreed to allow Mr Thorpe to give evidence on condition that a witness statement in his name was drafted immediately, that the same was served upon the Claimant, and that the Claimant was given sufficient time to prepare for his cross-examination of Mr Thorpe. A witness statement was prepared in Mr Thorpe's name and served by the Respondent during the lunch break on the first day of the Hearing. The Claimant confirmed after that lunch break that he had prepared his questions for Mr Thorpe. Mr Thorpe was duly permitted to give evidence.

### **Material before the Tribunal**

4. The Tribunal heard oral evidence on behalf of the Respondent from Mr Thorpe and Ms Shaw, and from the Claimant.
5. The Tribunal was provided with witness statements on behalf of each of the witnesses who gave live oral evidence.
6. Each party produced a range of documents, all presented loosely rather than in a bundle or bundles.

### **Findings of Fact**

7. The Tribunal made the following findings of fact.

### **Background**

- 7.1. The Respondent is engaged in the business of the manufacture and supply of extruded and injection moulded glazing products based at premises situated at Cradley Heath, Birmingham. It has some 20 employees.
- 7.2. The Claimant commenced employment with the Respondent on 5 November 2018 in the position of Commercial Sales Manager. His role changed to that of Regional Sales Manager with effect from 1 January 2022. It would appear that this change of role amounted to a demotion but that is not material for the purposes of this judgment.

### **Dismissal**

- 7.3. The Claimant was dismissed by Mr Thorpe with immediate effect on 31 March 2022, "the effective date of termination". The Claimant was informed of his summary dismissal at a meeting with Mr Thorpe that day, and dismissal was confirmed to him by a letter of the same date signed by

Mr Thorpe. In that letter, Mr Thorpe stated that the reason for dismissal was gross misconduct and that the conduct in question was serious enough to merit summary dismissal, notwithstanding that the Claimant had a clean disciplinary record.

- 7.4. In the dismissal letter, Mr Thorpe stated: *“we discussed a list of serious issues with you”*. As noted above and below, Mr Thorpe had not been involved in any discussion with the Claimant about disciplinary matters. The Claimant had attended a meeting with Mr Pope (paragraph 7.15 below refers), and a disciplinary hearing with Ms Shaw (paragraph 7.18 below refers), but no meeting with Mr Thorpe. In the dismissal letter, Mr Thorpe said that the reason for the decision to dismiss was that it had been found that the Claimant’s conduct towards another employee was *“unsatisfactory”* and that his actions had *“placed (the Respondent) in disrepute”* on the following basis:

*“A complaint has been bought (sic) to us by Michael Rollinson, we have received two witness statements, a discriminative (sic) remark was made concerning his disability which caused offense (sic) and upset to both the colleague and the victim at the time it was made by you, a previous and serious incident was noted also back on May 13<sup>th</sup>, 2021, regarding a racial complaint made against you also. We have evidence of guidance informing you that this was a serious breach at that time”*.

- 7.5. In the letter of dismissal, Mr Thorpe went on to say that the Respondent had a duty of care to all of its employees, and *“with your extremely poor conduct on both occasions, which you are responsible for your own actions (sic) we find this a serious incident. A remark we have found appalling which we find no excuse for”*. Reference was made to disability being a protected characteristic under the Equality Act 2010. It was stated that the Claimant had breached the Respondent’s *“value at work diversity policy”*, and that it could not tolerate discrimination of any kind. Mr Thorpe continued:

*“You are responsible for your daily actions and conduct and even after a first incident, this has now come up again and we just cannot accept this behaviour as this could have serious consequences to (sic) our staff and business not to mention our reputation.”*

- 7.6. The letter concluded by informing the Claimant that he had the right to appeal against his dismissal, and that if he wished to do so, he should inform HR in writing by 29 March 2022, stating his grounds of appeal in full. Plainly, the reference to that date was a mistake, given that the dismissal letter was dated 31 March 2022, and only given to the Claimant on that date.

### **Events leading to dismissal**

- 7.7. On or about 11 February 2022, the Claimant took part in a conversation with two other employees of the Respondent, namely Mr Mark Webb, then

an External Sales Representative, and Mr Michael Rollinson, whose job title was described to the Tribunal as “Admin/Call Handler”. Mr Rollinson has cerebral palsy. Mr Webb, Mr Rollinson and the Claimant engaged in a discussion with regard to their respective work experiences. It is common ground that Mr Rollinson’s disability was discussed during the conversation. It is the Claimant’s position that Mr Rollinson referred to the fact that he had limited movement and how his joints would lock up, causing him to fall occasionally, that he volunteered information as to how he came to have cerebral palsy, and that he (the Claimant) expressed an opinion as to how language had changed over the years in that in the 1960’s and 1970’s, someone with Mr Rollinson’s condition may have been referred to as “*spastic*” and that he, the Claimant, was pleased that such language was no longer used. It was further the Claimant’s position that Mr Rollinson indicated that at one stage he had applied to join the military, to which the Claimant had expressed surprise given Mr Rollinson’s condition, and that Mr Rollinson responded that the Army has a long history of employing people with disabilities but that such treatment was reserved to people who had acquired their disability through service as opposed to those applying to join, having become disabled elsewhere, and that his application had therefore been declined. It was the Claimant’s position that there were further conversations between himself and Mr Rollinson throughout the day and that the latter’s behaviour towards him did not change, nor did Mr Webb express any concern about the content of the relevant conversation.

- 7.8. On the day the above conversation took place, Ms Gosia Schmidt (position not specified) took a brief witness statement from Mr Rollinson. The details of Mr Rollinson’s account were set out in a proforma document in the following terms:

*“Michael attended our offices to explain of (sic) a discriminative (sic) comment used against him. Michael is extremely aggrieved by the comment and would like further action taken by the company”.*

Under the heading “Findings”, the proforma document continued:

*“An employee Michael Rollinson has been subjected with (sic) discrimination in regard to his disabilities, a comment was made directed from a conversation regarding previously applying for the Army, he came from Shawthorpe (sic) Offices as he was so upset with what has happened”.*

- 7.9. On 22 February 2022, Mr Richard Pope, General Manager, took a witness statement, again in very brief terms on a proforma document, from Mr Webb. That document reads as follows:

*“On the morning of 11<sup>th</sup> February 2022, Mark, Bill and Michael were discussing previous jobs upon leaving school. Michael mentioned his situation in the Army and Bill replied “you applied to join the Army with your spastic conditions? What on earth made you think you’d get in?””.*

7.10. The Tribunal was also provided with more substantial witness statements from Mr Rollinson and Mr Webb (both undated).

7.11. Mr Rollinson's fuller witness statement reads as follows:

*"A comment was made to me on the 11<sup>th</sup> of February 2022 whilst I was working at Central Extrusions<sup>1</sup> as a [word is illegible].*

*I sadly am used to comments due to my disability, however, remarks from the manager were disgusting and I would like to make a formal complaint and hope the company deals with this appropriately.*

*I was in the room with Mark Webb and Bill Clark on the date above, discussions were had regarding jobs we used to have on which we started a career (sic).*

*I mentioned that I applied to join the army, on discussing this I also stated that due to my disability I was sadly turned away, they did advise me at the time that they only assist recovering soldiers.*

*Bill Clark's response was the following:*

*"How did you apply for the army with your spastic condition, why on earth do you think you would have got in"*

*I have cerebral palsy and have dealt with comments most of my life, but this one was extremely embarrassing, I felt belittled and hurt.*

*This one was extremely upsetting and unbelievable from a manager".*

7.12. The material part of Mr Webb's statement (referring to the conversation on 11 February) reads as follows:

*"Michael stated that he applied to join the army and had been unsuccessful due to his medical conditions. Michael had challenged the Army Officer at his interview stating that he knew the Army supported soldiers with disability and wondered why he was being turned away. The Officer at that time suggested that the support they offered at that time was mainly for recovering serving soldiers but praised him for his application.*

*On hearing the above, Bill Clark replied, "You applied to join the Army with your spastic conditions? What on earth made you think that you would get in?"*

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<sup>1</sup> It would appear that Mr Rollinson left the Respondent in the second week of March 2022.

- 7.13. In this statement, Mr Webb indicated that Mr Rollinson was taken aback by the above comment and quickly changed the subject, that he had asked Mr Rollinson at the end of the day if he was ok:

*“and he commented that he was disappointed that a manager had chosen to use those words, but that he had dealt with comments like that all of his life”.*

- 7.14. Mr Webb indicated that he considered the Claimant’s comments to be offensive and that he had therefore reported the matter to the relevant line managers, Theresa Hyde (position not specified), and Mr Pope.

- 7.15. During the week commencing 6 March 2022, the Claimant was invited to attend a meeting with Mr Pope. That meeting duly took place on 15 March 2022. On the same date, the Claimant was informed verbally of a complaint about him relating to Mr Rollinson in relation to a conversation which had taken place in mid-February. From Mr Pope’s perspective, the topics covered at the meeting on 15 March 2022 were set out in an e-mail written by him on that date. The Tribunal was provided with a copy of that e-mail. It would appear, although it is not entirely clear, that the subject heading of the e-mail was: *“Meeting of Concern 15<sup>th</sup> March 2022”*. It is certainly clear that the e-mail was either sent (or found its way) to Ms Shaw, as HR Adviser to the Respondent.

- 7.16. Mr Pope’s e-mail contains the following matters of note for the purposes of these proceedings:

*“Had an hour with Bill this morning, to hold the meeting of concern around the comment that has been investigated with regards to Michael Rollinson and a lot of work factors too.*

*Below are the subjects that I covered with him and responses –*

***“i. Personal conduct / Discriminative (sic) Comment Made***

*I asked Bill what had happened on February 11<sup>th</sup> with Michael Rollinson, Bill looked quizzical, but when I told him that he’d used an offensive term in conversation with him, he said that he’d been referring to a relative from a situation in the 1970’s.*

*I spoke to Bill about his own personal interaction with the workforce and my concerns about things that had been said by him and the people (that I knew of) that he’d upset, in the short time I’d been at Central. I said that in the first couple of weeks of me being here, I had been asked to get involved in a conversation with Bill and Tracy Shaw about an issue with Ray Fox on the shop floor. Bill stated that he should have been the one raising a grievance at the time but chose not to. I stated that because of what had gone on, I’d had to instruct him to keep off of (sic) the shop floor, as there were clearly some issues.”*

Mr Thorpe then referred to an incident with one Craig Benion, stating that *“again, this was yet another occasion of me having to calm the waves after something he’d done and that he was very lucky it hadn’t been bought (sic) to me in any official capacity. I stated that even so, you are a senior manager within this business, and you cannot utter words like that, regardless of the context or meaningful. I stated that I expected a huge amount more from him and that I, and Rob or HR should not have to keep on having these conversations and should not have to keep having to clear up chaos, confusion and mess caused by you!”*

*Bill stated that he had written lots of notes (I can confirm that, his pad was full of notes) and that it would all be different going forward. I finished the meeting by saying that we’d come to the end of the hour and that he had appointments to keep, and I had a busy day, so I’d leave it at that”.*

Mr Pope’s e-mail of 15 March 2022 then set out details of further alleged concerns regarding the Claimant, including *“lack of preparedness when attending meetings that required him to provide/present information to myself/Rob/others”*, difficulties involving the Claimant’s visit to a customer called QAS, issues concerning the Respondent’s relationship with a customer, MFT, and further alleged issues concerning “Smith’s Systems”.

- 7.17. On 17 March 2022, Ms Shaw telephoned the Claimant to say that he was required to attend a disciplinary hearing on 21 March 2022. The Tribunal accepts the Claimant’s evidence that Ms Shaw stated during the phone call: *“it is a shame it has come to this”*.
- 7.18. The disciplinary hearing on 21 March 2022 was conducted by Ms Shaw. The Respondent decided not to provide the witness statements of Mr Rollinson or Mr Webb to the Claimant for the purposes of the disciplinary hearing. The Tribunal was informed that this was in order to protect the identity of the witnesses. The witness statements were nevertheless read out at the disciplinary hearing.
- 7.19. During the disciplinary hearing, the Claimant gave his account of relevant matters and stated that he would be raising a grievance against Mr Pope. The Claimant stated that whilst he fully accepted that in his conversation with Mr Rollinson, he had used a word that would be seen in modern society as a discriminatory term if used to describe someone, he had used the term in a conversation about the relevant condition by reference to its historical usage, and had not in any way used the term in an offensive manner.
- 7.20. The Tribunal was provided with handwritten notes of the disciplinary hearing of 21 March 2022. The passage dealing with the alleged incident of 11 February 2022 covers less than a page of notes and can therefore be quoted concisely:

*“Ms Shaw: Michael Rollinson. Complaint being made about his disability.*

*Claimant: Wasn't comment made to Michael directly was just a conversation.*

*Richard has raised this and Bill apologised to Richard.*

*Ms Shaw: Are you saying you need training to speak to a person with a disability.*

*Claimant: Work with people with ethnic backgrounds + disability. Finds it's better to have an open conversation.*

*Ms Shaw: Not work-related, it didn't need to happen.*

*Claimant: Michael brought his condition was conversation (blank).*

*Mark was third person in conversation.*

*Claimant: Bill knows how to speak at work.*

*Ms Shaw: So do you need training?*

*Claimant: No just guidance.*

*Ms Shaw: People like you should be able to dance like that.*

*Claimant: Bill didn't mention dance just rhythm. Did realise what he said was crass + immediately apologised to person.*

*Ms Shaw: What did you learn from conversation? Do not speak about race or disability.*

*Ms Shaw: Michael could still take us to Court - severity of impact to business.*

*Wording in conversation getting company into trouble.*

*Following September incident, why did you ask for guidance".*

- 7.21. It would appear that the reference to *"people like you should be able to dance like that"* was a reference to a comment said to have been made by the Claimant in the *"racial incident"* which is alleged to have occurred on 14 September 2021. Indeed, the reference in the minutes of the disciplinary hearing immediately preceding the passage quoted above states: *"Personal conduct. Racial comment 14/09/21 on shopfloor"*. The Tribunal also noted the comment attributed to Ms Shaw: *"Following September incident, why did you ask for guidance"*. (Emphasis added). It will nevertheless be recalled that the dismissal letter referred to a *"serious incident"* which was alleged to have occurred on 13 May 2021, and that this related to *"a racial complaint"* which had been made against the Claimant (paragraph 7.4 above refers).



- 7.22. On 22 March 2022, the Claimant issued a formal grievance against Mr Pope. Essentially, he alleged that Mr Pope had subjected him to bullying. On 23 March 2022, the Respondent paused the disciplinary process pending the outcome of the Claimant's grievance. On 30 March 2022, a grievance hearing was held with Mr Thorpe. All of the Claimant's points were dismissed. The content of the grievance and the way it was handled by the Respondent are of no bearing in relation to the Tribunal's decision in this case.
- 7.23. At 10.13 pm on 30 March 2022, the Claimant received an e-mail from Mr Thorpe instructing him to attend a meeting the next day at 4.30 pm. He was told that he would not need a witness.
- 7.24. On 31 March 2022, the Claimant attended the meeting with Mr Thorpe and was dismissed. He was handed a sealed envelope containing his dismissal letter.
- 7.25. Mr Thorpe's witness statement contains the following passages of note:

*"5. My final decision for Gross Misconduct (sic) was made based on the following:*

*There was an admittance (sic) to the discriminatory comment made towards another employee with a witness in the room at the time, Mr Michael Rollinson and Mark Webb, both suffered injury to feelings, we had full and reasonable belief of genuine guilt that this happened.*

*I had no choice in my decision, the relationship between Bill Clark and members of staff and the business was irredeemable and therefore I had no other choice, the relationships had gone, I had to look after my business and employees at that time, and keeping Bill employed after this, would have truly damaged the business and staff."*

- 7.26. Mr Thorpe's witness statement contains two paragraphs bearing the number "5". In the second paragraph numbered "5", he said this:

*"5. Bill Clark appealed to (sic) my decision which I could not uphold, as again there is no reasonable doubt this was the right decision for the business and employees, I felt there was no other alternative".*

## **Appeal**

- 7.27. By letter dated 6 April 2022, the Claimant appealed against his dismissal. After an exchange of correspondence, he received an e-mail stating that the Respondent had conducted an internal review and that his appeal would not be taken further forward.

## **Respondent's Disciplinary Procedure**

- 7.28. The Respondent's disciplinary procedure (which is said to be non-contractual) contains the following:

*"Dismissal can be authorised only by a senior manager or a director. The employee will be informed of the reasons for dismissal, the appropriate period of notice, the date on which his or her employment will terminate and how the employee can appeal against the dismissal decision".*

*"An employee may appeal against any disciplinary decision, including dismissal, to a director of the Company within five working days of the decision. Appeals should be made in writing and state the grounds for appeal. The employee will be invited to attend an appeal hearing chaired by a senior manager or a director.*

*At the appeal hearing, the employee will again be given the chance to state his or her case and will have the right to be accompanied by a trade union official, a trade union representative or a fellow employee of his or her choice.*

*Following the appeal hearing, the employee will be informed in writing of the results of the hearing. The Company's decision on an appeal will be final".*

### **Claimant's Submissions**

8. In simple terms, the Claimant submitted that the Respondent had failed to test the evidence given by Mr Rollinson and Mr Webb as to the context in which he (the Claimant) had used the relevant word. He further submitted that there was a lack of transparency in relation to the allegation against him. He referred to the fact that Mr Thorpe appeared to have dismissed him without knowing what the Claimant's evidence would be. He said that there had been errors of procedure applying the Respondent's own disciplinary procedure and referred to the fact that the decision to dismiss had been pre-determined before Mr Thorpe met with the Claimant on 31 March 2022. He referred to the fact that at that meeting, Mr Thorpe handed the Claimant a pre-prepared and signed letter of dismissal.

### **Respondent's Submissions**

9. For the Respondent, Ms Shaw maintained that the Respondent had a genuine belief in the Claimant's guilt of an offence of gross misconduct, and that the matter had been fully investigated. She submitted that the Respondent is a small business with a small senior team and an appropriate level of investigation had been conducted. She stated that the Respondent has a duty of care to all employees, and that the Claimant had caused distress and ill feeling to a disabled employee and to another employee. She submitted: *"This must be acted upon, he has not been the*

*only individual to take offence to what was said, we have had to have informal discussions previously in regards (sic) to a racial comment made towards another employee caused by (sic) Mr Bill Clark less than a year previous (sic)".* Ms. Shaw submitted that the decision to dismiss was made because there was no alternative in that relationships had broken down and that the relationship between the Claimant and the Respondent was irredeemable. Had Mr Thorpe not dismissed the Claimant, this could have had a huge impact on the business and to Mr Rollinson. The decision was not pre-determined. The Respondent would not have wished to rid itself of a "high billing sales manager" such as the Claimant. Ms Shaw submitted that using the word "*spastic*" in any context is unacceptable. It was submitted that Mr Thorpe had taken the correct course of action.

## Discussion

10. It was for the Respondent to show the reason, or if more than one, the principal reason for dismissal and that such reason or reasons was or were potentially fair within the meaning of ss.98(1) and (2) of the Employment Rights Act 1996, "ERA". Conduct is such a reason.
11. If the Tribunal was satisfied that dismissal was for a potentially fair reason, it would then have to consider the reasonableness of the decision to dismiss.
12. Where an employer purports to dismiss an employee on the grounds of conduct, it is not the function of the Tribunal to determine whether the employee was indeed guilty of that conduct, rather the Tribunal asks itself whether at the time the decision was taken to dismiss:
  - (a) the employer genuinely believed that the conduct complained of had taken place;
  - (b) that belief was based upon reasonable grounds, and
  - (c) the decision was made after a reasonable investigation.
13. In the context of its consideration of the reasonableness or otherwise of the decision to dismiss, it is not the function of the Tribunal to substitute its own view for that of the employer, rather the Tribunal has to determine whether the employer's decision fell within the range of reasonable responses.
14. In so far as there was any procedural unfairness in the dismissal, it is open to the Tribunal to conclude that the Claimant would have been dismissed in any event, had a fair procedure been followed. This will not affect the fairness of the dismissal, but it can (and probably will) have a bearing on compensation.
15. If dismissal was unfair, did the Claimant contribute to his or her own dismissal? Again, this will not affect the fairness of the dismissal, but it can (and probably will) have a bearing on compensation.

16. The Tribunal was satisfied that dismissal was for the potentially fair reason of conduct (in other words that this was the reason in the Respondent's corporate mind when the decision to dismiss was made). However, the Tribunal was not satisfied that at the time the decision was taken, the Respondent held a genuine belief that the Claimant had been guilty of misconduct, or that it had reasonable grounds to so conclude, or that it conducted a reasonable investigation. The Tribunal also concluded that there were other features of this case which meant that the Claimant's dismissal was manifestly unfair. In the Tribunal's judgment, dismissal was plainly not within the range of reasonable responses.
17. It was consistently the Claimant's case that whilst he fully accepted that in his conversation with Mr Rollinson, he had used a word that would be seen in modern society as a discriminatory term if used to describe someone, he had used the term in a conversation about the relevant condition, and in a historical context, and he had not in any way used the term in an offensive manner.
18. Central to Mr Thorpe's decision to dismiss the Claimant was the fact that he had "*no choice*" but to do so because "*the relationship between (the Claimant) and members of staff and the business was irredeemable*". Having been made aware that the Claimant, whilst admitting the use of the relevant word in the conversation with Mr Rollinson, was maintaining that he had used the word in the context suggested at paragraph 17 above, the Respondent took no steps to check with Mr Rollinson (or Mr Webb for that matter) as to the veracity or accuracy or otherwise of the Claimant's account as to the context of the remark. In evidence, Mr Thorpe stated that it made (or would have made) no difference to him as to the context in which the relevant word was used, a point adopted by Ms Shaw in her closing written submissions. However, during the course of her oral closing submissions, Ms Shaw accepted that if the relevant word were to be used in a particular context, for example referring to terminology which had been used to describe that condition in the 1960's and 1970's, it *could* be the case that the use of the term in such a manner would not amount to misconduct, let alone gross misconduct.
19. At no stage did Mr Thorpe explore whether Mr Rollinson had been asked if he was sure that when the Claimant used the term "spastic" he was simply talking about the position as it pertained in the 1960's and 1970's. At no stage did Mr Thorpe explain how he had resolved whether the term had been offensively or used by reference to its historical usage. The suggestion that this would have made no difference on the issue of whether the Claimant was guilty of gross misconduct was wholly illogical.
20. The Tribunal had significant reservations as to who actually made the decision to dismiss. The fiasco with regard to the non-provision of a witness statement by Mr Thorpe until enquiry was made by the Tribunal is but one aspect of this. The fact that Mr Thorpe, despite being the dismissing officer, did not conduct the disciplinary hearing is another factor. The first time Mr Thorpe met with the Claimant face to face to discuss the matters he was

being dismissed for was when he presented him with a letter informing him that he was being summarily dismissed. For the avoidance of doubt, the Claimant's dismissal was unfair irrespective of the identity of the dismissing officer.

21. In her oral closing submissions, Ms Shaw made it clear that the sole reason for dismissal was the comment made by the Claimant during the course of his conversation with Mr Rollinson on 11 February 2022. Yet it is clear that in deciding to dismiss the Claimant, Mr Thorpe (or indeed whoever was the dismissing officer) took into account *"a previous and serious incident" on 13 May 2021, regarding a racial complaint made against "(the Claimant)"*. Further confusing matters, there is a clear reference in the notes of the disciplinary hearing to a *"racial incident"* which is alleged to have occurred on 14 September 2021. Despite this obvious flaw having been pointed out during the course of the hearing, in her written closing submissions, Ms Shaw maintained the point, stating: *"we have had to have informal discussions previously in regards (sic) to a racial comment made towards another employee caused by Mr Bill Clark less than a year previous (sic)"*.
22. The Tribunal concluded that the Respondent was hopelessly confused as to whether dismissal was because of (a) the alleged incident of 11 February 2022 alone, or (b) that alleged incident together with an incident said to have occurred on 13 May 2021, or (c) the alleged incident of 11 February 2022 together with an incident said to have occurred on 13 May 2021, and an incident said to have occurred on 14 September 2021. The Respondent led no evidence as to any alleged incident on either 13 May 2021 or 14 September 2021. If either of those alleged matters had any bearing on the decision to dismiss (and there is substantial evidence to suggest that they did), this was manifestly unfair to the Claimant given that he was denied the opportunity to defend himself as to any such allegations.
23. The Respondent decided not to provide the witness statements of Mr Rollinson or Mr Webb to the Claimant for the purposes of his disciplinary hearing, on the pretext that this was in order to protect the identity of the witnesses, but that explanation was completely illogical. Given that the witness statements were apparently read out at the disciplinary hearing, it would have been manifestly obvious to the Claimant that at least (as a bare minimum) Mr Rollinson was the author of one of the witness statements. In the scheme of things, this was not the gravest of errors on the Respondent's part, but it is certainly one aspect of the unfairness to which the Claimant was subjected.
24. According to his e-mail relating to his meeting with the Claimant on 15 March 2022, Mr Thorpe had concluded that meeting:

*"by saying that we'd come to the end of the hour and that he had appointments to keep, and I had a busy day, so I'd leave it at that"*.

Yet within less than 24 hours, the Claimant was informed that he was required to attend a disciplinary hearing and, as matters transpired, the

principal focus of that hearing was the alleged incident of 11 February 2022, one of the very topics which had been the subject of Mr Thorpe's discussion with the Claimant on 15 March 2022.

25. The admission made by Mr Thorpe that the reason the Claimant's appeal did not go forward was because he, Mr Thorpe could not uphold it, despite the fact that he had made the decision to dismiss, speaks volumes in terms of the fairness of the process adopted by the Respondent.
26. The Claimant was plainly denied a proper right of appeal. The Respondent essentially took it upon itself, and wrongly so, to decide that the Claimant's appeal (reference is made to his appeal letter of 6 April 2022) was purely on "process" and nothing more, and therefore did not require to be determined.
27. In the Tribunal's judgment, the unfairness in this case was not simply procedural (see paragraph 15 above). It was substantial and thoroughgoing.
28. In the Tribunal's judgment, the Claimant did not contribute to his dismissal (see paragraph 16 above).
29. In the Tribunal's judgment, dismissal was not within the band of reasonable responses.

### **Conclusion**

30. For all of the above reasons, the Tribunal concluded that the Claimant was unfairly dismissed.

**Employment Judge Gilroy KC  
21 June 2023**