EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
	AND
Mrs M Cunnington	Sainsbury's Supermarkets Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 7th and 8th April and 12th May 2021

EMPLOYMENT JUDGE A Richardson

Representation
For the Claimant: Mr J Gidney, Counsel
For the Respondent: Ms E Wheeler, Counsel

JUDGMENT

The judgment of the Tribunal is that

(1) The claim of unfair dismissal is well founded.
(2) The matter is to be listed for a remedy hearing.

REASONS

Background and Issues

1. The claimant was dismissed by reason of gross misconduct on 2nd July 2020 following an alleged racist incident at work on 11th June 2020 (the Incident). The claimant brings a complaint that the dismissal was unfair procedurally and substantively, and that it was wrongful. The proceedings are fully defended.

2. Mr Gidney prepared a list of issues of both fact and law. Whilst Ms Wheeler objected, believing that the issues of fact went beyond those set out in paragraph 15 of the grounds of complaint which did not rely on procedural unfairness, and which needed an application to amend, Mr Gidney intended to cross examine the respondent's witnesses on the list of issues of fact. Section 98(4) Employment Rights Act 1996 requires consideration of the fairness of the

procedure. I have therefore considered both the issues set out in the grounds of complaint at paragraph 15 and also in Mr Gidney's list of issues of fact and law.

3. The Tribunal has to determine the case having regard to the guidelines in the well-known authorities:

British Home Stores —v- Burchell [1978] IRLR 379

Iceland Frozen Foods Ltd --v- Jones [1982] IRLR 439

Sainsburv's Supermarkets Ltd —v- Hitt [2003] IRLR 23

4. In short, the test in Burchell is as follows:
For our purposes, the dismissing officer of the respondent was Mr Cowsill. Did he hold a genuine belief in the facts found? Was such belief held on reasonable grounds? Did this follow a reasonable investigation?

5. Then, from Iceland, was dismissal within the range of responses open to a reasonable employer in all the circumstances of the case?

6. Was the decision to dismiss overall fair pursuant to section 98(4) of the Act? This test is neutral.

7. The Tribunal would have to consider the ACAS Code of Practice on disciplinary and grievance procedures. There is an initial burden of proof upon the respondent to show a potentially fair reason. It is not disputed that the reason for dismissal was conduct.

Proceedings and evidence

8. The hearing was conducted by video (CVP) by consent of the parties. I was provided with an agreed file of documents exhibited as R1. I heard evidence from the claimant and Ms C Bellamy, the claimant's companion at the disciplinary hearing whose evidence, by consent, was heard first, out of the usual order of witnesses. The claimant's other witness was Mr G Walker-Prior, former department manager and now retail assistant; he was the claimant's representative at the appeal hearing. I did not allow the late submission of a third witness statement in the form of a letter providing a character reference and opinion that the claimant's comments were not racist, for reasons given at the time. The respondent's witnesses were Ms C Brookin, customer and trading manager; Mr James Cowsill, operations manager; and Mr Robert Houghton, store manager.

9. It was agreed at the commencement of the hearing that there would be insufficient time for remedy. In fact there was insufficient time to hear the

claimant's evidence and the hearing went part heard after conclusions of the respondent's evidence.

10. In the agreed bundle are several core hand written documents such as fact-finding meeting minutes, investigation and disciplinary meeting minutes. Some are not easily legible; some have been badly photocopied and none have a typed transcript to enable ease of reading. Therefore where the intended meaning has been clear and I have been able to readily understand what missing or half legible words were intended to be, I have enclosed them in square brackets. Empty square brackets mean the word is illegible or missing/partially missing and unascertainable. I do not believe any of the manuscript evidence has been materially compromised despite the lack of an agreed transcript. The lack of a typed transcript of manuscript notes is a departure from good practice and has been a considerable inconvenience to the Tribunal.

11. To protect the identity of persons who have not been involved in these proceedings but who have been frequently referred to by name during the course of evidence, and of necessity must be referred to in this judgment, I refer to them as the Complainant and the Co-worker and have substituted those titles where names were used in the evidence.

Finding of Relevant Fact

12. I have made my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts and documents. I refer to my assessment of the Respondent's witnesses below in the conclusions. I found Mr Walker- Prior to be an honest and helpful witness although he made an error in relation to whether the claimant was present when the first time the Co-worker made the comment which had offended the Complainant. That did not affect the genuineness of the rest of his evidence. I found the claimant to be a direct witness and did not doubt her honesty. There were no issues with Ms Bellamy's short witness statement which was not challenged by the respondent.

13. It is not my function to resolve each and every disputed issue of fact. What follows are the relevant factual findings in relation to these issues.

13.1 Sainsburys has a Fair Treatment Policy, an Equality, Diversity and Inclusion policy (EDI policy) and a Disciplinary and Appeals Policy (Disciplinary policy). I set out below the relevant sections of those policies for the purposes of this hearing.

Fair Treatment Policy

13.2 The introductory paragraph of the Respondent's Fair Treatment Policy , last updated July 2019, states:

> *"Sainsbury's promotes a culture of fair treatment and we will not tolerate bullying, harassment, discrimination or any other treatment towards individuals or groups which is less favourable or has a negative impact on the way they feel at work. We have a set procedure for dealing with this type of complaint to make sure that any complaints are dealt with in an appropriate way but also to enable us to put steps in place to prevent incidents reoccurring."*

13.3 The first stage of the Fair Treatment Policy is to resolve issues at work informally if possible. The suggestion is that as a first step work colleagues should take steps to resolve an issue themselves where it is appropriate to do so. Where that is not appropriate or not successful, the next step is to talk to a manager who will look into the issue raised and do what they can to sort the problem out quickly and explain the steps being taken. The Fair Treatment Policy suggests that a voluntary conciliation meeting between work colleagues with a manager acting as an independent third party can be helpful.

13.4 The Policy goes on to explain that if the informal route does not resolve the issue, a manager may decide to start the formal process. Where a manager decides that trying to resolve the complaint informally will not be appropriate, the manager will discuss this with the complainant before starting the formal process.

13.5 The formal process has four steps. Step 1 is the manager needing to understand precisely what the complaint is and if necessary asking for a written complaint and perhaps calling a meeting to discuss the complaint.

13.6 Step 2 is inviting the complainant to a meeting to be held by an independent manager. Prior to the meeting the manager would investigate the issues and may adjourn the meeting to gather further information.

13.7 Step 3 is when the manager, having all of the information needed, will make a decision; and

13.8 Step 4 the manager may invite the complainant to an outcome meeting if necessary otherwise the manager will provide a written conclusion within seven days of the meeting, either upholding the complaint or arranging another meeting to explain the outcome reached and the reasons for it.

13.9 The entire process is intended to be dealt with within a 14 day time frame. The complainant has the right to appeal and the procedure for the appeal process is set out in the Policy.

13.10 *The Equality, Diversity and Inclusion policy (EDI Policy)* sets out Sainsbury's ethos with regard to discrimination and harassment in the workplace. The latest version is also dated July 2019. Line managers have a responsibility

for effective company communication about equality, diversity and inclusion in the work place.

13.11 The EDI Policy states*: As part of our Fair Treatment policy… we have a complaints procedure to help resolve complaints quickly, confidentially and if possible informally. You can tell any manager about concerns about your work, work environment, work relationships, bullying, harassment or any unwanted behaviour and they will take steps to investigate and solve the problem straight away. We take cases of discrimination and unfair treatment very seriously and they can lead to disciplinary action or dismissal.".* A statement in similar terms to a complaints procedure under the Fair Treatment Policy, is also made in the Inclusion Policy.

13.12 The Sainsbury's *Disciplinary policy* states under the heading of "Gross Misconduct" that certain conduct issues considered so serious may result in dismissal without notice even for a first offence. Examples are set out. One example of gross misconduct is:

> "*Discrimination, harassment, bullying or victimisation of colleagues or customers, breach of our Fair Treatment or Inclusion policies, please refer to the relevant policy and our guide to Discrimination, Bullying, Harassment, Sexual Harassment and Victimisation for more information."*

13.13 The disciplinary policy confirms that with regard to suspension, alternatives would be considered such as moving the employee to work in another area, changing hours, supervising the employee at work and limiting duties. It acknowledges that suspension is stressful so this action will only be taken when it is absolutely necessary.

13.14 The policy refers to the Business Protection Team which supports managers investigating matters. The stages of the disciplinary process are investigation, disciplinary hearing and appeal. Guidance is given to the colleague on each stage. In respect of the outcome of the investigation stage, the policy states: "*If the decision is to invite you to a disciplinary meeting, you will receive an invitation letter containing sufficient information about your attendance levels, alleged misconduct or poor performance and its possible consequences to enable you to prepare to answer the case at a disciplinary meeting."*

13.15 In respect of the decision to invite the colleague to a disciplinary hearing the policy states: "*the manager will provide you with all relevant documentation relating to the situation. It is important to read through this ahead of the meeting in order to understand the evidence that has been looked at."*

13.16 Under the appeal section, it confirms that the appeal manager will review any meeting notes and evidence in detail prior to the meeting. They may also carry out further investigations and gather more information before the meeting. The appeal manager can decide to adjourn if further investigation is needed and reconvene as appropriate on another day.

13.17 The policy confirms:

At an appeal meeting there are two decisions that a manager can make:

- *Uphold the original decision; this means they agree with the decision that was made and it'll continue to remain active*
- *Overturn the original decision; this means they didn't agree with the original decision and they can decide either that:*
  - *No warning is required, or*
  - *A different level of disciplinary outcome should be given.*

The manager will explain their decision to you and confirm this in writing."

The claimant's work history

13.18 The claimant worked for the respondent since 1992. By reason of a TUPE transfer to Sainsbury's in 2004, she has 28 years' continuous service without any disciplinary record. She was engaged as price controller. The claimant had received numerous awards and commendations during her employment with Sainsburys.

13.19 The claimant had not received any training in equality and diversity issues since her transfer to the respondent, at which point she had induction training. She had had no EDI training in at least 16 years.

Black Lives Matter

13.20 Global media relayed news of George Floyd's tragic and unnecessary death on 25th May 2020 at the hands of a police officer in Minneapolis, USA. It would have been impossible not to have been aware of the incident because of the widespread news and media reports in the 2 ½ weeks prior to the Incident. The circumstances of George Floyd's untimely death and the manner in which it occurred, sent shock waves throughout the United States and the UK, causing major demonstrations supporting the Black Lives Matter movement.

13.21 Sainsbury's staff will also have been aware that Sainsbury's Chief Executive made a timely public statement on 2nd June 2020 entitled *"We stand together with our black colleagues and customers"* referring in the statement to the deep rooted inequality the George Floyd tragedy had brought to the surface. The statement commented that it had been for all, heart-breaking to watch and that the death of George Floyd had had a profound impact on black colleagues, customers, friends and relatives. The Chief Executive posted his message to let black colleagues and everyone in the black community know that they were supported.

11th June 2020 – the Incident

13.22 On 11th June 2020 the claimant was working a morning shift commencing at 6am with a colleague to whom I shall refer as the Co-worker. They were long term work colleagues. The store was due to open at 7am. After an initial exchange of courtesies, the claimant and the Co-worker set about their respective duties. The claimant moved to aisle 4 to carry out price changes on the entertainment section. The Co-worker went to get the self scan tills ready for opening time. Another work colleague, to whom I shall refer as 'the Complainant', had worked for the respondent at the same store as the claimant for a number of years; she was laying out newspapers near the front entrance of the store. The Complainant is Black British. The claimant and the Co-worker are white British.

13.23 Whilst carrying out price changes in aisle 4, the claimant picked up a soft toy called 'Bing'. It was a small black soft toy with a large head, long ears and big eyes showing the whites of the eyes. The toy wears checked trousers. It is supposedly a talking toy and appeared possibly to represent a rabbit.

13.24 With the toy in her hand, the claimant started to walk towards the Co-worker who was about 30 feet away from her at the time. There is a dispute whether the claimant said to the Co-worker words to the effect "*Do you think we should be selling these in the light of what is going on with Black Lives Matter?"* (the claimant's case), or "*Oh I'm offended Black Lives Matter"* or, just "*I'm offended Black Lives Matter"* (the respondent's case*).* The claimant said the words in a raised voice as she walked up the aisle holding the toy towards the Co-worker. Without doubt this is why the Complainant heard the claimant speaking. I deal in the conclusions below with the respondent's identification of what exact words were spoken by the claimant. The Co-worker replied with words to the effect *"what is that, it looks cute".* The claimant and the Co-worker looked at the toy and pressed the voice activation button a couple of times; they laughed at the unintelligible sound it made.

13.25 The Co-worker had a current issue with the store management because earlier in the week she had been moved by her manager from her normal job of checkout supervisor/runner to standing on the door to monitor customer numbers. It had been suggested that younger members of staff would do the checkout running and this caused the Co-worker a concern. With reference to this concern, and in her words, trying to make a "light hearted" comment, the Co-worker said words to the effect "*perhaps I should get a t-shirt with "Old colleagues' jobs matter".*

13.26 The claimant returned to aisle 4 and replaced the soft toy on the shelf.

13.27 The Complainant had overheard the Co-worker and the claimant speaking and she heard their laughter. She went across to the Co-worker and asked her what the claimant had said? The Co-worker directed the Complainant to the claimant. The Complainant approached the claimant and

asked her what had she been saying about Black Lives Matter? The claimant pointed to the toy and went to retrieve one, but was cut short by the Complainant who was clearly very angry and very upset. The Complainant said words to the effect *"do you not know what colour I am? You are disrespectful".*

13.28 The claimant apologised to the Complainant and backed away towards the toy section. The Complainant repeated her comment, words to the effect "*can you not see the colour I am, look at the colour of my skin, I am really offended".* The claimant attempted to apologise again but the Complainant walked away saying "*you are a disgrace"* and went back to speak to the Co-worker again.

13.29 There was a further two exchanges between the Complainant and the Co-worker with raised voices heard by the claimant and Ms Brookin, the customer and trading manager. The claimant decided not to get involved. The Complainant went to speak to Ms Brookin.

13.30 Ms Brookin had been a junior manager for about a year. She had received training in the respondent's disciplinary investigation procedures. Ms Brookin was inexperienced in conducting investigation meetings, having conducted one or two. She had never conducted any process under the Fair Treatment Policy.

13.31 The Complainant was very distressed when she went to see Ms Brookin. She explained that she had overheard the claimant and the Co-worker making "*offensive comments*" on the shop floor. Ms Brookin advised the Complainant to go away, calm herself and put her complaint in writing. Ms Brookin did not keep a file note of what the Complainant had said.

13.32 The Complainant went to the canteen to write out a statement and about an hour later, returned to give Ms Brookin a hand-written complaint. The Complainant's hand written letter was one of the documents for which no transcript was provided. The statement reads:

> "I am making a formal complaint today concerning Marian and [the Co-worker] at Bridgnorth 2201.
>
> Whilst I was doing newspapers and magazines today I was just putting some newspapers out and I heard Marian come over to [the Co-worker] who was on Self scan setting it up for opening. said "oh look, I'm offended Black Lives Matter" Then the Co-worker replied by saying maybe "I should get a top that says old colleagues jobs matter and they both laughed about the matter. As I heard this my heart just sank and I felt completely sickened inside by what I'd just heard and very angry and upset so I asked the Co-worker as I couldn't see Marian she walked off, why did Marian say that, and she said to me she's over there ask her. So I did and she picked up a Bing and [ ] soft toy which has a black face and said to me while she was laughing that she was having a laugh with this. So I said to her why are you saying that. I'm black and it's a serious matter. She then said "I apologise"

very coldly, there was nothing in her apology as far as I heard and I said to her "it's a disgrace."
I then went to the [Co-worker] and asked her why she said what she had said using the (Black Lives Matter) phrase being used at the moment because of the killing of another black man by police and how can she compare this. And her reply was "this is my […..] opinion"
I'm finding it very hard to put into [words] exactly how I felt it made me so angry. I was totally offended by what they both had said. I found it completely racist towards me. I was deeply saddened and very very upset and just started crying as I went to speak to Charlotte about this. I just keep thinking to think the people I'm working with are racist towards black people which includes me, and to think that they don't have a problem with joking this openly. Every time I think of it I just feel sick and angry about it and very upset. After speaking to Charlotte I went back to my job and [the Co-worker] was then trying to explain what she said which was totally irrelevant as far as I am concerned. She was trying to explain away what had already been said and playing the victim. And I asked her to stop talking to me but she just kept trying to say her reason which just made me even more upset.
I continued to be crying on and off for the best part of my shift and I know if I speak about it to anyone I will cry because its unbelievable how jokingly and insensitive all this was said and with no regard to me, or the serious cause and protests that are taking place across the world in regards to George Floyds murder and the oppression of black people though Sainsburys state that they stand for diversity and stand with their colleagues in support of them, clearly those two colleagues don't and have voiced that loud and clear. I do fear that having made this a complaint it will get brushed under the carpet and forgotten. But Charlotte has assured me it won't be and will be dealt with in the correct way. They've made a mockery of the seriousness of racism and I am sickened deeply offended and appalled by what was said [……]. [the Complainant's name] 11-6-20
I felt like just walking out and going home But why should I, I've done nothing wrong only defended myself as a black person and stood up to racism."

13.33 Ms Brookin asked the Complainant if she wanted the matter to be dealt with informally. The Complainant confirmed that she wanted it to be dealt with as a formal complaint under the Sainsbury's Fair Treatment Policy. Ms Brookin did not discuss the Fair Treatment Policy informal and formal procedures with the Complainant.

13.34 After Ms Brookin received the Complainant's written complaint, she conducted an informal fact finding meeting with the Complainant at 7.50am on 11th June 2020. Ms Brookin records the Complainant's complaint in the third person. The notes can be summarised as the claimant going over to the Co-worker and saying "*Oh I am offended black lives matter"* and the Co-worker saying *"I should get a T-shirt saying old colleagues jobs matter".*

13.35 The Complainant is recorded as challenging the claimant about what she had said; she said the claimant had replied "*Oh well I apologise."*

13.36 Ms Brookin records that the Complainant went back to the Co-worker and said "*why would you compare old colleague jobs with black lives matter? People have lost their lives."* The Co-worker is stated to have said *"well, that's my opinion, [name of Complainant]. The Complainant said 'well it's wrong."*

13.37 The final paragraph of the fact finding notes appeared to be added later in a different pen in the Complainant's hand writing and is in the first person. It states: *"When I went back downstairs after I spoke to you, [the Co-worker] tried to give an explanation why she had used that phrase 'old colleagues job matter in relation to something that had happened yesterday saying depressed because she heard that young people were going to take the older people's jobs.*

I think this is total irrelevant to the situation and is playing the victim."

13.38 There was therefore a second meeting between the Complainant and the Co-worker which did not involve the claimant.

13.39 Ms Brookin did not ask the Complainant to check and sign the notes she had made as a true record of the fact finding meeting because Ms Brookin believed the interview was not 'formal'.

The Co-worker's fact finding meeting

13.40 At 8.01 Ms Brookin held an informal fact finding meeting with the Co-worker who confirmed that the claimant had approached her saying "*I am offended, black lives matter"* and showed her a toy. The Co-worker said she had replied *"what is it? That's cute"* and then the claimant went away. The Co-worker said "*after yesterday I need a t-shirt saying old colleagues jobs matter".* The Complainant came up to her and asked what Marian had said? The Co-worker had replied "*she was on about a toy*".

13.41 The Complainant went down to claimant and then came past the Co-worker again and said that the comment "*old colleagues jobs matter*" was a disgrace. The Co-worker tried to explain that it was to do with something that had happened yesterday and it was her opinion of yesterday, and nothing to do with the black toy. The Co-worker stated she had tried to apologise a few times to the Complainant.

13.42 Again Ms Brookin did not ask the Co-worker to check and countersign the fact finding notes as an accurate record because she believed it was an informal meeting.

Claimant's fact finding meeting

13.43 At 08.11 Ms Brookin conducted a fact finding meeting with the claimant. Ms Brookin took a note. The claimant explained that she found a toy on the

shelf. It was a black doll. She explained that she had taken it to the Co-worker and had said words to the effect "*it's a wonder we can sell this, with all the stuff that's going on with black lives matter".*

13.44 She explained there was a button on the front of the toy to press, so she had pressed it. She had to press the button twice because she and the Co-worker could not understand what it said. She and the Co-worker had laughed at how "*pathetic*" the toy was. When she had returned to aisle 4 the Complainant had then "*rounded on*" the claimant, asking her "*What are you saying about black lives matter?"* The claimant explained as she had pointed to the toy and said "*it is a wonder we are selling*….". She was unable to say more because the Complainant "*came at me with 'what colour do you think my skin colour is". I am really offended by what you said"*.

13.45 The claimant explained to Ms Brookin that she did not mean to offend but the Complainant had walked off. The claimant said that she was not a racist and what the Complainant had heard was taken out of context. The claimant confirmed to Ms Brookin that she did not mean to offend anybody no matter what skin colour they are.

13.46 The claimant was not asked to sign the fact finding meeting notes.

Suspension meeting with the claimant 11th June 2020

13.47 At 12.07 on 11th June 2020 Ms Brookin conducted a suspension meeting with the claimant. A note taker was present. Ms Brookin's personal notes prepared for the meeting with the claimant, record that she believed the Sainsbury's Equality Diversity and Inclusion Policy applied. She did not appear to have addressed her mind to the Fair Treatment Policy and the informal and formal processes set out within that policy.

13.48 Ms Brookin explained that the claimant was being suspended on full pay to allow a thorough investigation because of an "*alleged allegation of fair treatment leading to gross misconduct"* without any further explanation.

13.49 The notes of the suspension meeting also record the reason for suspension as an *"alleged allegation of fair treatment leading to gross misconduct".* It might be assumed that the words "a breach of" were missing from the note which should have read "an allegation of a breach of the fair treatment policy leading to gross misconduct".

13.50 Ms Brookin ticked off each of the steps in the respondent's standard form suspension meeting checklist, to confirm that she had complied with all of the steps necessary in conducting a suspension, including stating the reason why the colleague had been asked to the meeting, ie. alleged gross misconduct and the details of the allegation. Ms Brooking did not provide the claimant with any details of what the allegation was or what the alleged gross misconduct was in either the suspension meeting or the confirmation of suspension letter which she handed to the claimant.

13.51 Ms Brookin explained to the claimant that she was not permitted to contact any other colleagues, not permitted to attend work premises, but could discuss the case with her chosen representative. The claimant was informed she would be given at least 24 hours' notice of the next step in the process.

13.52 Ms Brookin confirmed that the claimant would get a copy of the notes with the disciplinary invitation.

13.53 The suspension letter repeats the nonsensical words recorded in the suspension meeting notes: "*I write to confirm the decision to suspend you with pay from this date pending an investigation into the allegation of Fair treatment under gross misconduct".*

13.54 The letter referred the claimant to the Sainsbury's Disciplinary and Appeals policy and reminded her of the Employee Assistance programme.

13.55 Ms Brookin's oral reasons for suspending the claimant were inconsistent with the written reason in the suspension letter and those she gave to myER Adviser, the respondent's HR help line support provided to managers. Ms Brookin stated in cross examination that she suspended the claimant because her presence at work had the potential to create a risk to the investigation, the business, herself or other colleagues. The reason Ms Brookin gave to myER Advisor, was that the claimant was suspended because of the seriousness of the issue and the upset caused. Ms Brookin did not consider any alternative to suspension despite the disciplinary policy saying that suspension would be a last resort and suggesting potential alternatives be considered.

The Co-worker's Investigation meeting 23rd June 2020

13.56 On 23rd June 2020 Ms Brookin conducted a formal investigation meeting with the Co-worker. A note taker was present and Ms Bellamy accompanied the Co-worker.

13.57 The Co-worker had prepared a statement which Ms Brookin read. The first paragraphs of the letter related to the Co-worker's working history with the respondent and that she had received numerous recognition awards. She had always got on with all colleagues across the store. She stated that was why she had been "*absolutely shocked and upset beyond measure to be suspended on a count of gross misconduct involving another colleague."* The statement then refers to the Incident:

"Just after 6.30am on the 11th June I was going about my job putting cash in the self scans when one of my colleagues in a raised voice said "I'm offended, black lives matter" and proceded [sic] to bring a little black teddy from the shelf over to me, I just giggled as I always do and said "Ah he's cute" to which I think she said "should we be selling these". I was a bit taken aback, so to lighten the mood and because I didn't know what else to say, I said "we need t-shirts with old Colleagues jobs matter which was following on from a discussion we had earlier in the week.

At no point did I mention black lives or any other racist conversation. The comment was heard by one of our black colleagues who was rightly offended and distressed and lead to me and the other colleague being suspended. I am not racist in any [ ] will fight to clear my good name."

13.58 Having read the letter Ms Brookin asked the Co-worker to give her account of the incident on 11th June 2020. The Co-worker explained that the claimant was approaching her down the aisle as she said "*I am offended, Black Lives Matter – what is this?*". The claimant brought the black toy over to the Co-worker at the self scan. The Co-worker had replied "*what is it? Aw he is cute".* The Co-worker said that although she couldn't remember the exact words but the claimant had said something like "*surely we shouldn't be selling these?"*

13.59 The Co-worker continued, as the claimant was walking away the Co-worker had tried to make a light hearted comment. She said "*On the Tuesday of the same week, we had had a discussion of younger people taking our jobs. I said after that conversation "I'm going to get a t-shirt with old colleagues jobs matter". It wasn't meant in any racist way, it was just a silly comment."*

13.60 Ms Brookin asked the Co-worker *"what do you think the colleague meant when she brought the toy to you and said she was offended BLM?"* The Co-worker replied "*I think she meant she wasn't sure we should be selling the toy but I'm not sure what was going on in her mind."* Mr Brookin challenged the Co-worker why she had not mentioned that the claimant had said '*should we be selling these'* in the (informal) fact finding on the morning of 11th June. The Co-worker explained that she *"was in a state that morning – I am sure she said something along those lines. I didn't remember until after I had come out, but the claimant had definitely said those words. If you look on CCTV then you will see her mouth moving and her saying them."*

13.61 Ms Brookin asked the Co-worker why she had said she was taken aback when the claimant had approached her and said should we be selling these? The Co-worker replied: *"it was early in the morning and I didn't expect her to say I'm offended Black lives matter, I knew when she said it, it was wrong…….Because of the current climate – it could – well it was taken as offensive by another colleague – I didn't ask for the toy to be brought over to me – I was just doing my job."*

13.62 The Co-worker confirmed that the black toy could be seen as offensive. She explained again the background to her comment about old colleagues' jobs matter. She was upset about being pushed out due to her age and that a few of her colleagues had felt like that for a few weeks. She said "*It wasn't related to the BLM Movement, it was just a comment reflecting my opinion on a previous conversation I had had.*"

13.63 In response to Ms Brookin's question whether the Co-worker thought her comment was inappropriate or offensive, she stated :

"I can see how it might of [sic] been but it wasn't my intention to be offensive at all….. I could see that I had upset the colleague. I felt awful. I tried to apologise several times to her, it wasn't meant to be racist, I wouldn't do that to someone else. My comment wasn't connected to the BLM movement which I tried to explain…. It was an ignorant comment; it wasn't meant to be racist."

13.64 The Co-worker stated that she was deeply distressed and very apologetic having informed herself since the Incident about Black Lives Matter.

13.65 Ms Brookin read out the relevant section of the EDI policy: "*Everyone of us is responsible for supporting our commitment to diversity and fair treatment through our behaviour at work. We must all act respectfully and fairly in our dealings with others in our work place."* She asked the Co-worker if she thought her behaviour had reflected the policy on 11th June 2020?

13.66 The Co-worker replied: *"I don't think anything I said was racist although I realise that I have unintentionally upset someone."*

13.67 Ms Brookin took that as confirmation that the Co-worker had not displayed behaviour compliant with the EDI policy and therefore the Co-worker had broken the policy.

13.68 Ms Brookin confirmed to the Co-worker that the matter would proceed to a disciplinary hearing. The notes were countersigned and dated by the Co-worker.

13.69 The template decision making summary form gave the reason for the investigation meeting as *"made offensive and inappropriate comments regarding 'black lives matter protests' which highly offended another colleague and put in a formal complaint."* Ms Brookin recorded that the Co-worker had admitted she had "broken policy" and that the Co-worker was offended by what the other colleague had said 'Oh I am offended, black lives matter"

Investigation meeting with the Claimant on 25th June 2020

13.70 On 18th June 2020 the claimant received a written invitation from Ms Brookin to an 'investigation' meeting on 23rd June 2020. The letter, this time, gave a corrected reason for suspension, stating that the claimant was *"alleged to have made offensive comments which breached our fair treatment/equality and diversity policy…"* . The letter did not state what the offensive comments were or which policy section had been breached.

13.71 A delay in delivery of the letter by post resulted in the investigatory meeting being rescheduled for the claimant to 25th June 2020.

13.72 Ms Brookin conducted the formal investigation meeting with the claimant on 25th June 2020 at 13.00. A note taker was present. Ms Bellamy accompanied the claimant.

13.73 The claimant's account of the incident on 11th June was recorded in Ms Brookin's notes. The claimant recounted what had happened:

"I *was working on entertainment doing price control. I saw a toy and knowing gollywogs and things had been banned since 1980's, I picked up the toy, went over to [the Co-worker] and said "I'm surprised we can sell toys like this due to the BLM. I think the Co-worker just laughed. It has a button on the [toy] which is activated when pressed, we pressed it and couldn't understand what it was trying to say. We pressed it again and still didn't understand what it was trying to say, we didn't know the character [of] the toy, that was the only interaction with the doll at any time. I put the [toy] back on the shelf and carried on with my price changes. [The Complainant] came around the corner and shouted "what are you saying about BLM?" I'd moved from [where] the doll was so I moved back to the doll & pointed but I didn't get a chance to speak as [the Complainant] shouted me down saying "Can you [see] what colour skin I [am] I'm really offended by what you're saying". I could see from her face [that] there was no joke here right away so I immediately apologised if I had said anything that had offended her, although I don't understand [ ] she had heard, as I was saying as I stated the conversation of BLM and I was actually standing up for BLM and was wondering how we can sell the toy when I know gollywogs are banned. [The Complainant] did come back at me with something but I couldn't remember but she walked away uttering about BLM and I'm not sure she heard my apology [or] about my opinion on the toy. I then saw [the Complainant] go over to the [Co-worker] and shout at her as well, and [the Complainant] wasn't listening to [the Co-worker] either about [what] we had said. A few minutes later Charlotte came down and reprimanded us and said "Be mindful of what you're saying on the shop floor".*

13.74 Ms Brookin put it to the claimant that she had said "*I'm offended Black Lives Matter*." Ms Brookin referred to 'a formal statement in another investigation' when it had been stated that the claimant had said "*I'm offended Black Lives Matter".* The claimant denied she had said those words. She reconfirmed that she had said *"should we be selling this toy in respect of what's going on in the BLM movement".*

13.75 The claimant said she did not remember it the same way as other colleagues. She stated: "*If I said anything bearing in [mind] it was two weeks [ago] [it would have been] that's offensive and Sainsbury's should not be selling it due to the nature of the toy."*

13.76 The claimant explained that she did not know at the time that the Complainant was within earshot and she did not know what the Complainant had heard. She thought that perhaps the Complainant had not heard her query whether Sainsburys should be selling the doll and that the Complainant did not know in what context the claimant had been talking about BLM. The claimant said that all the way though this she had only wanted to find out how she had offended the Complainant. The claimant confirmed she could see that Complainant was upset and immediately apologised to her but the Complainant had not given the claimant a chance to explain and she had not asked in what

context the claimant and the Co-worker discussed the Black Lives Matter movement. The claimant did not know what the Complainant had heard. She was therefore *"gobsmacked*" when she was suspended as she had been supportive of BLM.

13.77 The claimant asked Ms Brookin whether the Complainant had been offered the possibility of mediation? This is a step within the Fair Treatment Policy. Ms Brookin replied that the Complainant had been. That was not entirely accurate because Ms Brookin had not discussed the Fair Treatment Policy with the Complainant. Ms Brookin stated that the Complainant wanted to go "*formal*". Ms Bellamy asked why the Complainant had wanted to go formal and not discuss the incident? Ms Brookin replied that Complainant was upset and angry and she did not want to talk it through because she was so upset.

13.78 The claimant asked to be informed what exactly the Complainant had said as she believed the Complainant had not heard what the claimant had said in the right context. The Claimant said she supported BLM as a person and as a Sainsbury's colleague.

13.79 Ms Brookin then adjourned the meeting for 25 minutes. On reconvening she read out aloud to the claimant and Ms Bellamy, the Complainant's hand written statement of 11th June 2020. She did not provide them with a copy of it.

13.80 The claimant responded that the Claimant had misheard, totally out of context. She disputed that she had laughed when the Complainant had spoken to her as she hadn't had a chance to speak. She reiterated that she had not said "I'm offended Black Lives Matter." She also stated "*in my world all colours are welcomed, as it should be."*

13.81 There ensued a discussion on whether the claimant believed the black toy was offensive. She thought black people might be offended by the toy. She had not stated she personally was offended by the toy. She said that she could see, by drawing an analogy with the Robertson's jam gollywog, that others might think it was an offensive toy. The claimant did not believe what she had said was offensive but she also did not think that mattered, as she did not look at the Complainant and see a black person, she looked at the Complainant and saw another colleague. The claimant reiterated that she questioned whether Sainsburys should be selling the toy and confirmed she was in support of Black Lives Matter.

13.82 When pressed further the claimant agreed she had said 'Black Lives Matter'. She stressed again she had said "*should we be selling this toy as it is offensive. Black Lives Matter*." The claimant emphasised again, when asked by Ms Brookin, that she did not think she had said anything offensive, but she thought the toy could be seen as offensive to black people. The claimant clarified that black people could be offended, but she was not personally offended by the toy. The claimant was pressed further to explain in what context did the claimant say Black Lives Matter. The claimant replied *"How I remember my statement*

was should we be selling this toy as its offensive. Black lives matter." Ms Brookin asked the claimant whether her comment was appropriate on the shop floor. The claimant replied that she did not think she had said anything offensive but she though the toy could be seen as offensive to Black people. She stated she was being supportive and that's part of the policy for diversity and inclusion. If she had expressed her view then they are within Sainsbury's guidelines. She said she knew they support BLM and Pride which she supported.

13.83 Ms Bellamy asked why "*they were offended when Marian was backing the cause of BLM?*" Ms Brookin did not respond. There was a discussion on toys being of every colour so why would a black person be offended by a black bunny? The claimant referred again to her opinion that the gollywog [sic] was banned because it was offensive to black people, black dolls had been banned because clearly they are offensive to someone.

13.84 After a half hour adjournment, Ms Brookin informed the claimant that the matter would go forward to a disciplinary hearing. In the section of the meeting notes template, Ms Brookin stated the claimant did not know why both the Co-worker and the Complainant had said the claimant said "*Oh I am offended, Black Lives Matter*" and that the claimant "*thinks that the bunny is offensive to black people*. Ms Brookin noted that the Complainant had not found the bunny offensive, only the claimant's behaviour and comments.

13.85 Ms Brookin completed the summary by stating that she had a reasonable belief that the claimant had said "*Oh I am offended, black lives matter.*" She recorded that the claimant showed*" no remorse"* and *"a lack of understanding of the nature of what she had said."*

Claimant's Disciplinary meeting 2nd July 2020

13.86 On 30th June 2020 Mr Cowsill wrote to the claimant to invite her to a disciplinary meeting following an allegation of gross misconduct. The disciplinary meeting was to be held on 2nd July. The purpose of the meeting was stated to be:

"Fair treatment/Equality and diversity issue, on the 11th June 2020, you are alleged to have made offensive comments which breach our fair treatment/equality and diversity policy."

13.87 It was not stated what the alleged offensive comments were in the disciplinary hearing invitation or which section of which policy she had breached.

13.88 No documents were attached to the disciplinary invitation letter. The claimant attended the disciplinary meeting without any information on the charges she faced.

13.89 Mr Cowsill was the Operations Manager at another Sainsburys store. He had received training in conducting disciplinary hearings and had conducted on average in the last six years disciplinary hearings every other week. He had

also completed many disciplinary investigations and had a great deal of experience in conducting disciplinary hearings. The majority of the disciplinary hearings Mr Cowsill had conducted were for allegations of gross misconduct. He estimated that he had probably dismissed in about 25% of cases in the last year. Mr Cowsill had conducted one or two hearings under the Fair Treatment Policy.

13.90 Mr Cowsill had already conducted the disciplinary meeting with the Co-worker a couple of days before the claimant's disciplinary meeting. He had therefore seen the Co-worker's fact finding and investigation meeting notes and her personal voluntary statement where it recounted what had been said between her and the claimant on the morning of 11th June 2020.

13.91 Mr Cowsill gave the Co-worker a final written warning, accepting that she had inadvertently caused offence and had shown remorse. He found that the Co-worker had not instigated the conversation with the claimant and he believed that the Co-worker had not herself said anything which breached the EDI policy. He found that the Co-worker had shown a willingness to learn from her mistake of being involved in the conversation at all. He believed that the Co-worker would correct her behaviour.

13.92 In preparation for the claimant's disciplinary meeting, Mr Cowsill had been sent a 'hard copy pack' of documents including the Complainant's written complaint; the unsigned fact finding notes between Ms Brookin and the Complainant; the Co-worker's and the claimant's unsigned fact finding notes; the investigation notes signed by the claimant and the formal notes of the suspension meeting between the claimant and Ms Brookin on 25th June.

13.93 Mr Cowsill assumed that these documents had also been provided to the claimant. He did not check with Ms Brookin or MyER Advisor.

13.94 Mr Cowsill had read these documents. He did not review or add the information provided by the Co-worker in her disciplinary process to the documents he held for the Claimant's disciplinary hearing, despite the Co-worker being a corroborative witness to the Incident for which the claimant was now being disciplined. The claimant was completely unaware of evidence which was supportive of her case and unaware of the documents Mr Cowsill was relying on.

13.95 The disciplinary meeting commenced at 1pm on 2nd July 2020. Mr Cowsill had the assistance of a note taker. The claimant was accompanied by Ms Bellamy.

13.96 At the commencement of the hearing Mr Cowsill did not check what documents the claimant had received prior to the meeting and he did not tell her what documents he would be relying on. He made reference to the documents during the course of the hearing.

13.97 Mr Cowsill explained that the meeting was concerned with an allegation against the claimant raised by another colleague where the claimant "*broke the EDI policy".*

13.98 The claimant responded that she was there because the Complainant had only heard half a conversation and because she heard the claimant say BLM and not the full comment which was *"should we really be selling this toy? Black Lives Matter.*" The claimant stated that she still did not understand what the Complainant had found offensive especially since she had said *"should we be selling this"?* The claimant stated "*Put the conversation together and I'm not understanding what exactly [the Complainant] found offensive about it."*

13.99 Mr Cowsill wanted to hear what the claimant had said, in her own words. The claimant repeated what she had said and stated that she believed the Complainant had not heard all of it. She confirmed that she and the Co-worker had laughed only when they had not been able to understand what the toy was meant to be say when they pressed the activation button.

13.100 The claimant asked for clarification from Mr Cowsill - even if she had said "I'm offended Black Lives Matter", how was that statement racist?

13.101 Mr Cowsill did not respond but pressed the claimant to clarify what words she had used, as he had two separate colleagues and four statements taken from them in different meetings which contradicted the claimant. Was the claimant suggesting her colleagues were lying? The claimant recounted again her exchange of comments with the Co-worker and her exchange with the Complainant. Again the claimant stated that the Complainant had only heard half of the conversation. The claimant had no recollection of saying *'I'm offended Black Lives Matter".* She confirmed that she and the Co-worker had laughed at the voice activation of the toy – nothing to do with race or colour but to do with only the toy.

13.102 The claimant said she recognised with hindsight that the Complainant had been upset after hearing the laughter and only half of her exchange with the Co-worker. However the claimant did not believe she had actually said anything offensive but she understood that because the Complainant had heard only half a conversation, the claimant could see why the Complainant could feel offended by what she thought she had heard. The claimant stated that she believed that the Complainant had been too far away to hear the full conversation and that although the claimant had tried to explain what she had said, the Complainant had refused to listen.

13.103. In reply to the question would the claimant have been offended if she were in the Complainant's shoes, the claimant replied *"well yes, obviously [the Complainant] is of colour, so if you feel someone is making derogatory comments, then have a conversation – she came round the corner to ask me about what I'd said but didn't give me a chance to answer."*

13.104. The claimant confirmed that she was pro-BLM and didn't believe that she had said anything offensive. She asked a second time for an explanation of why the words 'I'm offended Black Lives Matter' were deemed offensive or racist, even if she had said them. Mr Cowsill responded: "*each*

colleague has a different interpretation of how something is said. The Complainant had taken offence at this comment which is why this formal process is taking place."

13.105. When Ms Bellamy protested "*She made a pro BLM statement*". Mr Cowsill replied "*I think we are in a different place to where we were 3 weeks ago due to the educational side of how the movement has taken place".* Ms Bellamy suggested there was a difference to being on the shop floor where voices can carry and people can hear things out of context, unlike in the meeting room where comments could be clearly heard and understood. Mr Cowsill replied *"I can see where 3 weeks ago any comment made regard[ing] BLM would immediately be picked upon".*

13.106. Mr Cowsill adjourned for a few minutes. He was asked by Ms Bellamy again to explain what the Complainant was taking offence to? She stated that "*if we can't talk about it, we can't learn."*

13.107 Mr Cowsill spells it out: *"it's the fact that [the Complainant] has overheard a conversation and what you've said and found it offensive."* Mr Cowsill then read out aloud to the claimant and Ms Bellamy, the Complainant's written complaint and the notes from her unsigned fact finding meeting. He offered the claimant an adjournment for her to discuss the written complaint with Ms Bellamy. The claimant did not accept the opportunity.

13.108 Mr Cowsill was satisfied that the claimant was aware of the content of the documents (ie. the Complainant's statement and the fact find notes) as they had already been read out to her during the investigation meeting. That was an assumption on his part. She had not been read anything out aloud by Ms Brookin other than the Complainant's hand written statement.

13.109 On hearing Mr Cowsill read out the Complainant's statement, the claimant objected to four of the comments made by the Complainant. The claimant said she did not remember the Co-worker saying anything about a t-shirt. She did not say to the Complainant when approached by her *"we were having a laugh with this".* The Complainant had also not asked "*why are you offended BLM";* she had asked "*what were you saying about BLM?"*.

13.110 The claimant also objected that "[*the Complainant] stated I said Oh well, I apologise, that makes it sound like I was really flippant – I was not, it was a heart-[felt] apology if I had said anything offensive so I can see she was obviously upset and I didn't want to make it worse."*

13.111 The claimant became upset. She stated *"I have been upset that throughout this process anyone could think that I'm a racist, I don't see [the Complainant] as a different colour, I see her as another colleague. I'm upset that anyone could think I was being offensive and that is what has led us to this point. Having never been in trouble for 28 years, why she was given the opportunity to*

have an informal discussion about what I said, what she said. We've never been given that opportunity – I don't understand why we weren't."

13.112 Mr Cowsill's response was "*In answer to that last question as soon as a colleague states they want to make a formal complaint that is why we have followed a formal route. If [the Complainant] hadn't stated she wanted to make a formal route, a manager could of [sic] taken a more informal approach, however as [the Complainant] had made a formal complaint that is why we are doing this process now."*

13.113 This was an incorrect and misleading statement concerning the Fair Treatment Policy and indicative of a lack of understanding by Mr Cowsill of the Fair Treatment Policy. He added: *"This protects all colleagues involved and gives us chance to gather all the facts otherwise this could of [sic] escalated for all involved."* It escaped Mr Cowsill's notice that it had already escalated to a disciplinary hearing because Ms Brookin and he had not followed the Fair Treatment Policy.

13.114 Mr Cowsill wanted to know whether the claimant felt she had done anything wrong? The claimant replied *"having a conversation on a sensitive subject in an open environment was a mistake".*

13.115 Mr Cowsill asked the claimant if she believed the Bing toy should not be in the store, what was the correct escalation process? The claimant did not know. She thought the toy reminded her of a golliwog and perhaps she would first speak to a buyer.

13.116 The claimant was pressed twice to say whether she personally found the toy offensive, yes or no. on the second occasion the claimant said yes because Mr Cowsill was insisting on a yes or no answer, but she gave a qualified answer. The toy reminded her of a golliwog which she knew from forty years ago were banned.

13.117 Mr Cowsill asked the claimant again if she would do anything differently and she stated that she wouldn't have said the comment because of misinterpretation. She also added that she did not believe what she had said was racist. If she had not said it, none of this - the disciplinary- would have happened.

13.118 The claimant also stated that with hindsight she could see why it would be an issue but to her, it looked like a golliwog and now she was in this process, she could understand why the conversation could be seen as offensive. Mr Cowsill wanted to know whether on reflection the claimant still believed what she had said was, in her own eyes, not offensive. The claimant replied correct.

13.119 At this point Mr Cowsill wanted to refer to something on page 4 of the notes. The claimant told him she had been read aloud a statement by the Complainant and that she understood that the Complainant and the Co-worker thought the claimant was lying, but the fact was obviously neither the

Complainant nor the Co-worker had heard what she had said when they both thought she had said "I'm offended".

13.120 Mr Cowsill asked the claimant what her understanding of the EDI policy was. He was satisfied that she understood the principles of the policy because she had replied that "*everyone no matter what race, colour, sexual persuasion is treated as an equal*."

13.121 Mr Cowsill wanted to know if the claimant believed she had breached the policy or not. She replied she realised that what she had said was a mistake. She stated that she sincerely regretted having this conversation where she did because she would not like to offend anyone.

13.122 The claimant explained that when [the Complainant] came at her while she was angry, the claimant wished she had pursued that fact that the Complainant understood the context. She seriously objected to the Complainant's statement and said "*I would have made sure she understood that the conversation that she had heard and what I actually said were two different things."*

13.123 The claimant explained she would not repeat the comment because of the "misinterpretation". The claimant explained: *"there is no way I would be offensive".*

13.124 Mr Cowsill took another break of almost an hour. He had two more questions for the claimant. The first was whether she took responsibility for her actions affecting another colleague? The claimant responded "*Yes"*.

13.125 Mr Cowsill wanted to clear up a couple of conflicting answers between the investigation and the disciplinary. The claimant had stated in the investigation that she didn't find the toy offensive but today she did. The claimant clarified that she didn't find the doll offensive as a black person might – but it reminded her of a golliwog which she knew could be deemed offensive.

13.126 At the conclusion of the hearing Mr Cowsill dismissed the claimant and informed her that the appeal manager would be Robert Houghton.

13.127 The claimant wanted to know how Mr Cowsill had reached that decision. He replied that he had based the decision on the evidence he had and the reasons he had gathered from the investigation. A colleague had taken offence and raised a formal complaint against the claimant. The claimant pointed out that the colleague had not accepted her apology. Mr Cowsill replied that the claimant had caused offence and the colleague had gone down the formal route for a reason.

13.128 The Decision Making Summary form was completed by Mr Cowsill. He had taken advice during the adjournments, from myER Advisor. The entry for Summary of Allegation was "*fair Treatment/Equality and Diversity issue on 11th June 2020."* He listed the documents he had relied on – the investigation

meeting and notes; the suspension meeting and notes/checklist, the disciplinary policy and notes; statement from [the Complainant]; the investigation/suspension and disciplinary notes from the Co-worker.

13.129 Mr Cowsill's findings were that the claimant had accepted responsibility for her actions in causing offence to another colleague within the store. She had denied making the offensive comment despite the Complainant and another colleague stating on four separate occasions that the same specific offensive comment was made. He recorded that with hindsight the claimant could see offensive comments had been made. He commented that the claimant had changed her stance across comments from the investigation to disciplinary and had also changed again during the disciplinary process.

13.130 Mr Cowsill's reasoning for the outcomes were:

"Final written warning - will this correct her behaviour? No

Will other colleagues feel comfortable? No

Final written warning and relocation - colleague would not be adverse to this decision

Dismissal"

13.131 Under the section of the pro forma document, Mr Cowsill entered his reasons for dismissal which then were set out in the dismissal letter. The dismissal letter sent the following day on 3rd July 2020 confirmed summary dismissal on 2nd July 2020. Mr Cowsill stated:

"*The reason for my decision is I have reasonable belief that the comments made are aligned to that of comments made during witness statements by other colleagues in formal settings. You are fully accountable for your actions and have caused upset with these actions to another colleague, based on interpretation of comments. I believe you have breached the equality diversity and inclusion policy in the comments made and have inadvertently made a colleague feel isolated and secluded within the store. I also feel that you showed minimal remorse through the process."*

Appeal hearing 31st July 2020

13.132 The claimant appealed on 9th July to Mr Houghton. The grounds of appeal are summarised as follows:

1. <u>The correct process was not followed:</u>

- Failure to follow the employee handbook and ACAS guidance:
- Failure to provide the statements which were highly influential in the sanctioning manager's decision making.

- Failure to take into account that the claimant's actions were a moment of mindfulness of whether Sainsbury's should sell such an item, rather than intent to upset or offend.

- Failure to provide the manager's decision making summary sheet at any point

- Failure to explain the change of wording on investigation letter and disciplinary letter. Both have changed from conduct to gross misconduct and fair treatment changed to equality and diversity issue

- Failure to enclose more information about suspension which is found within the disciplinary and appeals policy as stated in the suspension letter

- Failure to appoint someone that was not previously involved in the case as appeals manager. Robert Houghton was the claimant's store manager at the time of the incident.

- Failure to state what part of the policy was breached.

2. <u>Failure in the duty of care to support and re-train the claimant.</u>

- Failure to take into account that the claimant had worked in the same store for 28 years maintaining an unblemished record, achieving Colleague of the year.

- Failure to deliver EDI training on an annual basis. Having lost access to Oursainsurys [the on-line portal], the claimant could not confirm or remember her last training date for EDI which she believed demonstrated that this is not a high priority for the employer unlike fire training and Think 25 which are carried out on a far more regular basis. How is the policy communicated to colleagues in its detail?. The subject of EDI is a fast changing environment when terms such as BAME or Black Lives Matter were not existent two years ago.

- The claimant was unaware of the formal process for raising concerns over the products sold by Sainsburys as stated by James Cowsill in the disciplinary.

3. <u>The sanctions were not proportionate to the statement the claimant made.</u>

- Because the colleagues did not hear the claimant's whole sentence properly this cast doubt on the accuracy of the two statements gathered.

- There was no intention to offend and therefore due consideration should have been given to alternative sanctions to correct behaviour.

- failure to follow a fair and consistent approach where the other colleague involved has returned to work.

- The disciplinary meeting with James Cowsill was more like an interrogation, following a harsh line of questioning. James Cowsill was making accusations rather that trying to establish facts.

- James Cowsill's decision was influenced by the belief that the claimant had shown minimal remorse, however at the time and at the meeting the claimant apologised for any offence caused and this was not acknowledged.

- The dismissal was based on an "interpretation of comments" where the mis-quote of "I'm offended" was too heavily focused on.

13.133 The claimant added that she held the belief that she was misheard and that she regretted not being given the opportunity to explain to the colleague, with whom she had worked alongside for many years, the motivation for the conversation. The claimant's concern over the toy only supported the Black Lives Matter movement.

13.134 The appeal hearing was arranged for 31st July 2020 before Mr Houghton. The claimant was accompanied by Mr G Walker-Prior.

13.135 Mr Houghton was in a more senior management position than Mr Cowsill and Ms Brookin. He had received training in conducting disciplinary and appeal hearings, although he had done fewer since becoming Operations manager. He conducted no more than four or five appeal hearings during his service with Sainsburys. Mr Houghton had received equality and diversity training in 2019 and also in June/July 2020 although he was unable to confirm that was before the claimant's appeal hearing. Prior to that he had not received any diversity training for about 7 years.

13.136 Prior to the appeal hearing Mr Houghton had been provided with the invitation to the appeal hearing; notes from the investigation meeting with the claimant; notes from the disciplinary meeting with the claimant; unsigned notes from the fact finding with the claimant and the Co-worker and the statement from [the Complainant].

13.137 At the commencement of the appeal hearing Mr Houghton immediately confirmed he had been approached on 11th June 2020 separately by both the Complainant and Ms Brookin but had immediately stopped both of them discussing the matter with him. He had directed the Complainant to put her complaint in writing and he had directed Ms Brookin to myER Advisor. Accepting Mr Houghton's assurance he had no prior involvement, the claimant agreed to continue with the appeal hearing.

13.138 Mr Houghton took the claimant through all of the grounds of complaint. The minutes of the meeting are detailed. The claimant's account of what had happened on 11th June 2020 did not change from her previous account.

13.139 During the course of the appeal meeting Mr Houghton acknowledged that the claimant had not been provided with any of the documents relied upon by Mr Cowsill. However, Mr Houghton deflected blame onto the claimant for failing to ask Mr Cowsill for the statements, failing to seek advice from HR, and failing to ask Charlotte Brookin for documents. Eventually some six hours into the meeting the claimant was provided with a photocopy of the Complainant's complaint letter and her fact finding meeting notes. The claimant had about 20 minutes to read and discuss it with Mr Walker-Prior.

13.140 On the question of there being no training in the EDI for colleagues Mr Houghton explained he would look into it but EDI training was potentially part of the claimant's induction. He believed nevertheless that Sainsbury's took EDI seriously as shown by the recent statement from the CEO which was issued to make sure colleagues felt comfortable to talk about the equality issue and to bring it to the forefront of conversations. To this comment the claimant riposted *"so me talking about the toy was pro black and I have a right to say that".*

13.141 The minutes record that Mr Houghton's reply was: *That's what you wanted to get across but how the colleague has interpreted it was obviously different at that time. It's not around what was said but how the person interpreted and how they felt in the eyes of the law."*

13.142 After an adjournment Mr Houghton provided the claimant with copies of the missing documents – the colleagues' statements and fact finding notes. Mr Houghton also confirmed that Mr Cowsill's decision making notes which he had checked in the adjournment did not mention at any point the claimant's length of service being taken into account, but he assured the claimant that he would take it into account in his appeal decision. He also confirmed he had checked the mandatory training for colleagues and confirmed that there was no refresher training for EDI.

13.143 On reading the documents, the claimant informed Mr Houghton that the Co-worker's account had missed out a whole section of what had happened on the morning of 11th June 2020. Mr Houghton did not see the relevance of the point despite a detailed explanation of it by Mr Walker Prior. It did not prompt him to take any steps to investigate further.

13.144 Mr Houghton responded to the claimant's complaint that she had been treated unfairly during the course of the disciplinary hearing by Mr Cowsill who had had a different attitude towards the Co-worker's disciplinary and the claimant's. Mr Cowsill had been almost friendly with the Co-worker but had been accusatory and had interrogated the claimant. Mr Houghton batted away this ground of appeal and suggested that the claimant should have raised it at the time, after the disciplinary meeting, through the Fair Treatment Policy, not in the appeal hearing. It was incorrect information. The claimant's complaint about inconsistent treatment in the disciplinary meetings was a valid ground of appeal.

13.145 There was a discussion on whether the claimant found the black toy personally offensive or not. She explained her position again. It had been minuted on several occasions in the documentation. There was a discussion on whether the claimant had shown remorse. Mr Houghton referred to Mr Cowsill's finding that the apology was minimal, no remorse. The complainant recounted the occasions on which she had apologised or attempted to apologise, recorded in the fact minding minutes and investigation minutes and that she had explained this to Mr Cowsill in the disciplinary hearing and it was puzzling how he had failed to take it into account. It had been recorded that the claimant had expressed regret at not being able to explain the converstion to the Complainant so she struggled to understand the finding of no remorse by Mr Cowsill. Mr Houghton suggested that the claimant could have written a personal apology to the Complainant through the customer and trading manager.

13.146 At the conclusion of the appeal hearing Mr Houghton read out his decision making summary regarding the claimant referring to 'people of colour. Mr Walker Prior challenged Mr Houghton to explain what was the issue with the use of the phrase "people of colour?" Mr Houghton said that the claimant had referred to people of colour three times during the appeal hearing and said that "*identifying someone as of colour is not acceptable in the workplace."*

13.147 The Decision Making Summary sets out the findings established by Mr Houghton during the meeting. Again the Tribunal was not provided with a transcript of Mr Houghton's written notes and they are not entirely legible.

13.148 The summary shows that Mr Houghton recorded a balancing of whether to re-instate the claimant or uphold the decision. Those factors in favour of reinstatement were:

- *The claimant did not receive the statements/fact finding prior to the appeal meeting;*
- *The claimant did not receive documents in the suspension letter (but did access them via OurSainsburys);*
- *The manager taking the disciplinary meeting did not take into account the claimant's 28 years' service with no sanctions.*

14.149 The outcome options for upholding the decision to dismiss were listed as:

- *The claimant had received 24 hours' notice of the appeal hearing;*
- *The claimant fully understood process;*
- *The claimant was happy for Mr Houghton to complete the meeting;*
- *The claimant stated she did not intend upset however [the Complainant] was [ ] offended and upset;*

- *Policy broken is on the invite letter;*
- *No current specific training for EDI;*
- *If the claimant went through again, she would only change environment as she "is still of belief" she said nothing wrong;*
- *Colleague statement and fact finding both confirm line/phrase used;*
- *Terminology used in today's meeting by the claimant 'colour' and 'of colour' not appropriate terminology to be used in the work place.*

13.150 Under the section Decision and Reasons – Mr Houghton entered:

"As above. The colleague has not demonstrated a change in behaviour. Colleague would still do same just change the environment, again showing no change in behaviour. During today's meeting terminology such as "colour" or "of colour" is terminology not acceptable in the workplace again showing no change in behaviour. I have a duty of care to our colleagues, customers and to protect our brand. From behaviours demonstrated on 11/6/20 to 31/7/20 no behaviours have been corrected. As from the facts gathered today our process is a corrective not a punitive process and the action on the 2/7/20 still has not corrected your behaviours. I uphold the decision made."

13.151 The claimant was provided with a copy of the appeal hearing notes. The appeal hearing outcome letter dated 4th August 2020 notified the claimant that the dismissal by Mr Cowsill had been upheld. Mr Houghton set out the grounds of appeal. He addressed each of the points in turn, summarising the discussion on each point. He confirmed that he had taken a comprehensive review of the facts available to him. He confirmed that the appeal process had been concluded.

13.152 The claimant commenced tribunal proceedings on 15th October 2020.

Submissions

14. I received written submissions and heard oral submissions from both parties. I have read and re-read those submissions prior to reaching my conclusions. For the avoidance of doubt I have read the respondent's written submissions and reviewed my note of the respondent's oral submissions made. In two places the submissions were factually incorrect, without doubt an inadvertent error. I did not find the respondent's submissions sufficiently persuasive on the facts found to justify anything other than conclusions below.

The law

15. Section 98(4) of the Employment Rights Act 1996 ("the ERA") which relevantly provides:

(4) [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."

The guidance to the Tribunal is set out in the authorities referred to above under Issues and is not repeated here.

16. In determining the question of fairness, it is not for the Tribunal to substitute its own view; its task is to consider whether the Respondent's decision fell within a band of reasonable responses open to a reasonable employer in those circumstances.

17. That applies not only in relation to the substantive decision to dismiss but also in respect of the question of procedural failures, albeit the Tribunal is required to consider decisions taken in this regard not in isolation but as part of the overall process: (see **Iceland Frozen Food v Jones** [1982] IRLR 439 EAT, and **Post Office v Foley** and **HSBC v Madden** [2000] IRLR 827 CA).

Conclusions

Investigation

18. The claimant claims that her dismissal by the respondent was procedurally and substantively unfair. It is not disputed that the reason for dismissal was conduct. I turn first to the process which began with Ms Brookin's conduct of the investigation into the incident on 11th June 2020 and ended with Mr Cowsill's conclusion that dismissal of the claimant was an appropriate, fair decision to make.

18.1 Ms Brookin was an unreliable witness. She was at times evasive, and argumentative. She appeared at times distracted during cross examination and resentful.

18.2 Ms Brookin was an inexperienced manager and at the time of the Incident she had conducted no more than about two investigations previously. She had never undertaken any steps under the Fair Treatment Policy.

18.3 Although Ms Brookin professed to be familiar with the Respondent's Fair Treatment Policy, EDI policy and disciplinary policy, under cross examination she did not understand or appreciate the interface between these three policies or that there was a formal process within the Fair Treatment Policy. Her own witness statement recorded that the Complainant requested a formal procedure under the Fair Treatment Policy but Ms Brookin did not address her mind to the

correct procedure to follow. Ms Brookin had completely omitted to discuss all of the options, both informal and formal, with the Complainant. She made a misleading statement during the course of the claimant's investigation when she confirmed to the claimant that she had offered mediation to the Complainant.

18.4 Her omission to apply the Fair Treatment Policy is not entirely her fault. The ultimate responsibility for her lack of understanding of the Fair Treatment Policy and its application, must lie with a lack of adequate training and any form of procedural check by the Respondent's HR advice service to managers. Although the HR advice is dependent on what information is provided to them by a manager there should be a simple checklist to ensure the early decision making on appropriate procedure has been followed.

18.5 Ms Brookin decided to follow the disciplinary policy before seeking advice from the respondent's myER Adviser on procedure. She presented the myER Advisor with her decision to suspend the claimant pending the disciplinary procedure. MyER Advisor did not check why Ms Brookin had gone straight to a disciplinary hearing rather than follow the in a case of racial harassment.

18.6 Ms Brookin's justification for going straight to a disciplinary procedure was the depth and intensity of the Complainant's upset and distress. Ms Brookin stated in cross examination that she referred the matter to a disciplinary hearing *"because she upset [the Complainant] and [the Complainant] believed she had been discriminated against."*

18.7 Over a total of no fewer than five fact finding/investigation meetings, Ms Brookin made no actual finding of what actually had been said by the claimant, the Co-worker and the Complainant despite there being clearly a dispute about what was said at the Incident. Ms Brookin ignored the evidence that the Co-worker had given corroborating the claimant's account that she had said the words "*should we be selling this*?"; she did not re-interview the Complainant to establish what she had actually heard and whether or not there was a possibility that the Complainant had only heard part of what had been said. It was Ms Brookin's duty as investigating officer to complete sufficient investigation to enable her to reach a decision to recommend the case to a disciplinary hearing and it was her duty to put all the relevant evidence to the disciplinary panel. She failed to do this.

18.8 The Complainant had requested that her complaint be dealt with "formally" under the Fair Treatment Policy. That is Ms Brookin's own evidence. The course of the investigation may have taken a drastically different turn had Ms Brookin followed the respondent's own procedures and followed the formal route under the Fair Treatment Policy. The Fair Treatment Policy formal route would have enabled the Complainant to hear, in a calm and neutral environment, the claimant's side of the story. They had been colleagues at Sainsburys for many years and had always previously had a friendly working relationship. The claimant had been clear that she believed the Complainant had not heard the entire conversation or understood the context of what she had heard. Following

the Fair Treatment Policy might have avoided a disciplinary hearing or, if it was nevertheless followed, reduced the extent of a disciplinary sanction.

18.9 Omitting a fundamental stage in the Fair Treatment Policy process and going straight to a disciplinary hearing in a case where an allegation of racial harassment was made in one incident lasting probably no more than seconds or a minute, was a breach of the policy designed and intended to deal with precisely that type of issue. It was unfair to the claimant and, on the respondent's own evidence, it did not comply with what the Complainant had asked for.

18.10 Ms Brookin's procedural errors were compounded by the failure to properly consider alternatives to suspension; by the failure to inform the claimant what the alleged breach of the Fair Treatment Policy and/or the EDI policy was at any stage of the disciplinary process for which she was responsible. She did not state what words she found had been spoken by the claimant which in her reasonable opinion amounted to the alleged breach. The claimant was left to surmise from the fact finding meetings and the investigation meeting what the allegation and offending words were. Ms Brookin's defensive attitude when cross examined on this point was "*she was there and knew what was going on".*

18.11 I find that attitude was pervasive throughout Ms Brookin's conduct of the investigation. Her ignorance of how to conduct a fair investigation procedure however, as I have stated above, is attributable to the respondent's failure to provide her with adequate training and/or supervision in her early experience of dealing with disciplinary matters which can have such a serious effect on a colleague's livelihood. She was placed in a position where she was unable to adequately fulfil her duties as an investigation manager because she did not understand her role or what her duty was. An investigation officer needs to be curious but remain neutral, with a balanced approach to all the persons involved.

18.12 The investigation procedure was inadequate. However, at this early stage the failure of the investigation was not necessarily fatal to a fair disciplinary hearing as the situation could have been ameliorated by the disciplinary hearing officer, Mr Cowsill.

Disciplinary hearing and dismissal

18.13 Mr Cowsill found cross examination uncomfortable and to his credit he did acknowledge on several occasions in cross examination, the procedural errors in the disciplinary process although sometimes only when the facts left with him with no alternative but to agree with the claimant's counsel. It is not that I found him to be a dishonest witness, but his conduct of the disciplinary hearing left him with his credibility damaged. Mr Cowsill also had a tendency to deflect responsibility for the errors made from himself to others, such as Ms Brookin, MyER Advisor or the claimant. There was also a serious uncorrected error in his witness statement which I refer to below.

18.14 As stated above, Mr Cowsill was very experienced manager, trained to conduct disciplinary hearings and he professed to be familiar with the respondent's Fair Treatment, EDI policy and disciplinary policy.

18.15 When appointed to conduct the disciplinary hearing, Mr Cowsill signed a letter of invitation to the claimant to attend disciplinary meeting. The invitation did not set out what offensive words the claimant was alleged to have said in breach of the Fair Treatment Policy, or the EDI policy, repeating the error made by Ms Brookin in breach of the disciplinary procedure. The Disciplinary policy makes it clear that he had the responsibility to ensure that the claimant the disciplinary hearing 'information pack' although it did not appear that he appreciated that fact at the time at the disciplinary hearing. He left it to others to provide the claimant with the necessary documentary evidence.

18.16 The claimant attended the disciplinary hearing still with no real understanding of the complaint being made by the Complainant and none of the documents relied upon by Mr Cowsill. She had only heard the letter of complaint being read out aloud by Ms Brookin during the investigation meeting. This was a fundamental flaw on the part of the respondent, but, again, not necessarily fatal had Mr Cowsill taken appropriate steps. Unfortunately for the claimant he did not.

18.17 Once Mr Cowsill had received the information pack for the disciplinary hearing, he did not check whether the referral to the disciplinary hearing had been made at the conclusion of the Fair Treatment Policy and ask for the paperwork relating to the Fair Treatment Policy. This was a complaint of alleged racial harassment, so powerfully and graphically set out in the letter of complaint from the Complainant about what she had heard and how it had made her feel. Mr Cowsill claimed he was familiar with the policies concerned, yet he conducted the disciplinary hearing without any thought to the Fair Treatment Policy despite the EDI policy directing colleagues with a complaint of harassment to the Fair Treatment Policy to try to resolve complaints.

18.18 Reference was made repeatedly in the investigation invitation, the suspension letter and the disciplinary hearing invitation to a breach of the Fair Treatment Policy although the Fair Treatment Policy did not feature at all in the entire process in relation to this Incident.

18.19 I find that this was another occasion when a manager, in this a case a senior manager, did not understand what the interface was between the Fair Treatment Policy, the EDI policy and the Disciplinary procedure. This is again a management training failure. What is the purpose of the Fair Treatment Policy if an experienced junior manager can decide to ignore it without explanation to the parties concerned, and more senior managers compound the failure to apply it in circumstances, such as these, for which the Fair Treatment Policy appears to be designed and would be appropriate to follow, before resorting to the disciplinary procedure. The claimant and/or Ms Bellamy raised the question at least twice why hadn't this been processed under the Fair Treatment Policy which would

have given the claimant the chance to put her side of the case to the Complainant.

18.20 In respect of the documents to be considered at the disciplinary meeting, Mr Cowsill made an assumption that Ms Brookin had sent the claimant the information pack but Ms Brookin had not. That error was compounded when Mr Cowsill failed to take the fundamental step at the beginning of the hearing to satisfy himself that the claimant had received the relevant statements and investigation in sufficient time before the disciplinary hearing commenced. He proceeded without the claimant having had any opportunity to read and digest the documents on which he relied throughout the disciplinary hearing. He denied this was an ambush, but it was an ambush and a breach of natural justice. Without the chance to read the documents the claimant could not prepare her case. That is a breach of natural justice.

18.21 When Mr Cowsill was informed during the hearing that the claimant had not received any documents, he should have provided her with a copy of the information pack and adjourned the hearing to a later date, at least three clear days later, to enable the claimant time to read, digest, take advice and prepare her response to the (at that point) unspecified allegation of breaching the Fair Treatment Policy/EDI policy.

18.22 Instead, Mr Cowsill took the extraordinary step of reading out aloud the Complainant's written statement of complaint and offered the claimant an adjournment to discuss it with her representative. He did not provide her with a photocopy of it. Mr Cowsill effectively gave the claimant a comprehension test of what was written in the Complainant's complaint. This was wholly inadequate.

18.23 Mr Cowsill therefore missed the opportunity to conduct a fair disciplinary hearing. His conduct from this point onwards continued to be in breach of the respondent's disciplinary policy and also the ACAS Code of Practice on which the respondent's disciplinary policy is based.

18.24 The Complainant's perception of what had happened on 11th June 20120 was reality for her and it explains her angry reaction. The situation that arose between these three colleagues required however an impartial assessment and whether it was reasonable for the claimant's conduct to have had that effect. It was therefore important to establish the true facts of what had happened. This did not occur.

18.25 There was also no attempt to analyse or assess what precisely the Complainant had heard or whether she had misunderstood the situation as the claimant had asserted. The Complainant's statement said: *Marian said "oh look I'm offended black lives matter" Then [the Co-worker replied by saying maybe "I should get a top that says old colleagues jobs matter" and they both laughed about the matter. As I heard this my heart just sank and I felt completely sickened inside by what I'd just heard and very angry and upset."*

18.26 As a small point, the inclusion of the word “oh” at the beginning of the phrase, as in ‘Oh! I’m offended Black Lives Matter’ is not consistent throughout the proceedings. Sometimes it was included and sometimes it wasn’t. The inclusion of the word “oh!” potentially adds meaning to what the claimant intended the words to mean, but no finding was made as to the exact phrase used – with or without the word ‘oh!’.

18.27 Mr Cowsill was aware that the claimant had an alternative version of the incident in which she vehemently and consistently protested that the Complainant had not heard the full conversation and had misunderstood the context of what she had heard. The claimant’s case was that she and the Co-worker had laughed only when they had pressed the activation button on the toy and had been unable to understand what it had said. The Co-worker’s evidence was that she had made the comment *“I should get a t-shirt with old colleagues jobs matter”* as the claimant walked away back to aisle 4. It is therefore entirely possible that the claimant laughed at the toy before she walked away and before the Co-worker had made the t-shirt comment.

18.28 This corroborates the claimant’s evidence that there was no laughter at the claimant’s comment, if it is accepted that she said “I’m offended, Black Lives Matter” and suggests that the Complainant could indeed have been mistaken as to what she heard and believed had happened

18.29 The timing of the incident based on the Co-worker’s evidence and the claimant’s evidence puts the sequence of events as the claimant approaching the Co-worker saying (on the respondent’s account) “I’m offended Black Lives Matter”, or, (on the claimant’s account) “should we be selling this, Black Lives Matter”; the Co-worker replies “Aw he is cute”; the claimant presses the voice activation button twice and they both laugh at the unintelligible sound made; and as the claimant walks away to return the doll to the shelf in aisle 4, the Co-worker makes the t-shirt comment.

18.30 It would therefore seem possible on the balance of probabilities that the Complainant may have had a misconception about what was said and when, in the timing of the words Black Lives Matter and the laughter she heard. The Complainant’s statement suggests she was sickened by the Co-worker’s t-shirt comment followed by laughter which does not correspond to the claimant’s and the Co-worker’s evidence. It was Ms Brookin’s job initially to find out what the facts were, with specific attention to detail where there is a dispute of fact. Where she did nothing to investigate further into disputed facts, it was Mr Cowsill’s job to satisfy himself what had happened and make findings of fact as I have identified above, before he could begin to reach a conclusion and form a genuine belief as to the claimant’s guilt.

18.31 Neither Ms Brookin nor Mr Cowsill took into account the voluntary corroborative statement by the Co-worker in her investigation meeting that the claimant had indeed said words to the effect “*should we be selling this?”* Those words were discussed and set out in the Co-worker’s signed investigation

meeting notes with Ms Brookin but she did not provide those to Mr Cowsill. She had instead provided the unsigned fact finding notes to him for the disciplinary. However, both of those documents were before Mr Cowsill when he conducted the Co-worker's disciplinary hearing. The Co-worker was a participant and key witness to the Incident; her evidence was crucial, relevant and should have been taken into account in the claimant's disciplinary hearing.

18.32 In cross examination, Mr Cowsill's reason for not taking into account the evidence of the Co-worker, was that it would "*give the claimant an unfair advantage*." Mr Cowsill then attempted to correct that statement but his evidence was confused and confusing. There is in fact no reasonable explanation for excluding it from the claimant's disciplinary hearing and for failing to provide her with a copy of it.

18.33 Despite the Co-workers evidence being directly relevant to the guilt or otherwise of the claimant, her evidence was not provided to the claimant and she was not re-interviewed for the purposes of the claimant's disciplinary meeting despite it corroborating the claimant's evidence with regard to her saying words to the effect "should we be selling this, Black Lives Matter".

18.34 The Co-worker also never mentioned the voice activation button on the doll in her fact finding and investigation meetings. That was another reason why she should have been re-interviewed because the timing of the laughter was in dispute – was it before or after the t-shirt comment. Did they press the voice activation button and laugh at the sound of the toy? There was the possibility that the Complainant had misunderstood the situation and the timing of laughter in conjunction with the words she had heard being spoken as she approached the claimant and the Co-worker on the shop floor. Mr Cowsill never made inquiries so that he could make findings of fact on it.

18.35 In his witness statement Mr Cowsill also stated that he reached a reasonable belief that offensive words had been spoken by the claimant based on the statements of the Co-worker and the Complainant who had corroborated each other. In fact, the claimant had stated twice in the disciplinary meeting that she had said *"it's offensive*". She also agreed she had said the words "Black Lives Matter". It therefore would have been within Mr Cowsill's reasonable opinion on the evidence before him, to find that the claimant did say words to the effect "I'm offended, Black Lives Matter" but he did not expressly find so. Even if he had made that finding expressly, it does not explain why he believed the words were offensive. There are two potential interpretations of these five words in this case. One is that the speaker is offended by the Black Lives Matter movement. The other is the speaker is offended by [something- in this case, the soft toy] because Black Lives Matter. Mr Cowsill did not decide which words or in which manner the claimant had spoken. The claimant repeatedly expressed her support for the BLM movement. He ignored the evidence of both the claimant and the Co-worker who both stated the claimant had said words to the effect "*should we be selling this*" which gave context to the comment.

18.36 Whilst the t-shirt quip spoken by the Co-worker could be found to be an offensive parody of what is the aim of the Black Lives Matter movement, it is difficult to see how the words "*should we be selling this, Black Lives Matter*? Or "*I'm offended, Black Lives Matter*" are offensive if spoken genuinely and not in a cynical or joking manner.

18.37 Mr Cowsill made no finding of fact as to the how the claimant had said the words, or what was her intention in saying the words. She consistently said she believed the black toy was similar in her opinion to the marketing logo of Robertson's jam in the 1960's and 1970's. It had been banned in the 1980s. Mr Cowsill did not address his mind to whether the claimant had either said those words "should we selling this" or if she had not, had she said the words "I'm offended Black Lives Matter" in a laughing, joking or sneering manner. The Co-worker stated that she had made her t-shirt comment to "*lighten the mood*" which suggests a serious point had been made. The Co-worker also did not say the claimant was joking or being facetious – she said she did not know what was in the claimant's mind. Mr Cowsill could not explain during cross examination what was offensive about those words I'm offended Black Lives Matter. He accepted in cross examination the words on their own were not offensive without context which would make them offensive. In his disciplinary hearing conclusions, Mr Cowsill made no finding on the context in which the words were spoken. It was critical to a finding of reasonable belief in the claimant's guilt that he knew what precisely were the words spoken and in what context. He did not establish either.

18.38 In the circumstances, I find that Mr Cowsill cannot reasonably claim to have reached a genuine belief in the facts found. He had made no findings of fact. He failed to address the allegation that the claimant had in front of the Complainant picked up a Bing toy and holding it up to the Complainant, had said *"we were having a laugh with this"* as the Complainant had alleged. He never addressed that with the claimant or the Complainant. A general statement that he found the claimant had made an offensive comment which had upset another colleague is insufficient to meet the first and second limb of the Burchell Test.

18.39 With regard to the third limb, the investigation, as I have already stated, was insufficient and not within the band of responses of a reasonable employer undertaking an investigation into similar circumstances. As stated above, not to have taken the statements of the Co-worker into account and not to have reinterviewed the Co-worker on the differences between her statement and the claimant's on the same incident, was a failure to conduct sufficient investigation in the circumstances. It was also a failure of the investigation process not to have interviewed the Complainant (which would have been done under the Fair Treatment Policy) and provide the claimant with the Complainant's considered response before he reached any decision on guilt.

18.40 The flawed investigation was initially Ms Brookin's failure, but that error was not corrected by Mr Cowsill who did not adjourn the disciplinary hearing to

complete the investigation himself to ascertain whether there could be any truth in the claimant's version of events. That would have been an appropriate step for a disciplinary hearing officer where the fundamental facts were in dispute. Even if not following the Fair Treatment Policy, Mr Cowsill needed to interview the Complainant during an adjournment of the disciplinary hearing before he could make any findings of fact on disputed issues.

18.41 I find therefore that the third limb of Burchell test has not been met.

18.42 With regard to S98(4) and the assessment of fairness, I find the decision was unfair for the following reasons some of which cross over between procedural and substantive unfairness:

18.42.1 The disciplinary procedure followed by the respondent was fatally flawed from the beginning for the reasons stated above.

18.42.2 Because of the flawed investigation procedure and the failure to take relevant witness evidence into account, the respondent could not fairly reach the conclusion that the claimant had spoken offending words. In any event at no point was the claimant told in advance of the disciplinary hearing what the offending words were or why those words attributed to her were a breach of policy. Mr Cowsill based the dismissal on the degree of offence taken by the Complainant to words possibly misheard, not established through a reasonable investigation and no assessment whether the words actually found to have been spoken could reasonably cause such a degree of offence justifying summary dismissal..

18.42.3 Mr Cowsill failed to take into account that the claimant had undergone no equality and diversity training in at least 16 years. He mistakenly believed that she had received training.

18.42.4 Mr Cowsill was inconsistent in the treatment of the claimant and the Co-worker. Mr Cowsill reached a perverse conclusion when he stated that he had found that the Co-worker had not herself said anything which breached the EDI policy. The Co-worker had acknowledged she said '*I should get a t-shirt saying old colleagues jobs matter*', a potentially offensive parody of the Black Lives Matter movement. The Complainant had also remonstrated with the Co-worker for making that comment; she had objected to the analogy between oppressive treatment of black people and a joke about old colleagues' jobs. The Complainant had been sickened at what she believed was laughter at the t-shirt comment. There was no dispute that the t-shirt comment was made. There was a dispute as to the words spoken by the claimant and the timing of the laughter.

18.42.5 In Mr Cowsill's witness statement which he had sworn as true, he claimed that the claimant had made the t-shirt comment. Mr Cowsill did not correct his statement formally at any point during the proceedings, unlike Ms Brookin who had made the identical error in her witness statement. Mr Cowsill denied that he had mistakenly attributed the Co-worker's t-shirt comment to the

claimant but he also stated that the Co-worker had not made any comment related to Black Lives Matter which is contradictory. These serious errors undermined his credibility as to what was in his thoughts at the time of dismissal and he can show no findings of fact to demonstrate his thought processes at the time. This serious error in Mr Cowsill's witness statement is at best an example of Mr Cowsill not paying sufficient attention and care in preparation of his witness statement in these proceedings. At worst it indicates that Mr Cowsill was potentially confused at the time as to the words actually relied upon to justify the claimant's dismissal but a final written warning to the Co-worker.

18.42.6 Mr Cowsill made a finding the claimant had "inadvertently" caused the offence to the Complainant, attributing to the claimant "I'm offended Black Lives Matter." There was no finding by Mr Cowsill that the claimant's comment 'I'm offended, Black Lives Matter" or "should we be selling this, Black Lives Matter" was said in any way other than innocently.

18.42.7 In terms of the disciplinary process, a finding of inadvertence in causing offence should have been taken into account as mitigation when deciding the degree of severity of the disciplinary sanction. There is no evidence that Mr Cowsill took it into account.

18.42.8 Mr Cowsill made a false assumption that the clamant had received diversity training but made no inquiry to establish that fact. It is not sufficient to rely on the availability of policies within the store or electronically on the online portal to discharge the duty to act appropriately towards colleagues if an inadvertent comment could result in summary dismissal where 28 years continuous service is irrelevant.

18.42.9 In the face of mitigating factors such as no equality and diversity training and a finding that the claimant had inadvertently caused offence to a black colleague, a reasonable employer could and would have considered alternative sanctions to dismissal such as a written warning or final written warning, the requirement to undergo diversity training, the possibility of relocating to another store if necessary and potentially changed working patterns.

18.42.10 There is no evidence that Mr Cowsill placed any weight on the claimant's 28 year service with no disciplinary record on any matter.

18.42.11 Mr Cowsill's finding that the claimant had shown minimal remorse was not supported by the evidence, as Mr Cowsill acknowledged in cross examination. The claimant had apologised to the Complainant twice as soon as she realised the Complainant was upset. It is accepted by the Complainant that the claimant had apologised. It is not relevant that the Complainant did not consider it enough at the time and described it as a 'cold apology'. The claimant was remorseful throughout the disciplinary process; she referred to her anguish at being considered a racist by the Complainant, and she referred to her wishing she had had an opportunity to speak to the Complainant to explain the situation. She expressed her support for the BLM movement and confirmed she

did not see the Complainant as a person of colour but a work colleague. Mr Cowsill's Decision Summary records that the claimant had accepted responsibility for her actions in causing offence.

18.42.12 I find that there is sufficient evidence that the claimant had shown insight into why the Complainant could be upset based on the Complainant's perception of what had happened. The claimant believed the Complainant had misheard and misunderstood the full exchange between her and the Co-worker; repeatedly stating that belief is not the same as showing no remorse. The claimant acknowledged that if the Complainant had heard the whole conversation regarding the sale of the toy, it was hard to understand why she would have been offended. The claimant also acknowledged that having only heard part of the converstion, she could understand why the Complainant could find what the claimant had said was offensive. There was insufficient evidence to support a reasonable belief that the claimant would not "correct her behaviour" if a final written warning were given instead of dismissal.

18.42.13 Mr Cowsill claimed in cross examination that he had based the decision to dismiss not only on the comment of "*I'm offended Black Lives Matter"* but also on the claimant's conduct during the hearing. He referred in his witness statement to her belligerent attitude during the hearing and specifically commented on the claimant saying that if she did say 'I'm offended Black Lives Matter', how was that deemed to be racist? as showing a complete lack of understanding as to why her actions may be considered offensive. Mr Cowsill has completely missed the point that he failed at any point to answer that question himself, whether in the disciplinary hearing or during cross examination. In cross examination he could not explain why saying "I'm offended, Black Lives Matter" breached the Fair Treatment or EDI policies. He said it depended on the context but as stated above, he made no findings of fact on the context. In the absence of any finding that the claimant was not raising a genuine concern about the toy being potentially culturally inappropriate, the fact that Mr Cowsill measured the seriousness of the claimant's alleged misconduct only by the degree of upset experienced by the Complainant, was unfair.

18.42.14 Ms Bellamy's unchallenged evidence was that Mr Cowsill had conducted the claimant's hearing differently to the Co-worker's hearing. With the Co-worker Mr Cowsill had been friendly and coaxing. With the claimant it had been more like an interrogation. That allegation is illustrated by Mr Cowsill's finding that the claimant had changed her stance during the hearing – stating that she was offended by the doll and then that she wasn't offended. Reading the record of the disciplinary hearing, Mr Cowsill asked the question and demanded that the claimant provide a yes or no answer as to whether she was offended by the toy. He did this twice. The claimant gave a qualified answer but when pressed the second time, to give a yes or no answer, she said yes, but then again gave a qualified answer. On any fair reading of the record of proceedings, the claimant consistently claimed throughout that she was not

personally offended by the toy but she believed that some people of colour could be.

19. My conclusion is that the dismissal was both substantively unfair and procedurally unfair. The decision did not fall within the band of responses of a reasonable employer conducting similar proceedings on similar facts.

Appeal hearing

20. The respondent had yet a second opportunity to take corrective action in this matter and 'cure' the defective disciplinary proceedings. It would have required Mr Houghton to provide the claimant with all of the information pack provided to Mr Cowsill, and the disciplinary hearing documents, adjourn the appeal hearing to another date, interview the Co-worker and the Complainant himself and conduct effectively a re-hearing. That option is not one that is set out in the Disciplinary policy.

21. Mr Houghton also demonstrated a lack of understanding as to the application of the Fair Treatment Policy. He not query why it was not followed before the matter was referred to a disciplinary hearing by a junior manager.

22. Mr Houghton's response to the claimant's appeal point that she had not been provided with the Complainant's statement of complaint, was to deflect the blame onto the claimant. He was of the opinion that it was sufficient for the complaint to have been read out aloud to the claimant in the investigation meeting and the disciplinary hearing and she had failed to ask for a hard copy despite being informed that she could request further information if required. Eventually six hours into the appeal hearing, Mr Houghton provided a copy of the letter of complaint and the Complainant's fact-finding notes.

23. Mr Houghton appeared reluctant to accept the obvious unfairness that Mr Cowsill had not provided the claimant with any documents prior to the disciplinary hearing, although eventually he acknowledged it was a breach of policy. He assured the claimant that he would take into account in his decision. He also accepted that Mr Cowsill had not taken into account her length of service of 28 years. He assured the claimant that he would also take that into account in his decision. There was no evidence that Mr Houghton did either.

24. Whilst the appeal hearing outcome letter states the grounds of appeal and a summary of the discussion it does not set out the grounds for upholding the dismissal. Mr Houghton asserts that he gave the grounds orally at the conclusion of the appeal hearing but it is not recorded in the appeal hearing notes. In cross examination he admitted that he could not recall what weight he had given to the failure of Mr Cowsill to state fully the charges to be met, or to provide the documents prior to the disciplinary hearing, or to the claimant's 28 years' service.

25. Mr Houghton agreed in cross examination that he had accepted that Mr Cowsill finding that it was not the words '*I'm offended Black Lives Matter'* but the

Complainant's interpretation of them, that caused the offence. Mr Houghton also acknowledged that Mr Cowsill had found that the claimant had inadvertently offended the Complainant but he did not explain what weight, if any, he had attributed to that finding of inadvertently offending the Complainant.

26. Mr Houghton concluded that the claimant had not shown any willingness to correct or change her behaviour ***since*** the disciplinary hearing took place, with particular reference to her stating she would not change her behaviour only the setting.

27. In the disciplinary hearing the claimant had stated that she sincerely regretted having the conversation with the Co-worker as she did not like to offend anyone. The claimant stated in the appeal hearing that she would not repeat or make such a comment again. That is a change in behaviour. The reliance on this ground at this point by Mr Houghton has little justification. It is contradicted by the evidence. There was sufficient evidence to show more than minimal remorse. In cross examination Mr Houghton conceded there was evidence of remorse.

28. Mr Houghton displayed a lack of awareness of the EDI policy when he explained that he found the claimant's language during the appeal hearing to be "*extremely offensive*". He referred to the claimant using the words "*of colour*". He reasoned that this illustrated the claimant's lack of awareness of the key Equality and Diversity issues.

29. I take judicial notice that the use of the words 'people of colour' to be currently, generally an acceptable, appropriate and inoffensive way to speak of a person from an ethnic minority and can be used as an alternative to BAME. The respondent submitted that the phrase 'people of colour' is found by some to be offensive. There was no evidence to support that submission. In contrast the use of the word "coloured" to describe a person of a different ethnicity is not appropriate or acceptable. Mr Houghton confused what was and was not acceptable; in so doing he relied on a completely false assumption to make a finding that the claimant had not changed her behaviour. His decision on this ground alone is sufficient to render the appeal hearing unfair.

30. Mr Houghton refused to engage with the claimant on one of her grounds of appeal - that Mr Cowsill's decision to dismiss the claimant was inconsistent with his decision to give a final written warning to the Co-worker. The Co-worker had had a second altercation with the Complainant who had remonstrated with the Co-worker about the parody of Black Lives Matter when saying 'old colleagues' jobs matter'. This is a legitimate ground of appeal and the failure to grasp it, was a procedural flaw in the appeal hearing. He also dismissed the claimant's complaint that Mr Cowsill had conducted the disciplinary hearing in a hostile and accusatory manner as being a matter for complaint under the Fair Treatment policy rather than an appeal hearing; this was another example of Mr Houghton not understanding the purpose of the Fair Treatment Policy.

31. In summary during the course of the appeal hearing Mr Houghton had acknowledged that:

- the Fair Treatment Policy had not been followed;
- the claimant had not been informed of the specific allegations or which part of the Fair Treatment or EDI policies she had breached;
- the claimant had not been provided with the evidence prior to the disciplinary hearing;
- the claimant had not had equality and diversity training;
- the claimant had inadvertently offended a work colleague;
- the claimant's length of service and clean service record had not been taken in account.

32. It is remarkable that Mr Houghton did not find these reasons combined, to be sufficient to overturn the dismissal decision and impose a lower sanction which it was open for him to do. Nor did he recognise the flaws in the investigation hearing or Mr Cowsill's failure to gather the evidence to support making a reasoned and just decision. He made no critical analysis of Mr Cowsill's decision at all and was generally supportive of Mr Cowsill's conduct of the hearing. In the circumstances, the appeal hearing did not come even remotely close to remedying errors in the disciplinary hearing.

33. Standing back and looking at the evidence as a whole, the clear impression from the behaviour of the respondent's managers in the conduct of these proceedings, is one of a lack of impartiality, a lack of understanding of the respondent's policies and the correct application of them. The fact that sensitivities were heightened at the time because of the tragic circumstance of George Floyd's death, a fact acknowledged by Mr Cowsill, it is all the more reason to take great care that proper procedures are followed thoroughly, objectively and fairly so that justice can be done. Given the size and resources of the respondent, the fact that so many fundamental procedural errors were made is unacceptable. It is not only the case that the claimant was treated unfairly during the course of the proceedings but the process followed was a disservice to the Complainant and also to the respondent's cause to being an inclusive employer.

34. In summary the decision to dismiss was not well founded and is unfair.

35. The matter is to be listed for a remedy hearing.

Employment Judge Richardson
21 June 2021