



# EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: Y

HELD AT: Sheffield (by CVP)

ON: 20 and 21 August 2020

BEFORE: Employment Judge Little

## REPRESENTATION:

Claimant: In person

Respondent: Mr A Willoughby of Counsel  
(instructed by Gordons LLP)

**JUDGMENT** having been sent to the parties on 10 September 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. These reasons are given at the request of the claimant contained in his email to the Tribunal dated 13 September 2020.

### 2. The complaints

In a claim form presented to the Tribunal on 5 April 2020 the claimant brought the following complaints:-

- Unfair dismissal.
- Unauthorised deduction from wages – in respect of commission allegedly due but unpaid.
- Breach of contract – the alternative complaint in respect of commission.

3. Because this case involves allegations of sexual misconduct I had during the hearing made an Order under Rule 50 and it is for that reason that in the version of these reasons which will appear on the register, the claimant, the respondent and another individual have been anonymised.

**4. The issues**

At the beginning of this hearing it was agreed that the following were the issues which I had to determine.

Unfair dismissal

- 4.1. Can the respondent show a potentially fair reason to dismiss? - it sought to show the reason of conduct.
- 4.2. If so was that actually fair by virtue of the test in the Employment Rights Act 1996 section 98(4)?

In particular:-

- Did the respondent believe that the claimant was guilty of misconduct?
- Did it have reasonable grounds on which to sustain that belief?
- Had it carried out a reasonable investigation?
- Did the respondent condone or encourage banter in the workplace including banter of a sexual nature?
- Did Steve Harwood dislike the claimant and so encouraged Ms A to make a complaint against the claimant?
- Was there unfairness because the claimant's appeal against dismissal was delayed?
- Was the claimant treated differently from Mr Evans, against whom allegations were allegedly made by another female employee? Had the claimant been made a scapegoat?
- Was Mr Evans the appropriate person to have conducted the disciplinary hearing for the claimant because of the matter above and because, according to the claimant, he and Mr Evans did not get on.
- Because the respondent had not interviewed "the relevant people"
- Should the respondent have treated Jessica Pattison's evidence with caution because she allegedly did not like the claimant and because she resigned the day after giving her statement to the respondent so that, according to the claimant's contention "she didn't have to deal with the lies she had given".
- The claimant had only admitted to types of conduct which "everyone in the shops" also do.
- Ms A had joined in the banter.
- Ms A's allegations against the claimant were motivated, according to the claimant, by her belief that the claimant had taken a sales lead from her.

- There were some inconsistencies in the statements of Ms A and Miss Pattison as to the location of the alleged “I’d ruin you” comment. Was it allegedly made at the desk or in the canteen?
- 4.3. If the claimant’s dismissal was found to be procedurally unfair, would a fair procedure have made any difference and if so what?
- 4.4. If the claimant’s dismissal was found to be substantively unfair had the claimant contributed to his dismissal and if so to what extent? How should that be reflected in terms of remedy?

Unauthorised deduction from wages/breach of contract

- 4.5. Did the claimant have a contractual entitlement to commission over and above the £651 he was paid in his final payslip?
- 4.6. If so what was the amount that had been deducted?

**5. The evidence**

The claimant has given evidence. The respondent’s evidence has been given by Mr Alan Evans, regional manager and dismissing officer; Ms R Frati, HR advisor and Mr N Smith, HR manager and appeal officer. The respondent had also served witness statements by Ms Jessica Rose and Ms Maria Goodley. Ms Rose did not attend but I have read her witness statement and have given it such weight as I felt appropriate. The respondent was not relying upon the statement by Ms Goodley and so I have disregarded that.

**6. Documents**

The parties had agreed a bundle running to 321 pages. During the course of the hearing a further document was put in by the respondent – it’s Designer Pay Commission and Bonus Scheme for April 2019.

**7. The relevant facts**

- 7.1. The claimant’s employment, as a kitchen designer, commenced on 1 November 2015.
- 7.2. On or about 11 January 2020, Ms A who was also a kitchen designer had been talking to potential customers in the store and the claimant took the view that his colleague was having difficulty engaging with those customers. As the potential customers were about to leave the claimant approached them and managed to secure a design appointment with them. He told the customers that either Ms A or a Mr Bradley who had also been talking to them, could do their design and apparently the customers chose Mr Bradley. The claimant’s case is that Ms A was upset about this and believed that the claimant had taken a lead from her. The claimant contends that this motivated what happened shortly afterwards.
- 7.3. On 13 January 2020 Ms A complained to Mr Harwood about the claimant’s allegedly inappropriate behaviour towards her. She subsequently sent Mr Harwood an email on the same date in which she wrote that the claimant had been making her feel very uncomfortable at work, taking into account what she described as her home situation. She felt that the claimant had been quite inappropriate towards her because of what he had been doing and comments he had been making. That included making comments about the claimant’s ‘bum’ “Saying its fat quite often, hitting it with my

crutches and things, which definitely crosses a line with me.” She also referred to an occasion when the claimant had approached her from behind and pulled her hair whilst she was talking to customers on the telephone. She also referred to him “messing around putting his hands around my waist/rib area.” A copy of that email appears at page 311.

- 7.4. On 16 January 2020 the claimant was suspended. A copy of the letter of suspension signed by Mr Harwood is at pages 86 to 87 in the bundle. The claimant was informed that he was suspended pending investigation into a complaint which had been received. That complaint alleged that the claimant might have acted in a manner which could be classed as gross misconduct. The claimant was advised that he would not be entitled to earn or be paid any commission or bonus payments during the period of suspension.
- 7.5. On 19 January 2020 Ms A submitted a formal grievance and a copy appears at pages 313 to 314. She explained that she had been feeling very uncomfortable at work because the claimant had been very inappropriate towards her. He had, in her words, crossed the line on various occasions. She pointed out that he was much older than her (she was 19 the claimant was 43) and that he had been making sexual references about her and hitting her bum with things and also grabbing her waist and pulling her hair. She went on to state that she believed that it was not right for someone that much older than her to be acting in that way and to be continually doing things which made her uncomfortable to the point where she felt that she couldn't tell him to stop. She said that she would now not feel comfortable working with the claimant again as she did not think he would treat her with respect.
- 7.6. On 21 January 2020 the claimant was interviewed by Ms Rose of HR. a copy of the interview notes is at pages 90 to 93 in the bundle. The claimant was asked whether he had ever made comments towards Ms A about a sexual relationship with her and he said never. He was then asked whether he had touched another colleague in what could be perceived as an inappropriate way. The claimant's reply was “again, not really ... I would walk past Ms A and pull her hair but that was just joking.” He went on to refer to the sales lead incident. The claimant said that he had pulled other women's ('girls') hair. He denied that he had touched Ms A in the waist or torso area. The claimant went on to say that if he had offended anyone he would apologise. He said that they all had horse play at work but he had not done anything wrong.
- 7.7. Ms Rose continued her investigation by interviewing various other employees. A Mr Caldwell said that there were many times when the claimant had, as he put it, taken the conversation a level down. Ms A had reported to him that the claimant had made remarks to her that made her feel uncomfortable. Mr Caldwell had seen the claimant put his hands round Ms A's waist and on her shoulders.
- 7.8. Ms A was interviewed on 27 January 2020 (notes at pages 97 to 99). She referred to a day when the claimant was having a conversation “around random sex stuff” and that was when he had said “he'd ruin me”. She said that after that comment he had come across to her as if he was trying to go past her but had grabbed her waist. She referred to an incident when the

claimant had pulled her hair and rubbed his hands on her ribs. She believed that the “I’d ruin you” comment had been made on the same day as the hair pulling and hands on rib incident, but not at the same location. Only the latter had been at Neil’s desk.

- 7.9. Miss Pattison, also a kitchen designer, was interviewed on 27 January 2020 (pages 100 to 103). She explained that she and the claimant had always had a laugh and joke which included sexual references but said that Ms A had been quite uncomfortable when the claimant tried to include her. She referred to the claimant tapping Ms A’s bottom with a wooden spoon and Miss Pattison felt that that had crossed the line. She also referred to an incident in the canteen when she Ms A, the claimant and someone called Elliott were present. She agreed that they had been talking about sex but went on to report that the claimant had gone behind Ms A trying to squeeze past her and had grabbed her ribs and held on for quite a long time. She then recollected that he had said something to the effect of “I’d absolutely ruin you” to Ms A. Miss Pattison reported that Ms A’s face had gone white at this stage. Miss Pattison said that she herself was disgusted and referred to the claimant pulling a face and making references to Ms A’s ‘tiny little waist’. She said that he was getting ‘pervey’.
- 7.10. On 12 February 2020 Ms Rose interviewed the claimant again. The notes are at pages 104 to 107. The claimant was asked whether he had ever touched Ms A’s bum with any kind of object such as a wooden spoon. The claimant replied yes but it had been in jest. He said that the store was full of people messing about and having a laugh and everyone did that sort of thing. It was horse play and banter. He felt that there was a witch hunt against him. The claimant again said that if he had offended anyone he would apologise but it was just banter in the store.
- 7.11. On 13 February 2020 Ms Rose wrote to the claimant inviting him to attend a disciplinary hearing. A copy of that letter is at pages 108 to 109. The allegations of potential misconduct were described as:

“

- Inappropriate physical behaviours and actions towards your work colleague Ms A.
- That you made inappropriate comments of a sexual nature to your work colleague Ms A.
- That you have acted inappropriately in way (sic) of sexual harassing your work colleague Ms A on a number of occasions.
- That you breached the terms of your suspension by contacting a work colleague, J Pattison.”

On the latter point the letter of suspension had prohibited the claimant from contacting colleagues. However the respondent subsequently realised that at the material time Miss Pattison had ceased her employment with the respondent and so this allegation was not pursued.

- 7.12. The disciplinary hearing took place on 18 February 2020 and was conducted by Mr A Evans, regional manager. The notes of that meeting are at pages 120 to 136. The claimant read out a document he had

prepared and a copy of this is now in the bundle at pages 120A to 120C. This is a further document that was not originally in the bundle but it was put in on the first day of our hearing.

- 7.13. The claimant contended that Ms A had only made these allegations against him because of the lead incident. He believed that Ms A and Miss Pattison had fabricated the whole saga. The claimant accepted that he had hit Ms A's bum with a tape measure and possibly also with a wooden spoon but that was something that everyone did. He agreed that he had pulled her hair but he did not "playfully mess with her hair when she was on the phone to a customer."
- 7.14. As to putting his hands on Ms A's waist the claimant said that he could not remember ever doing that "but again everyone in the store grabs each other and plays around so I cannot say I have never done this." The claimant went on to speak of what he described as a culture of jokes, pranks and banter in the store. He believed that there was a trend within the company that colleagues lied or made things up when they were struggling with work. During the course of the meeting the claimant explained that pulling Ms A's hair had again been banter and it was not pulled in a nasty way.
- 7.15. Mr Evans asked the claimant whether he agreed that that type of unwanted behaviour could intimidate or undermine. The claimant said sometimes he did believe that but when "we are having these conversations they don't have to join in they choose to." Mr Evans reminded the claimant that when he had been asked in the first disciplinary interview whether he had touched Ms A's bottom in any way he had said 'no' but he was now accepting that he had with a wooden spoon. The claimant said that it was just playful and jesting. The claimant denied making the "ruin you", comment and suggested that Miss Pattison had not been consistent in her evidence about who was present when this was allegedly said. The claimant had understood that Ms A was saying that this happened at Neil's desk, rather than in the canteen. I should add that on proper reading, what Ms A actually said was that her reference to Neil's desk was to pinpoint the date when the 'ruin you' comment was allegedly made, not the location. In any event the claimant believed that there had been a massive set up. The claimant acknowledged that Mr Caldwell had given a statement referring to the claimant grabbing Ms A by her waist. The claimant said "I've admitted I might have done, but like I said it's not just me its everyone." The claimant again said that all he could do was to apologise and he had never meant to hurt Ms A but always tried to help her.
- 7.16. Mr Evans did not make a decision on the day, but on 24 February 2020 wrote at length to the claimant informing him that he was to be summarily dismissed on the grounds of misconduct and setting out Mr Smith's rationale for that decision. This letter is at pages 138 to 142 in the bundle.
- 7.17. On 26 February 2020 the claimant appealed and a copy of his appeal letter is at page 145. He said that there had been a lack of consistency; he referred to Mr Evans being the subject of a newspaper campaign about sexual harassment and the claimant knew that he would be used as a scapegoat; the witness statements against him had contradicted each other; there was a culture of horse play and jest from regional managers

downwards; the respondent was relying on statements from “prolific liars”. There had been delay and the accusations against him were false.

- 7.18. The appeal hearing took place on 2 March 2020 before Mr N Smith HR manager. A copy of the notes of that hearing are at pages 146 to 154. The claimant alleged that he and Mr Evans had not got on. The claimant said that Mr Evans had also been accused of harassing someone and making inappropriate comments to a female employee, so why had he not been suspended? He queried whether Mr Evans had been a correct person to conduct the disciplinary hearing and the claimant reiterated that he felt that he had been made a scapegoat. He believed that his relationship with Ms A had been fine “until I took the lead off her”. The claimant was asked about the context of the hair pulling and replied that he had tapped Ms A on the head and tugged her hair a little bit. The claimant’s view was that this was going to happen in every showroom. The claimant described Miss Pattison as a liar who would say anything.
- 7.19. Mr Smith did not give a decision on the day and in fact took the view that further investigation was required. This investigation was conducted by Ms Frati HR advisor and she interviewed Mr Caldwell again and eight other employees who had not been contacted before. Copies of these interviews are at pages 164 to 199.
- 7.20. When Mr Caldwell was re-interviewed he explained that Ms A had told him that she had been molested by her father and that the claimant had “kept hitting on her and touching her”. Mr Caldwell believed that the claimant and Ms A’s relationship had changed quite a while before the lead incident.
- 7.21. Another person who was interviewed commented that Ms A was young and it was her first job whereas the claimant was a more senior person. This witness felt as though Ms A believed she needed to go along with the banter but then the claimant took it too far. This witness confirmed that Ms A had, she believed, felt uncomfortable with the claimant because he had “creeped her out a bit.”
- 7.22. A further witness interviewed by Ms Frati said that Ms A had said to him that she wished the claimant would stop texting her all the time. This conversation was prior to the sales lead incident.
- 7.23. Mr Harwood was interviewed. He said that he felt that the claimant was a bit too friendly to start with as he the claimant was 40 and Ms A he described as 18. The claimant had got flirty with her. He said that the “banter” was one sided and it came from the claimant. Mr Harwood’s evidence was that Ms A had informally made him aware of her concerns about the claimant before the email of 16 January 2020 and that those informal conversations had been prior to the lead incident.
- 7.24. Another witness spoke of Ms A being obviously affected when she told that witness that the claimant had been acting inappropriately towards her, although she had not told him in what way.
- 7.25. On 1 April 2020 Mr Smith wrote to the claimant giving the outcome of the appeal which was that he agreed with the disciplinary decision that the claimant’s actions and behaviours towards Ms A had been inappropriate unwanted and amounted to harassment. He set out his rationale which

included the observation that the circumstances of the claimant and the circumstances of the allegation against Mr Evans were not comparable. Accordingly there had been no reason to doubt the objectivity of Mr Evans. The claimant was informed of the further investigation which Mr Smith had commissioned and that the statements obtained had established that in general there was a feeling amongst the claimant's colleagues that he had acted flirtatiously towards Ms A whilst at work. Further Ms A had approached a number of her colleagues in order to express her concerns about the claimant's behaviour. There had also been confirmation that those concerns had been expressed prior to the sales lead incident. Moreover the witness statements that had been obtained generally did not concur with the claimant's assessment that the culture in the showroom was one where all colleagues regularly engaged in horse play and banter that extended to frequent sexual comments and jokes. Mr Smith believed that Ms A's and Miss Pattison's statements were credible.

7.26. In terms of the commission aspect of this case, the claimant appears to have been issued with a statement of terms and conditions of employment in February 2015 and that is at pages 64 to 83 in the bundle. However that document is not signed, at least in the version which is in the bundle. There is a further document headed Employment Contract Term Sheet which was apparently issued to the claimant when he moved from the respondent's store in Rotherham to their store in York. The claimant has signed that document. It refers to an additional benefit of the employment as being discretionary commission.

7.27. The 2015 statement has a clause 6 headed 'Commission Payments' and this begins as follows:

*"In addition to your salary, we will pay to you a commission as notified to you by your line manager. Any commission paid to you will not count as part of your contractual remuneration or salary for pension purposes or otherwise. The terms of the commission scheme are available from the finance department".*

A further clause provides:

*"Any commission due is not payable if you are not employed or are under notice of termination (whether given by you or by us) as at the date of payment or when such commission declared is due for payment."*

The relevant commission scheme appears to be the document "Designer Pay Commission and Bonus April 2019", to which I have referred earlier.

7.28. When the claimant received his final payment from the respondent it included the sum of £651 as commission (see page 228). That figure derives from the commission summary document which appears on page 204. That document shows £651 as being the total payable but also makes a reference to "Your outstanding commission" and gives a figure of £2849. It is the latter figure which the claimant seeks in this claim.

7.29. Mr Smith gave the respondent's evidence on the commission question. In paragraph 22 of his witness statement he says that this reference to £2849 is a reference to what is no more than potential commission within the claimant's order bank. This is the commission which could potentially have



been earned as the delivery bonus. That concept is defined by the respondent as something which is only payable once a kitchen has been delivered to the customer. Further as per the contract of employment Mr Smith points out that delivery bonuses are not paid if the employee has ceased to be employed prior to the date when the kitchen is delivered and installed. The respondent's system also draws a distinction between what they describe as "charter value" on which commission is not payable as opposed to delivery value where, as mentioned above, the bonus would be payable once delivery and possibly installation is complete.

## 8. My conclusions

### 8.1. Can the respondent show a potentially fair reason for dismissal?

The potentially fair reasons by which an employer can dismiss an employee are set out in the Employment Rights Act 1996 at section 98 subsection 2. Within those reasons is a reason which relates to the conduct of the employee. As the respondent seeks to show that conduct was the reason for the claimant's dismissal I find that they have shown a potentially fair reason.

### 8.2. Was the claimant's dismissal actually fair?

Here the starting point is the statutory test of fairness which is set out in the Employment Rights Act 1996 at section 98(4). That provides:

*"Where the employer has (shown a potentially fair reason) the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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."*

It follows that it is not for me to decide whether I would have dismissed the claimant had I been his employer. Instead I have to decide whether a reasonable employer could, in the circumstances which applied in the claimant's case, have dismissed. That approach is often referred to as an assessment of whether the dismissal fell within a reasonable band of decisions.

I now deal with the various matters which have been identified as or are part of the claimant's case alleging that his dismissal was unfair.

#### 8.2.1. Investigation

In any case of suspected misconduct a reasonable employer will carry out an effective investigation. In the claimant's case there were two investigations. The first was carried out by Ms Rose from whom I have not heard.

I should add that the claimant had not been aware that Ms Rose would not be attending to give her evidence in person and it had not been entirely clear from the respondent's solicitor's correspondence to the Tribunal that

she would not be attending, which led to me not being aware that she would not attend until I was told by counsel on the first day of the hearing. Having explained to the claimant that I would in those circumstances give Ms Rose's evidence such weight as I felt appropriate subject to any objection he may have to make, no objection was received. However, when making his closing submissions the claimant said that he was 'taken aback' by her non-attendance and he described as the respondent's main witness. I find that clearly she was not. For instance she was neither the dismissal nor appeal officer. In any event I have heard from Ms Frati who conducted what could be described as the second line investigation. In any event I do not consider, in so far as the claimant may be contending so that Ms Rose's absence has made this hearing unfair.

Returning to the level of investigation, Ms Rose had interviewed the claimant twice. Ms A had been interviewed twice and Miss Pattison and Mr Caldwell had also been interviewed. At the request of the claimant Ms Rose had also sent questions to four other employees at the showroom.

Subsequently as part of the appeal process Ms Frati, from whom I have heard, again interviewed Mr Caldwell and also interviewed eight other employees who had not previously been interviewed.

As I have found, in his interviews the claimant admitted most of the alleged behaviour, although denied that there had been a sexual content or that behaviour or conduct was unwanted by Ms A. During the investigation the claimant stressed, as he has done during this hearing, that there was a high level of banter in the showroom and that he was doing nothing worse than anybody else including managers.

The claimant was obliged to accept in the second interview with Ms Rose that his earlier denial that he had touched Ms A's bottom was incorrect in that he had subsequently said he had 'probably and gently' hit it with a wooden spoon. He said that he thought that at the first interview he was being asked whether he had actually touched Ms A's bottom with his hand – although it is to be noted that the question he was actually asked included the phrase "in any way".

The claimant had also accepted that he had pulled Ms A's hair, although during the course of our hearing he said that he meant that he had just ruffled it. As I have also noted above, Ms Pattison corroborated Ms A's evidence that the claimant had held Ms A by her ribs and waist and told her that he would "absolutely ruin her". I should add that this is understood to be a reference to what could be described rough sex.

Miss Pattison also corroborated Ms A's evidence about her bottom being touched with a spoon and a pen. I have also noted that Mr Caldwell told Ms Rose that he believed that the claimant had made comments to Ms A which had made her feel uncomfortable and he had seen the claimant put his hand round Ms A's waist and on her shoulders.

The additional witnesses interviewed over the telephone by Ms Frati had not seen bottom touching but as I have also found, the common theme was that they reported Ms A expressing her concern about the claimant to them; there were comments that the claimant was flirtatious with Ms A and that Ms A was concerned about the claimant texting her. One witness, a Mr

Bishop had said that he had advised Ms A that she should report the claimant's behaviour to management.

Having considered the evidence before me I am satisfied that the respondent did carry out a reasonable investigation in this case.

**8.2.2. Was any general level of banter a mitigating factor?**

As noted, the claimant's case is that banter was rife in this workplace. He goes so far as to suggest that management had brought him to this particular showroom to either introduce or encourage such banter. It does appear from the documents which appear as pages 160 to 163 in the bundle that there was a culture of behaviour – banter – within this workplace which was both puerile and crude. However in respect of those examples it appears that there was a consensual or mutual element to that type of banter. However I find that the evidence which was before this employer in relation to the claimant and his behaviour towards Ms A was that he had as many witnesses put it, crossed a line. A witness Ms Mason said "X took it too far". Mr Caldwell reported that the claimant had "taken the conversation a level down". Miss Pattison said that the "ruin you" comment had caused Ms A's face to turn white and it had made Miss Pattison herself feel sick.

In the circumstances I consider that a reasonable employer could conclude that the claimant's conduct was in a different category to the general banter which may have existed and was not excused by any general culture of banter which prevailed.

**8.2.3. Did the respondent treat the claimant and Mr Evans inconsistently?**

The claimant contends that similar allegations had been made against Mr Evans to those made against himself. This contention stems from an email which an ex-employee had sent to the entire workforce of the respondent. That email had been the subject of a brief, apparently online, story in the Daily Mail and a copy appears at pages 215 to 216. In that email the ex-employee does not name Mr Evans, but does refer to the respondent being managed by "a bunch of ungrateful narcissistic men". It goes on to refer to those unnamed managers chatting up pretty girls and commenting on women's appearances. I have been told that there was an informal investigation into this matter but no action was taken against Mr Evans and there have been no further developments. Those decisions in Mr Evans' case were reached and taken before Mr Evans conducted the claimant's disciplinary hearing.

For a case of inconsistent treatment to be made out the circumstances of the two employees must not be materially different. I find that here there was clearly a substantial difference. Mr Evans, in so far as the ex-employee's comments were directed at him, was not accused of anything similar to the type of behaviour that Ms A was complaining about viz a viz the claimant. It also appears that the ex-employee was disaffected and angry about criticism, possibly from Mr Evans, that she was under performing. In these circumstances I find that the two cases are not comparable and that there was not inconsistent treatment as between the claimant and Mr Evans.

**8.2.4. In any event, did the Daily Mail story mean that Mr Evans should not have conducted the disciplinary hearing of the claimant?**

The claimant suggests that the perceived complaint by the ex-employee against Mr Evans would have had the effect that Mr Evans would then be over zealous in his conduct of the disciplinary process against the claimant. In other words the claimant suggests that Mr Evans would want to make the claimant a scapegoat. Against the backdrop of my findings on the differences between the two cases the force of this argument is diminished. It is also relevant that Mr Evans would have known by the date of the claimant's disciplinary hearing that no action was going to be taken against him because of the Daily Mail article. In any event it can hardly be suggested that Mr Evans took a disproportionate approach having regard to the weight of the evidence against the claimant.

**8.2.5. Were there inconsistencies in the account given by Ms A and Miss Pattison?**

The claimant argues that there were in terms of whether a Mr Routledge was present when the "ruin you" comment was allegedly made and the location for that comment. Was it in the canteen or was it at a desk? However it became apparent during the hearing that the claimant may have misread or misunderstood the relevant statements. As I have mentioned above, the claimant was using the reference to the desk 'hair incident' as being on the same date as the ruin you comment but not the same location. The claimant accepted during cross-examination that he may have misunderstood. In any event I find that a reasonable employer would be entitled to accept that there were not any significant inconsistencies in the evidence. It is to be noted that the further investigation conducted as part of the appeal produced generally corroborative evidence of the claimant's behaviour towards Ms A.

**8.2.6. Was Ms A's complaint motivated by the sales lead incident?**

I find that a reasonable employer would have been entitled to reject that argument. It was clear to the respondent from the evidence before it that Ms A's complaints to colleagues about the claimant's conduct and what the colleagues had themselves witnessed, significantly pre-dated the sales lead incident.

**8.2.7. Should the respondent have treated Miss Pattison's statement with caution because she resigned shortly after making it?**

The reason, if known, for her resignation has not been identified at this hearing. However the claimant's theory is that she resigned "so that she didn't have to deal with the lies she had given." I consider that a reasonable employer would be entitled to regard this suggestion as fanciful. There was plenty of other evidence to generally corroborate what Miss Patterson had told the respondent. It seems that Miss Pattison would have had no reason to take the drastic step of ending her employment to avoid an allegation of lying which has only ever been made by the claimant.

**8.2.8. Was Ms A's complaint encouraged or promoted by Mr Harwood?**

This is an allegation which the claimant did not make at the time, either at the disciplinary hearing or in the appeal. He only makes that complaint

within these proceedings. He alleges that Mr Harwood did not like him and says he referred to the claimant and a friend/colleague as a “cancer”.

It was Mr Harwood as store manager to whom Ms A reported her concerns. In these circumstances obviously Mr Harwood had to take some action. It can be seen from his email of 13 January 2020 at page 311 that he sought advice from HR. He did not recommend or propose any particular action. He was simply seeking that advice. His subsequent involvement in the case was limited to giving a statement. He was not a decision maker. It is also to be noted that in the statement that Mr Harwood gave there is a reference to “I do miss the guy” (meaning the claimant - see page 194) which suggests that Mr Harwood had a reasonable working relationship with the claimant. In any event as this was not a matter raised at the time the respondent cannot be criticised for not predicting a matter which the claimant would only raise after the event.

### **Overall conclusion in respect of unfair dismissal**

In all these circumstances my judgment is that the claimant's dismissal was fair. The respondent's decision was well within the reasonable band.

#### **8.3. The complaint in respect of commission**

During the hearing the claimant has clarified that his claim is for what the respondent describes as “charter value”. In other words commission due when the order is taken as opposed to delivery value. He therefore implicitly accepts that he is not entitled to commission which would only have accrued after his dismissal – in respect of kitchens delivered after that date. Whilst there has been some uncertainty as to whether the terms and conditions of employment at page 64 including clause 6.3 (page 69) was the applicable contract and term that is now an academic question.

The claimant's case is that the figures for charter value shown on, for instance, the commission summary for period one at pages 287 to 288 have, post-dismissal, been manipulated by the respondent so as to transfer to other designers concluded contracts that is sales which the claimant himself had achieved. The claimant has referred me to an email at page 214 where Mr Harwood in a text message refers to sacking an employee and then passing her sales over. The claimant contends that that is precisely happened in his case as well.

It is for the claimant to prove that the respondent's commission summary is incorrect or as he puts it manipulated. It is also incumbent upon the claimant to put forward a reasoned counter calculation so that his claim can be properly quantified. As the claimant accepts he is not in a position to prove his case. He has accepted that any suspected transfer of sales which he alleges would be undetectable. In these circumstances I am not able to give judgment based on an unproven theory for a non-specific amount of money. It is for these reasons that the complaints of unauthorised deduction from wages and/or breach of contract also fail.

Employment Judge Little

Date 5<sup>th</sup> October 2020