EMPLOYMENT TRIBUNALS

Claimant		***Respondent***
Mr O Adenusi	**AND**	London Underground Limited

Heard at: London Central **On**: 14-15 November 2019

Before: Employment Judge Nicolle

Representation
For the Claimant: Mr D Lemer, of Counsel
For the Respondent: Ms S Tharoo, of Counsel

RESERVED JUDGMENT

The claim for unfair dismissal is upheld.

REASONS

1. The Claimant brings a claim for unfair dismissal. The issues are as follows:

Unfair dismissal

2. Has the Respondent shown the reason for dismissal?

3. The Claimant was alleged to have made a series of inappropriate comments of a sexual nature during the RTWI with C1 to include:

- that it was important that she gets better after her gynaecological surgery as “she would need to please her future husband”;

- that she looks like she kept fit as you could tell from her body shape; and

- that when the Claimant had first seen her, he had thought "wow" and had wanted to sleep with her but having found out that she was in a relationship he had now had to control his thoughts.

4. That in the period from the RTWI until 4 August 2017 the Claimant had continued making comments of a sexual nature to C1 to include:

- a comment to the effect that he would do that too if he saw her referencing concern expressed by C1 that a customer had been staring at her through the window to the customer services manager's office at TCR;

- comments about C1 going to the gym and keeping fit and not having a sweet tooth, and that he could tell from her body shape that she works hard at the gym; and

- comments about C1's breasts and body.

5. Was the dismissal fair or unfair applying the band of reasonable responses? As part of that:

following the 3-stage test in British Home Stores v Burchell [1978] IRLR 379:

- did the Respondent genuinely believe the Claimant was guilty of misconduct?

- did they hold that belief on reasonable grounds?

- did they carry out a proper and adequate investigation?

6. Was dismissal a fair sanction? Mr Lemer acknowledged that if it were to be accepted that the Claimant had behaved as alleged, which it is not, that the Respondent's decision to dismiss the Claimant was within the range of reasonable responses. He confirmed that the Claimant's challenge to the fairness of the dismissal was based on whether the Respondent had undertaken a reasonable investigation, and whether on the basis of this investigation, the Respondent had reasonable grounds for suspicion that the Claimant had committed the acts potentially constituting gross misconduct.

7. Was there a breach of the ACAS Code on Disciplinary and Grievance procedures?

8. If the dismissal was unfair on procedural grounds, what is the chance that the Respondent would have dismissed the Claimant even if they had followed fair

procedures and on what date would the dismissal have taken place? It was agreed with the parties that I should consider this issue as part of the decision on liability.

9. Should there be any deduction from the basic award for conduct prior to dismissal? Regarding the compensatory award, did the Claimant cause or contribute to his dismissal and if so, to what extent?

10. Should the Claimant succeed, remedy. The Claimant is seeking reinstatement or reengagement and these issues would need to be considered at a remedies hearing.

The Hearing

11. The Tribunal heard evidence from the Claimant, and for the Respondent from Erica Hudson (Ms Hudson), Abdul Rahim (Mr Rahim) and Mercillina Adesida (Ms Adesida). There was an agreed trial bundle of 259 pages.

Findings of Fact

Background

12. The Claimant started work with the Respondent on 4 January 1994. His most recent position was as a Customer Services Manager (CSM) at Tottenham Court Road (TCR). His employment was terminated for alleged gross misconduct with immediate effect on 5 December 2018.

13. As a CSM at TCR the Claimant had responsibility for the management of the station and the supervision of the staff members employed at TCR. The Claimant gave evidence that his working time was split with approximately 30% being in the CSM's office with the remainder on the gate line.

14. The Claimant's dismissal arose as a result of a complaint raised by a Customer Services Assistant, referred to as C1 for reasons of anonymity, that the Claimant had behaved inappropriately towards her in the period from 16 April 2017 to 10 July 2017.

15. The identity of C1 was known to both the Claimant and the Respondent. The anonymisation was not undertaken by the Tribunal but was the position adopted by the Respondent throughout the disciplinary procedure and Tribunal pleadings. The Respondent adopted a similar approach with witnesses referred

to as W1 to W10 none of whom gave evidence to the Tribunal. I did not consider that this resulted in any prejudice to the Claimant.

16. C1's work location was transferred to TCR with effect from 18 March 2017, as part of the Respondent's Fit for the Future Stations initiative, which included a series of mass moves and grade changes.

17. In early July 2017 Tracey Simms (Ms Simms), an Accredited Manager of the Respondent, was contacted by Jon Abdullar (Mr Abdullar) an RMT representative. Mr Abdullar told Ms Simms that C1 had mentioned that she was having some issues in relation to sex harassment but was scared to report it and needed to speak to someone about her options.

18. Ms Simms arranged to meet with Mr Abdullar and C1 on 10 July 2017. C1 referred to two CSMs (R1 and the Claimant) and a British Transport Police (BTP) Officer as the harassers.

19. On 18 July 2017 Mr Abdullar advised Ms Simms that C1 had decided that she wished to formalise her complaint. Ms Simms interviewed C1 in the presence of Mr Abdullar on 4 August 2017.

The RTWI

20. The trial bundle contained a note of the interview between C1 and Ms Simms dated 4 August 2017. C1 referred to the return to work interview (RTWI) which had taken place on 16 April 2017 following a period of sickness absence between 9 April and 15 April 2017. The RTWI was conducted by the Claimant.

21. A RTWI is in accordance with the Respondent's policy following a period of sickness absence. During the course of such meetings the returning employee is asked questions regarding the medical reasons for their absence and any steps which can be taken by the Respondent to assist them on their return to active employment. Ms Hudson said that such meetings typically last between 10 and 30 minutes depending on the duration of the absence and the extent of issues being discussed.

22. Either during the course of, or subsequent to, the RTWI a form is completed summarising matters discussed. A three-page document was included in the bundle (pages 36-38) of C1's RTWI on 16 April 2017. The Claimant typed this form during the RTWI with C1. It is signed by both the Claimant and C1.

23. C1's absence from work was due to a gynaecological condition. Whilst the Claimant had been given training on the conduct of RTWIs the Respondent does not have any policy on whether it is appropriate for male managers to undertake

RTWIs with female employees where the reason for absence involves female specific medical conditions.

24. The Respondent's RTWIs are more thorough than most employers would adopt particularly in the context of what was in C1's case a relatively short absence. C1 alleged that the Claimant's enquiries regarding her medical condition extended into unnecessary and inappropriate questions and comments.

25. C1 raised concerns in early July 2017 about conduct she was subject to in relation to sex harassment with Jon Abdullah, RMT rep (Mr Abdullah). Mr Abdullah then contacted Tracey Simms, Accredited Manager (Ms Simms) by telephone on 10 July 2017. Ms Simms met with Mr Abdullah and C1 on 10 July 2017. At this meeting C1 made references to two CSM's (R1 and R3) and a BTP Officer (but all referred to anonymously at this time) as being responsible for the alleged sexual harassment.

26. On 18 July 2017 Mr Abdullah advised that C1 had decided that she wished to formalise her complaint. Ms Simms interviewed C1 in the presence of Mr Abdullah on 4 August 2017.

27. During the meeting on 4 August 2017 C1 alleged that the Claimant had made a series of inappropriate comments of a sexual nature during the RTWI to include:

- that it was important that she gets better after her gynaecological surgery as "she would need to please her future husband";
- that she looks like she kept fit as you could tell from her body shape; and
- that when the Claimant had first seen her, he had thought "wow" and had wanted to sleep with her but having found out that she was in a relationship he had now had to control his thoughts.

28. C1 went on to state that in the period from the RTWI until 4 August 2017 the Claimant had continued making comments of a sexual nature to her to include:

- a comment to the effect that he would do that too if he saw her referencing concern expressed by C1 that a customer had been staring at her through the window to the customer services manager's office at TCR;
- comments about C1 going to the gym and keeping fit and not having a sweet tooth, and that he could tell from her body shape that she works hard at the gym; and
- comments about C1's breasts and body.

29. C1 stated that the RTWI lasted for 2 hours at which at least 45 minutes had involved questions relating to her female condition. C1 stated that she found the questions intrusive and they made her feel uncomfortable. The Claimant gave evidence that he did not accept he asked unnecessary and intrusive questions regarding C1's medical condition. He stated that she volunteered more information than he required regarding her medical condition. He also stated that when she initially phoned in sick and spoke to another staff member that she had provided unnecessarily detailed information regarding her medical condition to include reference to "bleeding". A dispute exists as to the duration of the RTWI. The Claimant believes it lasted for approximately 30 minutes. I return to this issue later in the decision.

30. A note of the interview on 4 August 2017 made by Ms Simms, and signed by C1, records that C1 had returned to the gate line after the RTWI and advised that she was confused by what had occurred. It then records that C1 advised that she had told W4 (a male employee at TCR) that something "weird" had occurred to her and relayed the comments about a CSM (the Claimant) saying "wow" and that he told her that he wanted to sleep with her. C1 did not mention the name of the CSM that had made the comments. It is apparent from the content of the note that Ms Simms would almost certainly have been aware of the identity of R3.

The Investigation

31. As a result of Ms Simms not having capacity to undertake an investigation into the allegations made by C1 against the Claimant the matter was assigned to Ms Hudson with effect from 9 August 2017. Ms Hudson recommended that the Claimant should be suspended whilst the matter was investigated.

32. The Claimant was suspended on full pay with effect from 16 August 2017. In a letter from Tony Young, Area Manager, TCR (Mr Young), dated 16 August 2017 the Claimant was advised of the fact of his suspension and that it was as a result of C1 having made a serious allegation against him regarding inappropriate comments which may have been made during a return to work interview. The letter went on to state that notwithstanding the Claimant's suspension that no pre-judgement about the allegation against him had been made and that it was merely a precautionary measure whilst the investigation was undertaken. He remained suspended on full pay until his employment was terminated for gross misconduct on 5 December 2018 and therefore a period of nearly 16 months.

33. On 1 September 2017 Ms Hudson interviewed C1 in the presence of Mr Abdullar, to introduce herself as the new Accredited Manager, and to clarify some specific points relating to C1's complaint.

34. C1 said that the RTWI had been over an hour long. This contrasted with her previous statement in the interview with Ms Simms that it had lasted two hours. At no point was CM challenged by Ms Hudson, Mr Rahm or Ms Adesida regarding the discrepancy in her account of the duration of the RTWI, nor in respect of the Claimant's evidence that it lasted for a maximum of 30 minutes. I find that the duration of the meeting was likely to have been between 30 and 45 minutes. I reach this finding based on the discrepancy between C1's account of its duration between her interview with Ms Simms on 4 August 2017 and that with Ms Hudson 1 September 2017 and the evidence of the Claimant that any duration beyond 30 minutes would have been obvious to other staff members at TCR.

35. C1 said that she felt embarrassed by the number of complaints she has made. This represented a reference by C1 to previous complaints regarding R1, R2, the BTP Officer and customers at TCR following an incident on 3 July 2017.

36. In an email of 9 September 2017, the Claimant complained to Ms Hudson of his concern that there had been a breach of confidentiality about the reason for his suspension. As a result of this concern Ms Hudson undertook fact finding interviews with W6, W7 and W9, but as these interviews were not directly irrelevant to the Claimant's dismissal, there is no need for me to refer to them in this decision.

37. The Claimant attended a fact-finding meeting with Ms Hudson on 26 September 2017. He was accompanied by a trade union representative, Abdel Zaki, (Mr Zaki). At the meeting the Claimant was asked about the comments C1 alleged he had made to her and he denied having made any inappropriate comments. When asked why C1 might make such allegations he responded, "I don't know why she would say that".

38. During the meeting the Claimant was asked about what level of contact with C1 he had prior to her raising a complaint against him. The Claimant referred to her twice having asked to borrow his phone charger and asking to borrow a pen a few times.

39. The Clamant also referred to C1's tendency to keep disappearing from the gate line. The Claimant referred to a conversation with Sue Brown, customer services supervisor (Ms Brown) regarding his concern as to C1's whereabouts. The Claimant indicated the C1 became upset regarding this issue.

40. The Claimant also referred to an issue between C1 and Tony Young (Mr Young) and C1's concern that Mr Young was already taking a negative approach towards her as a result of her sickness absences.

41. The Claimant raised the issue concerning his having mildly reprimanded C1 regarding unauthorised and announced absences from the gate line in the wider context of Mr Young's previous concerns regarding her absence record, during the course of his appeal hearing. The Claimant's position being that this was potentially relevant evidence as to the possible motivation of C1 to make "false" allegations against him.

W4

42. Ms Hudson undertook a fact-finding interview with W4 (another employee at TCR) on 17 November 2017.

43. Ms Hudson asked W4 whether he recalled C1 speaking to him about a CSM and his behaviour towards her. W4 responded by saying it was "quite a while ago, months ago but I do remember". He referred to it as being a conversation on the gate line and described C1 as being "rattled". He stated that she was "quite serious" but she was not crying. He said that his impression of her from knowing her is that she is "not jokey" about this sort of situation. W4 said that C1 did not specify that it was the Claimant who was responsible but C1 let him guess names.

44. W4 was asked for his impression of the Claimant. He stated that he was "fine, cool, knowledgeable and a professional".

45. Ms Hudson asked W4 whether he could remember how long C1 was away from the gate line at the RTWI. He responded that he did not recall the meeting being on the same day but that C1 had told him quite urgently.

46. It subsequently became apparent on investigation by Mr Rahm that W4 was not at work on 16 April 2017 (the day of C1's RTWI). It was contended on behalf of the Claimant that there was an apparent discrepancy in C1's initial account which implied she had raised the matter with W4 on the day of the RTWI. Mr Lemer argued that it could have been at any time up to the Claimant's suspension. However, no further enquiries were made to ascertain when C1 raised her concern with W4.

47. I find that it was likely that C1 raised the matter with W4 relatively soon after the RTWI, but I am not in a position to form a view as to whether this was a matter of days or weeks after the alleged incident. I consider it to be unlikely that it was a matter of months later and I make this finding based on W4's evidence

that C1 had told him "quite urgently" and also as a result of the Claimant's evidence that W4 was making comments in the control room, which he overheard, to the effect that he was going to be giving evidence involving the Claimant. This would imply that that the conversation between C1 and W4 took place prior to the Claimant's suspension on 16 August 2017.

W5

48. On 23 November 2017 a fact-finding interview took place between Ms Hudson and W5. W5 is a female employee based at TCR. She stated that she "liked" the Claimant. She did not recall the Claimant making any inappropriate comments to or regarding C1. She was specifically asked whether she had observed the alleged incident where a customer stared at C1 through the customer services office's window and the Claimant was alleged to have made an inappropriate remark to the effect of he would do the same. W5 confirmed that she had not seen or heard any such incident.

49. W5 did, however, refer to the incident on 3 July 2017 when C1 had been subject to inappropriate comments from members of the public. W5 stated that "C1 is a very young girl and her reaction to those blokes astonished me a bit". "I felt it was a bit of an overreaction because they were 2 drunken p-brains". She went on to state that she feels that C1 had "underlying issues she's not dealt with".

50. W5 concluded by saying "I just think it's really sad" if the Claimant has been inappropriate, I can't believe it of him. I can't believe he's so stupid. If she is making it up its nasty. I don't know either way".

W10

51. On 28 December 2017 Ms Hudson received a phone call from Mr Abdullar to say that he had found out from a CSM at King's Cross about a possible witness who had information about the Claimant's behaviour towards female staff. Mr Abdullar said that the subject of the Claimant had come up in general conversation and the comment from another CSM was to the effect that the Claimant was a "sexual predator".

52. As a result of this previous allegation coming to Ms Hudson's attention, she considered it appropriate to arrange to interview the CSM (referred to as W10). W10 stated that the incident occurred when she was working at Camden in 2012 in the CSM office. In summary W10 referred to the Claimant making advances to her and having attended her home out of work but by a prior invitation. W10 referred to the Claimant having made an unsolicited and unwelcome advance

when he was at her home which involved him touching her on her upper right thigh. She then referred to the Claimant ignoring her at work.

53. As a result of the evidence from W10 Ms Hudson arranged a further interview with the Claimant on 13 February 2018. The Claimant was accompanied by Mr Zaki. Ms Hudson referred to the report from W10 and indicated that whilst not directly related to the complainant under investigation it could show a pattern of behaviour. When the allegations made by W10 were put to the Claimant he denied that any such incident had taken place.

Investigation conclusions

54. It was not until a letter dated 10 May 2018 that Ms Hudson advised the Claimant that having fully investigated and considered all the available information she considered that there was a case to answer and that he was being referred to a Company Disciplinary Interview (CDI) on a gross misconduct charge. Ms Hudson met with the Claimant on 11 May 2018 to communicate this to him in person.

55. Ms Hudson produced a three-page report dated 11 May 2018 with appendices of the various interview notes. Appendix C to the report contained a detailed analysis by Ms Hudson of the allegations against the Claimant and her summary of conclusions and her decision as to next steps.

56. Ms Hudson summarised the evidence and made the following findings based on that evidence:

- W5 is unable to corroborate C1's complaint; however, C1 was not sure if W5 had witnessed the Claimant's alleged comments;
- W4 confirms that C1 spoke to him "urgently" about the Claimant's behaviour in the RTWI and she was affected by it. Ms Hudson observed that the witness testimony of the immediate impact on a complainant can be taken into account; and
- In relation to W10, Ms Hudson took these complaints as evidence of two female members of staff, who are not known to each other, making allegations of unwanted sexual advances towards them by the Claimant.

57. Ms Hudson assessed the relative credibility of C1 and the Claimant. She found C1 at the fact-finding interviews with Ms Simms on 4 August 2017 and her on 1 September 2017 to be creditable. She referred to her as being "anxious and stressed". She also referred to a "pattern of behaviour" (given the earlier allegation from W10) and W4s confirmation of C1's account that she had told him what had happened shortly afterwards. She therefore concluded that it seems

most likely that C1's account is truthful. She concluded that, on the balance of probabilities, the Claimant did behave as alleged by C1 and, that this was unwanted and distressing to C1.

58. In her witness statement Ms Hudson explained that she had been unable to complete the investigation as quickly as she would have liked given the demands of her job and also being involved in various other investigations.

The CDI

59. By a letter dated 27 July 2018 the Claimant was instructed to attend a Company Disciplinary Interview (CDI), which was ultimately scheduled for 4 September 2018. The letter set out the allegations made by C1 against the Claimant as set out in paragraphs 27 and 28 of this Decision. The Claimant was advised that as he faced a charge of gross misconduct that dismissal was one possible outcome.

60. At the meeting on 4 September 2018 the Claimant was accompanied by Wendell Daniel, a trade union representative (Mr Daniel). The meeting was chaired by Mr Rahm, an Area Manager and the second Chair was Darren Miles, a Train Operations Manager.

61. Prior to the CDI, in an email dated 23 August 2018, Mr Daniel had requested the attendance as witnesses at the CDI, C1, Mr Abdullar and W10. This request was denied by Mr Rahm in an email dated 24 August 2018. He explained that the people identified "are not witnesses as they are already involved in the case and their statements/interviews are already present in the brief".

62. The Tribunal was referred to a document entitled LU Discipline Support Pack dated 25 April 2004 (revised 13 January 2006). This contains a section dealing with witnesses and a CDI. Relevant sections are as follows:

- The CDI may request a witness to attend where clarification is necessary regarding evidence the witness has already provided, or in light of further information becoming available, subject to the witness agreeing their attendance at the CDI;

- Witnesses will not be called if it is sensible that their anonymity is preserved; and

- An employee may request a witness to attend the interview. The managers conducting the CDI must be satisfied that the witness has

something specific to contribute in addition to their written statement. It is the final decision of the chairperson to allow the attendance of witnesses.

63. Mr Daniel produced a 56-page typed document in support of the Claimant at the commencement of the CDI. In this document and during the course of the hearing, which lasted from 10:05 to 13:10, Mr Daniel put forward multiple, and to a certain extent conflicting, explanations as to why C1 may have been motivated to make false allegations against the Claimant. It is not necessary for me to address these matters but rather to focus on those issues which were points of dispute in the evidence, and relied upon by the Claimant, in support of the contention that the investigation undertaken by the Respondent fell short of the required standard of reasonableness.

64. As the notes from the CDI run for 22 pages it is not necessary for me to summarise them in detail. It is, however, relevant for me to refer to the following matters raised during the CDI.

65. The Claimant referred to the issue involving C1's absences from the gate line, her IBS and C1's concern regarding the role of Mr Young and in particular relating to her previous absence record. The Claimant went to state that he perceived that C1 believes that he was telling Mr Young things about her.

66. The Claimant was asked about the duration of the RTWI. He stated that it was "25-35 minutes at most" and not 2 hours.

67. Two pages of the notes involve the Claimant being asked questions concerning the allegation of W10. In short he stated "it never happened that way. I 100% deny it".

68. During the course of the CDI Mr Miles raised the issue of W10. Following Mr Miles' questions regarding the W10 incident he asked general questions regarding the Claimant's relationship with staff members.

69. In relation to W10, Mr Daniel stated that this was a "historical allegation" that should never had been used as a part of the brief. He also stated that even if the allegations were correct, they did not occur at work.

70. It was not until a letter dated 5 December 2018 that Mr Rahm advised the Claimant of the outcome of the CDI. In a 16-page letter Mr Rahm concluded that the panel (he and Mr Miles, the second Chair) had decided to summarily dismiss the Claimant with immediate effect.

71. Mr Rahm confirmed that W4 had been absent on 16 April 2018. However, the panel noted that C1 did not state that she had informed W4 of the incident

immediately after the RTWI. The panel did not, however, go onto express a finding as the likely timing of C1 having the conversation regarding the Claimant with W4.

72. The panel found that on the balance of a probability C1's account of events was more creditable then that of the Claimant. The panel did not specify in what respects it reached this decision.

73. The panel did refer to what it considered to be the "unreasonably long time" from the complaint first being raised on 10 July 2017 to the outcome on 5 December 2018 but did not consider this critical to the issue of sanctions.

The Appeal

74. In a memorandum dated 5 December 2018 the Claimant appealed against the CDI decision on the grounds of the severity of the sanction, leniency and misdirection.

75. In a letter dated 2 January 2019 from Ms Adesida, Head of Customer Services, Central Line, the Claimant was invited to attend an appeal hearing on 17 January 2019.

76. At the appeal hearing the Claimant was again accompanied by Mr Daniel. Mr Daniel produced a lengthy submissions document on the Claimant's behalf (17 pages).

77. The appeal hearing lasted from 11:30am to 14:05. Ms Adesida gave evidence that she considered that the appeal constituted a review rather than a rehearing.

78. The Claimant raised the matter relating to C1, her IBS, breaks from the gate line and the role of Ms Brown and Mr Young and this was put forward as a potential ulterior motive for C1 making false allegations about him. For the first occasion the Claimant referred to a letter from Mr Young regarding C1 taking short breaks. The Claimant was of the view that C1's allegations may have arisen as a result of him not previously producing this letter which supported her taking short breaks.

79. It took until 9 April 2019 for Ms Adesida to reach her decision which was confirmed in a letter to the Claimant of that day.

80. The letter referred to Ms Adesida's concern that the Claimant had withheld some information from Ms Hudson so as to protect Mr Young, his manager. On

giving evidence Ms Adesida stated that the Claimant's failure to produce all relevant evidence as part of the investigation and/or at the CDI was a factor that she had taken into account in assessing his credibility.

81. Ms Adesida, at paragraph 26 of her witness statement stated that the evidence of W4 was important in deciding to prefer the evidence of C1.

82. At paragraph 27, Ms Adesida expressed concern regarding the apparent degree of "over familiarity" between the Claimant and C1 particularly where he had referred to her as being like his "younger sister". She also expressed concern regarding possible overfamiliarity with W4 to include the Claimant talking about "taking him under his wing". Ms Adesida considered that C1's version of events continued to appear more credible. As such she concluded that the appeal would be rejected, and the dismissal upheld.

Law

83. Under section 98(1)(a) of the Employment Rights Act 1996 (the "ERA") it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

84. Under s98(4) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.

85. In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in British Home Stores v Burchell [1980] ICR 303, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the

EAT in Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09.

86. In considering the fairness of the dismissal, the tribunal must have regard to the case of Iceland Frozen Foods v Jones [1982] IRLR 439 and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the ERA. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

87. The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.)

88. In reaching their decision, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

89. The ACAS Code provides, with underlining added where applicable for emphasis:

5*. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases, this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.*

8. In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action.

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

11. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case

Conclusions

90. I now apply the law to the facts to determine the issues. If I do not repeat every single fact, it is in the interest of keeping these reasons to a manageable length.

Unfair dismissal

91. The first issue is whether the Respondent has shown the reason why the Claimant was dismissed. I find that they have. The Claimant was dismissed for gross misconduct, i.e. for inappropriate comments amounting to sexual harassment of C1 in the period 16 April 2017 until 10 August 2017. It was not suggested on behalf of the Claimant that the Respondent had any alternative, or ulterior, motive for his dismissal.

92. I now have to decide whether it was fair for the Respondent to dismiss the Claimant for that reason which includes considering whether they followed a fair procedure. I have to apply the band of reasonable responses.

93. First, I will go through the three stages in the case of *BHS v Burchell.*

94. Stage 1: did the Respondent genuinely believe the Claimant was guilty of this misconduct? I find that they did. This was based on C1's complaint together with Ms Hudson's view, given the evidence of W10, that he had a possible propensity to behave in this way.

95. Stage 2: did the Respondent hold that belief on reasonable grounds? This issue is interrelated with the extent to which the Respondent undertook a reasonable investigation and whilst I find that the Respondent held its belief in the Claimant's culpability on reasonable grounds on the basis of the investigation as undertaken I find that the investigation was outside the range of reasonableness.

96. Stage 3: did the Respondent carry out a reasonable investigation? I find that they did not. Whilst the Respondent undoubtedly carried out a lengthy investigation involving significant managerial time, I consider that the investigation was inherently flawed in that there was a significant tendency throughout to accept without challenge the veracity and consistency of the initial allegations made by C1. I further find that where potential inconsistencies in the version of events put forward by C1 became apparent during the course of subsequent interviews, that there was failure by the Respondent to make reasonable enquiries as part of the investigation to ascertain relevant information and to put such inconsistencies to C1.

97. I refer to the following respects in respect of which I consider that the investigation undertaken by the Respondent was deficient.

RTWI

98. First, I find that a failure to carry out further enquires and challenge C1 regarding the duration of the RTWI was a significant short coming. I consider that the Respondent's witnesses rather glossed over this deficiency. For example, Mr Rahm said it may merely have seemed to have been longer from C1's perspective. Given that alleged inappropriate comments from the Claimant to C1, during the course of the RTWI, were a significant factor I consider that the duration of that meeting was a much more material factor than the Respondent's witnesses perceived. Whilst it is undoubtedly the case that inappropriate comments could have been made in a relatively short meeting it would be significant, in my opinion, if the Claimant had artificially extended the duration of the meeting beyond that customarily required with a view to engineering the opportunity for him to engage in inappropriate dialogue with C1.

99. Mr Rahm's evidence was that it would have been too late to check CCTV at TCR which is generally destroyed within 14 days. It would, in my opinion, have been possible to make enquiries of other employees at the station as to what they recollected regarding the duration of the RTWI. Was there anything out of the ordinary in terms of the absence from normal duties of the Claimant and C1 on 16 April 2017? Would they have noticed if there had been? In any no reasonable employer would have failed to challenge C1 as to the apparent disparity in her original evidence of 2 hours (subsequently reduced to 1 hour) where the Claimant's evidence was that the meeting had had a duration of no more than 25-35 minutes.

W4

100. Secondly, a failure to make enquires as to the date upon which C1 reported her concerns regarding the Claimant's conduct to W4. Whilst Mr Rahm was

thorough in checking the staff absence records at TCR to ascertain that W4 was not at work on 16 April 2017, he did not make further enquires as to when the conversation was likely to have taken place. I find that there was an assumption that it took place "promptly" after the RTWI. Nevertheless, I find that the most obvious reading of the original complaint raised by C1 was to the effect that she had gone immediately from the RTWI to the gate line and had raised her concern regarding the conversation with W4 at that point. This is consistent with W4 referring to her as appearing "rattled".

101. I consider that this is relevant factor particularly in a case where it involves one person's word against another. It is also significant in a case where the Respondent's witnesses all place significant reliance on the evidence of W4. In reality W4 had no evidence of any misconduct by the Claimant and his evidence was solely to report the fact that at a date of uncertain provenance that C1 had reported a concern regarding the Claimant's conduct towards her.

102. Given the significance the Respondent placed on W4 I find that no reasonable employer would have failed to carry out all lines of enquiry to ascertain when W4 recollects this conversation taking place. Further, no reasonable employer would have failed to challenge C1 as to an apparent inconsistency between her original complaint which inferred that she had immediately raised the matter with W4 and the evidence subsequently coming to Mr Rahm's attention that this could not have been on 16 April 2017. This should have included asking her when she believed the conversation took place, why she appeared to initially indicate that it was on the same day, why she would have still appeared "rattled" if she was not referring to an incident which had taken place on that day (or possibly not for some significant time previously).

W5

103. Thirdly, I also find that W5's evidence, that she had not observed any inappropriate conduct from the Claimant in respect of his comments following a customer staring through the office window at C1, should have been put to C1. I also consider that W5's view that C1 was "over reacting" to incidents of harassment should have been put to her. I find that no reasonable employer would have failed to challenge C1 on these issues.

C1

104. Fourthly, I find that no reasonable employer would have failed to challenge C1 regarding the Claimant's contention that she had a motive to make false allegations against him as a result of the so-called Toby Young/Sue Brown/absence from gate issue and the letter from Mr Young regarding C1's medical condition and need for frequent toilet breaks.

105. Fifthly, I find that C1 should have been questioned regarding the timing of her raising a complaint regarding the Claimant on 10 July 2017 albeit that he was not named specifically until 10 August 2017. I consider this to be relevant given that there had been a period of approximately three months from the RTWI and C1 had more recently been subject to an incident of harassment from customers on 3 July 2017.

106. I also consider that no reasonable employer would have failed to have enquired of C1 as to the nature of her ongoing working relationship with the Claimant in the period subsequent to the RTWI, and in particular his evidence that she worked with him normally, to include making what he considered to be unnecessary requests to borrow pens and a phone charger.

107. I find that in various respects that there was an approach from the Respondent whereby it accepted the credibility of C1's complaints without sufficient rigor. Given the seriousness of the allegations, and the potential impact on the Claimant of these allegations being substantiated, it was imperative that full enquiries should have been made of all evidence sought to be relied on as part of the investigation.

108. I find that the Respondent's deficiencies in this respect were partly as a result of the work and time pressures on Mr Hudson, Mr Rahim and Ms Adesida. I also find that it was contributed to by a reluctance to challenge the credibility of C1. This was particularly significant given that the Respondent's witnesses formed the view that they preferred the credibility of C1 over the Claimant. However, in reaching this conclusion they did not in my view adequately challenge C1 where there were potential inconsistencies in her version of events.

109. For the reasons as set out above I find that the investigation undertaken by the Respondent did not fall within the range of reasonable responses open to an employer.

The Appeal

110. I find it inappropriate that Ms Adesida took into account the Claimant seeking to raise a new matter, (the Toby Young letter) as a possible motivation for C1's allegations, during the course of the appeal hearing as going to his credibility in that he failed to raise it previously. This would in my opinion create a disadvantage to an appellant seeking to raise new matters, whether as evidence to the substantive decision to dismiss for gross misconduct, or by way of mitigation. I consider that this represented a false logic on Ms Adesida's behalf.

However, as this was at the appeal stage, I do not consider that this deficiency, in itself, contributed to the unfairness of the Claimant's dismissal.

W10

111. I find that the approach of the Respondent in respect of W10 was unsatisfactory.

The panel under section appendix C10 of its decision stated:

"The panel will disregard any information that does not directly relate to you and will only deliberate on information that relates on material aspects on the case".

112. I consider this to be a potentially ambiguous response. It does not address the specific concern raised as to whether matters relating to W10 were being relied on as evidence of the Claimant's credibility and/or potential propensity to behave in the manner alleged by C1.

113. Whilst Ms Hudson gave evidence that W10's evidence was a factor she took into account in assessing the credibility of the Claimant, and his propensity to behave in the manner alleged by C1, it is significant that the notice to attend a CDI (her letter dated 27 July 2018) did not refer to W10 and the allegations the Claimant was charged with related solely to those made by C1.

114. At paragraph 28 of his witness statement Mr Rahm said that the CTI panel did not take into account W10's evidence at all as we agreed that it was too historic and had not been reported by W10 at the time. He went on to state it had no relevance or direct connection to the allegations raised by C1.

115. Whilst I consider that the inclusion of significant questions from the CDI panel, in particular Mr Miles, on the allegations made by W10, to have been inappropriate I do not find that this makes the Claimant's dismissal unfair as it was not a matter relied on by the CDI panel in their decision to dismiss the Claimant for gross misconduct.

Delays

116. The ACAS Code provides with underlining added where applicable for emphasis:

5*. It is important to carry out necessary investigations of potential disciplinary matters <u>without unreasonable delay</u> to establish the facts of the case. In some cases, this will require the holding of an investigatory meeting with the employee*

before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

8. In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action.

11. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

117. I find that it was wholly unsatisfactory that there was such a significant time delay in the investigation, and in particular the delay from the final fact-finding interview with the Claimant on 13 February 2018 in advising him that he was being referred to a CDI.

118. It is wholly inappropriate that it took nearly sixteen months from C1's complaint being raised until the Claimant's dismissal. Whilst he continued to be paid in full during this period it would inevitably give rise to the risk of evidence going stale. It also left the Claimant in a considerable state of limbo for much longer than was necessary. It would also have been unsatisfactory from C1's perspective. I do not, however, find that the length of the delay was in itself a sufficient factor to render the Claimant's dismissal unfair.

Procedure and the ACAS Code

119. I find that the Claimant knew the allegations against him.

120. I find that it was appropriate, and in accordance with the Respondent's disciplinary procedure, for Mr Rahm to decline the request for the attendance of C1, W10 and Mr Abdullar. This was particularly the case given that the Claimant had received, as part of the CDI initiation pack, the transcripts of interviews with C1 and W10 and was also aware of the circumstances of Mr Abdullar pertaining to W10. I therefore do not find the failure of the Respondent to permit the Claimant's request for the attendance of these witnesses at the CDI was in itself unfair.

121. I do, however, consider that the Claimant should have been advised by Mr Rahm that he had the opportunity to raise points of challenge to the evidence of C1 and that Mr Rahm would then put such points to her. This did not take place despite Mr Rahm acknowledging in cross examination that this was an option available to him. This is relevant to my findings that the investigation undertaken was outside the range of reasonable responses.

Polkey deduction

122. I now need to consider what, if any, percentage reduction should be made to the compensatory award on the basis that if the Respondent had carried out a reasonable investigation the Claimant would have been dismissed in any event.

123. It was acknowledged by both Mr Lemer and Ms Tharoo that this was a difficult question given that it depended on the answer to hypothetical questions as to what outcomes would have been reached had various matters been investigated further. For example, it may well have been that W4 would have confirmed that the matter was reported to him by C1 on say 17 April 2017 (the day after the RTWI).

124. The principles in *Polkey* v AE Dayton Services Limited CA [1987] 1 All ER 984 have been consistently applied by the EAT in later cases, including *Allied Distillers Ltd v Handley and ors EATS 0020/08; Cumbria County Council and anor v Bates EAT 0398/11 and London Borough of Hillingdon v Gormanley and ors EAT 0169/14*. Tribunals must have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation even if there are limits to the extent to which it can confidently predict what might have been.

125. In undertaking this exercise, I am mindful of the guidance in cases such as *Eversheds v De Belin [2011] ICR 1137* which held that Tribunals should not decline to undertake a *Polkey* exercise merely because it involves "speculation. The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.

126. I have given this exercise careful consideration. It is not straightforward. This is primarily a case which goes to the credibility of C1 and the Claimant. It is possible that the perception of C1's credibility by the Respondent could have been affected if she had been challenged regarding potential inconsistencies in her version of events following a full investigation being undertaken by the Respondent.

127. Particular factors I have considered are those set out at paragraphs 98 to 109 of this Judgement. I consider that it would be wholly artificial and impractical to attempt to apply a hypothetical, what if, to the individual additional matters of investigation I consider should have been undertaken by the Respondent, but rather have looked at the matters concerning the length of the RTWI, when C1 reported the incident alleged to have occurred at the RTWI to W4, the evidence of W5 being put to C1, and inconsistencies raised with her, and more generally the Respondent's perception of C1 being different had possible inconsistencies in her evidence being challenged and arguable ulterior motives raised with her.

128. I find that had the Respondent undertaken an investigation within the reasonable range open to an employer, to include putting any potential inconsistencies to C1, that it would have remained more likely than not that it would still have reached the decision to dismiss the Claimant. However, I consider that there would have been a chance that the Claimant would have been given the benefit of the doubt had such further investigations been undertaken, and the evidence of C1 challenged. Having considered the totality of the evidence, and the reasons provided by the Respondent's witnesses to support their conclusions, I find a 75% deduction to the compensatory award to be appropriate.

129. I considered whether the compensatory award should specifically reflect an additional period of employment whilst these matters were investigated further. I find not based on the very substantial delays in the process between the investigation undertaken and the disciplinary hearing and therefore consider that such a determination would be wholly artificial.

Contributory conduct

130. I now need to consider what, if any contributory conduct of the Claimant should be taken into account in accordance with s.123(6) of the ERA. This involves my considering whether the Claimant's dismissal was "to any extent caused or contributed to by his actions".

131. In Nelson v BBC (No.2) 1980 ICR 110, CA, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

- the relevant action must be culpable or blameworthy
- it must have actually caused or contributed to the dismissal

- it must be just and equitable to reduce the award by the proportion specified.

132. An employee's failure to give the employer an explanation for his or her conduct can contribute to a dismissal. In *Kwik Save Stores Ltd v Clerkin EAT 295/95* a tribunal accepted the claimant's contention that his dismissal for allegedly falsifying the clocking-off cards of employees was unfair because he had in fact only been carrying out what he had thought to be standard company procedure. However, the tribunal found that his failure to raise this defence to his actions at the disciplinary hearing contributed to his dismissal by 40 per cent.

133. Contributory fault may arise in respect of the manner in which an employee conducts himself during a disciplinary process. In *Sidhu v Superdrug Stores plc EAT 0244/06*, an employment tribunal made a 90 per cent reduction in the employee's compensatory award because he could have done far more to assist himself during the course of two disciplinary hearings by probing the evidence submitted by the employer to support the allegation of gross misconduct and by attempting to call witnesses at the disciplinary hearing. On appeal, the EAT cautioned that a finding of contributory conduct in such a case was only appropriate if the tribunal is sure that the employee has caused or contributed to his or her dismissal by some aspect of his or her conduct during the disciplinary process. Although the EAT did not say so expressly, the implication is that such conduct will be rare.

134. In order for a deduction to be made under S.123(6) ERA, a causal link between the employee's conduct and the dismissal must be shown. This means that the conduct must have taken place before the dismissal; the employer must have been aware of the conduct; and the employer must then have dismissed the employee at least partly in consequence of that conduct.

135. If the tribunal does find contributory fault, it must be satisfied that the employee did actually commit the acts that contributed to the dismissal and should explain why this is so. In London Borough of Lewisham v James EAT 0581/03 the EAT stated that 'it is quite plain that S.123(6) is not satisfied by reference to a finding simply that an employer had reasonable belief in the conduct. The conduct which is to form the basis of a deduction for contributory fault, whatever it is, must be established, proved and identified by the tribunal.'

136. In *Cornwall County Council and anor v McCabe EAT 147/97* M, a teacher, was dismissed following allegations by two female pupils that he had fondled them. A tribunal found the dismissal to be unfair due to a woefully inadequate investigation, but nonetheless reduced M's award by 20 per cent for contributory conduct. The EAT set aside the deduction: there was nothing in the tribunal's

decision to show what misconduct M had actually committed. A 'no smoke without fire' approach was not acceptable.

137. In addressing this question, I consider that an inherent difficulty exists given that the Claimant denies all allegations of inappropriate conduct. His position is therefore that if the Respondent had carried out a reasonable investigation he would have been completely exonerated. As such I consider this case analogous to that in the McCabe decision above and do not consider it appropriate to make such a deduction for contributory conduct on the basis that the Claimant had as matter of fact committed the misconduct.

138. There is, however, an argument that the Claimant contributed to his dismissal by failing to put forward all potential grounds of defence at an early stage in the investigation and disciplinary procedure and that some evidence as to C1's possible ulterior motives was only raised at the appeal.

139. Mr Rahm at paragraph 29 of his witness statement makes, what I consider to be the legitimate point, that the denial and mitigating factors put forward by the Claimant and Mr Daniel, did not make logical sense.

140. I find that the Claimant's position was not helped by the multiple and somewhat inconsistent allegations put forward pointing to either a conspiracy involving trade union representatives or as to the potential ulterior motives for C1 making false allegations to include being able to obtain additional leave for her wedding. In terms of the Claimant's contribution by not raising potentially relevant matters this primarily relates to the evidence regarding C1's ulterior motive for making allegations against him relating to the Toby Young/Sue Brown/letter re C1's IBS and rest breaks until the appeal hearing.

141. Nevertheless, I do not find that delays or inconsistencies in the Claimant's approach to the investigation and disciplinary procedure were of such an extent as to justify a deduction for contributory conduct.

Basic Award

142. As I have decided that the Claimant's dismissal was unfair, he is entitled to a basic award. Given that he has over 20 years' service, and he is aged 59, this gives rise to a basic award of £14,478 based on 17 years' service over the age of 41 with a multiplier of 1.5, and 3 years' service below the age of 41 with a multiplier of 1.

Wrongful Dismissal

143. The Claimant is not bringing a claim for wrongful dismissal in respect of his notice period therefore I do not need to address whether his dismissal would have been wrongful.

Remedy

144. As the Tribunal did not hear evidence regarding reinstatement, mitigation and loss I therefore order, that if the matter of remedy cannot be agreed between the parties, that a separate remedies hearing should be listed. If this is considered necessary, the parties should write to the Tribunal accordingly.

Employment Judge Nicolle

Dated: **2 January 2020**

Sent to the parties on:

03/01/2020

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For the Tribunal Office