Case No: 3304834/2020 (V)

EMPLOYMENT TRIBUNALS

Claimant: Mr Jeffrey Hughes

Respondent: CALA Management Limited

Heard at: Watford (by CVP) **On: 17, 18 and 19 March 2021**

Before: **Employment Judge Reindorf (sitting alone)**

Representation:

Claimant: Mr S Tibbetts (counsel)

Respondent: Mr R Bradley (counsel)

RESERVED JUDGMENT

(1) The unfair dismissal claim fails and is dismissed.

(2) The wrongful dismissal claim fails and is dismissed.

REASONS

INTRODUCTION

1. In an ET1 presented on 19 May 2020 the claimant brought claims of unfair dismissal and wrongful dismissal. He had been summarily dismissed by the respondent from his job as a Senior Technical Manager with effect from 2 March 2020. His claim was, in essence, that he had

been dismissed unfairly and in breach of contract because allegations of sexual harassment made against him were inadequately investigated, the procedure followed was unfair, the outcome was predetermined and his conduct did not amount to gross misconduct. The respondent denied the claims.

THE EVIDENCE AND HEARING

2. The hearing was conducted remotely by video (CVP). The parties did not object to this. A face to face hearing was not held because it was not requested and all issues could be determined in a remote hearing.

3. The hearing took place over three full days. Judgment was reserved due to lack of time.

4. I heard evidence from Ian Curry (Technical Director), Stephen Bennett (Construction Director) and Neal Toland (Construction Director) for the respondent. The claimant gave evidence on his own behalf. All witnesses produced written witness statements and were subjected to cross-examination. There was an agreed trial bundle consisting of 373 pages and a mitigation bundle of 89 pages.

RULE 50 APPLICATION

5. In correspondence before the hearing the respondent sought an anonymity order pursuant to Rule 50(3)(b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The application was pursued at the outset of the hearing and I allowed it on the morning of the first day. I did not give detailed reasons due to pressure of time. My reasons for making the order are as follows.

6. The order sought related to the identity of a former colleague of the claimant who had been referred to in some of the correspondence as “the complainer” but is hereafter referred to as Ms X for ease of expression.

7. Ms X made allegations of sexual harassment against the claimant. Following an investigation and disciplinary proceedings, these allegations were the purported reason for the claimant’s summary dismissal by the respondent for gross misconduct. It was accepted by the respondent that Ms X did not make allegations of the commission of any sexual offences by the claimant.

8. In relation to the unfair dismissal claim the Tribunal will be concerned with determining whether the respondent genuinely believed that the claimant committed gross misconduct and if so, whether it acted reasonably in all the circumstances in treating that reason as sufficient reason for dismissal. In relation to the wrongful dismissal claim the Tribunal will have to determine whether or not the claimant committed gross misconduct

and whether his summary dismissal was a breach of his contract of employment.

9. Largely, the claimant does not bring Ms X's credibility into question. The evidence which formed the basis of the dismissal was generally either documentary (in the form of emails and Facebook messages) or was admitted.

10. By email dated 1 March 2021 the respondent applied for an order to prevent Ms X being identifiable by members of the public whether in the course of the hearing or in any documents entered on the Register or otherwise forming part of the public record. The email stated that Ms X was not a party to the proceedings and that the publication of her name would cause her a considerable degree of upset and distress.

11. In their response by email on 11 March 2021 the claimant's solicitors accepted that the claimant would be content if Ms X's distress would be alleviated by the redaction of her name from the proceedings. However they submitted that the circumstances did not fall within the scope of Rule 50.

12. The Tribunal informed the parties by letter dated 10 March 2021 that the application would be determined at the hearing.

13. At the outset of the hearing Mr Bradley reiterated the respondent's written application. Mr Tibbitts accepted that the claimant's position on the application was equivocal, and that omitting Ms X's name from the proceedings would be unlikely to impinge on the principle of open justice.

14. Rule 50 provides in relevant part:

    50.—(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.

    (2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

    (3) Such orders may include—

    …

    (b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course

of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record.

15. In *Gray v UVW* [2010] EWHC 2367 QB at §4 Tugendhat J described the necessary balancing exercise between Article 8 and Article 10 rights as follows:

    An application for an order that the names of the parties or the subject matter *of the action be not disclosed is a derogation from the principle of open justice and an interference with the rights of freedom of expression of the public at large. The jurisdiction of the court to restrain publication of names and the subject matter of the dispute is derived from the Human Rights Act 1998 ("HRA") s.6 (duty of the Court not to act in a way which is incompatible with Convention rights) and Arts 2, 3 and 8. Where the court is asked to restrain the publication of the names of the parties and the subject matter of a claim on the ground that restraint is necessary under Art 8, the question for the court is whether there is sufficient general, public interest in publishing a report of proceedings which identifies a party to justify any resulting curtailment of the right of the party (and members of that party's family) to respect for their private life.*

16. See also *F v G* [2012] ICR 246 EAT in which a permanent anonymity order was granted (and upheld) to protect the Article 8 rights of male disabled students of the Respondent residential college.

17. Article 8 is engaged in this case because the evidence includes sensitive personal details about conduct of a sexual nature alleged to have taken place between Ms X and the claimant. These details would be likely to cause Ms X embarrassment and distress going beyond the usual desire of people not to be mentioned in Tribunal proceedings. I take into account that the allegations made by Ms X are in large part not denied by the claimant; rather, the respondent's reaction to and assessment of the allegations is principally in issue.

18. The respondent does not seek an order that the hearing or any part of it is held in private. It seeks only the anonymisation of the identity of Ms X in open Tribunal and in documents forming part of the public record..

19. Ms X is neither a party to nor a witness in this case. She has no particular interest in the litigation. There is little challenge to her credibility. Her identity is not in issue and nor is it relevant in any meaningful sense to the issues to be determined. It has not been suggested that her identity is a matter of any particular public interest.

20. I therefore see no basis for concluding that any interference with the principle of open justice will be more than negligible if the application is allowed.

21. The claimant has not suggested that the Article 10 rights of any person are engaged, and I can discern none beyond the unlikely possibility that the press may wish to report on the outcome of the case. No representations have been made by members of the press. Should they wish to report on the case, Ms X's identity is highly unlikely to be a matter of significance.

22. I conclude, therefore, that Ms X's Article 8 rights weigh more heavily in the balance than the principle of open justice and any relevant Article 10 rights.

23. I allow the application. I order that:

    23.1. Ms X's name shall not be stated in open Tribunal in the event that a member of the public is present.

    23.2. To prevent jigsaw identification of Ms X, the location in which she worked shall not be stated in open Tribunal in the event that a member of the public is present.

    23.3. If a member of the public wishes to observe the proceedings Ms X will at all times be referred to by participants in the hearing as "the complainer".

    23.4. If a member of the public who is observing the proceedings wishes to inspect the documents, a bundle and witness statements will be made available by the Respondent in which Ms X's name and the location in which she worked are redacted.

    23.5. Neither Ms X's name nor the location in which she worked nor any other information likely to lead to jigsaw identification of Ms X shall be stated in the judgment or any other documents entered on the Register or otherwise forming part of the public record.

THE ISSUES

24. On the first day of the hearing I asked counsel to agree a list of issues. The following list was provided:

    <u>*Liability: unfair dismissal*</u>

    1. *The respondent accepts that:*

        1.1. *the claimant was an employee;*

        1.2. *he had the requisite length of service to bring a claim for unfair dismissal;*

        1.3. *the claim was brought in time;*

1.4. he was dismissed and that his employment ended on 2 March 2020.

2. Can the respondent show (on the balance of probabilities) that the reason or principal reason for the dismissal was a potentially fair reason (s.98(2))? The respondent's case is that the claimant was dismissed for gross misconduct. No suggestion that there is a specific ulterior motive, but not conceded.

3. If the claimant was dismissed for a potentially fair reason, was the dismissal fair or unfair (having regard to the reason)? In particular:

3.1. No reasonable investigation

3.1.1. investigation manager Ian Curry was biased, not impartial

3.1.2. manner in which he conducted the investigation was biased and not impartial and objective

3.1.3. extent of the investigation (as a whole) was deficient

3.2. No reasonable procedure

3.2.1. how did it transform from grievance to disciplinary – fundamentally unfair

3.2.2. not at investigation stage given reasonable opportunity to respond – not clearly set out what is being at both investigation and disciplinary

3.2.3. not 100% clear on whether he was dismissed for being a sexual predator / sex pest and concerns on the wider business or specific allegations against complainer

3.2.4. bullying and harassment policy only came in at disciplinary stage – disciplinary was for breaches of that policy

3.2.5. not provided with the policy and also not made clear that he was being disciplined for breaches for that policy

3.2.6. reasons / rationale for dismissal not set out either at hearing or in letter

3.3. No reasonable grounds

3.3.1. insufficient evidence

3.3.2. context of building sites – more loose language or use of sexualised banter more commonplace than in eg a solicitors office

3.3.3. predetermination

3.4. Sanction not reasonable

3.4.1. failure to consider mitigation and alternatives to dismissal

Remedy: unfair dismissal

4. *Would the claimant have been dismissed fairly in any event? If so, when?*

5. *Contributory fault.*

Liability: wrongful dismissal

6. *Did the respondent summarily dismiss the claimant in breach of his contract of employment?*

FINDINGS OF FACT

25. The respondent is a housebuilding company which is headquartered in Staines-upon-Thames. The claimant was employed by the respondent as a Senior Technical Manager from 30 May 2017 until his summary dismissal on 2 March 2020. He was based in the Staines office.

26. The respondent has a number of developments, each of which has an on-site sales office. Ms X was a Sales Consultant at one of the respondent's developments. She often worked alone in the on-site sales office. The claimant routinely visited the on-site sales offices in the course of his work to provide the sales staff with plans or other documentation. From time to time he visited the location at which Ms X worked.

27. In May 2019 the claimant undertook online training on the respondent's policies and procedures. His training record [46] shows that in the course of this training he attested that he had read and understood the respondent's Bullying and Harassment Policy [48] [58]. In evidence the Claimant described this training as a "feeding frenzy" and said that he had not seen and was unaware of the Bullying and Harassment Policy. I find that he did not in fact read the Bullying and Harassment Policy, but that he did attest that he had done so.

28. As at the start of 2019 the claimant had a friendly relationship with Ms X. Email exchanges between them in the first part of 2019 included light humour and emojis. They also contained some mild flirtation, invariably initiated by the claimant. For example, on 28 February 2019 [78] Ms X emailed the claimant to thank him for providing her with some information, saying "Fabulous!! What a star you are Jeff!". The claimant replied "Only because it's for you". Later in the exchange, on 20 March 2019 [76], Ms X again thanked the claimant in relation to a work matter and the following conversation ensued:

- claimant: “Short and sweet [name]”;

- Ms X: “Hey that’s me [smiley emoji] (Theres a name of a song in there?!)”;

- claimant: “I can think of a few song titles that would suit [name] [smiley emoji]”.

29. Similarly, on 2 May 2020 [75] the following email conversation took place:

  - claimant: “Then I don’t get the opportunity of listening to your dulcet tones [name]”;

  - Ms X: “Ah, you’ll have to wait for that treat till next time! [smiley emoji]”;

  - claimant: “I don’t think I could go through the whole weekend what am I going to do [smiley emoji]”.

30. This exchange is the only occasion in the first part of 2019 on which it might be said that Ms X responded to the claimant’s flirtation with anything which could amount to encouragement.

31. Later in May 2019 the claimant referred in an email exchange to “brighten[ing] your day” [73] and to sales people being “very special” [72].

32. On 4 June 2019 [71] Ms X emailed the claimant querying a work matter. On a separate work matter she commented that the sales team “wont be popping the champagne until we’ve got a few surveys/mortgage offers in”. She went on in the email to mention that she had bumped into Tony Hadley (of the 1980s band Spandau Ballet) at the weekend.

33. The claimant’s response on the same day [70] was: “Tony Hadley nice name drop there [name], I am surprised Tony didn’t pop something when he met you on the weekend [smiley emoji]”. This was deliberate sexual innuendo and the claimant intended it to be read in that way by Ms X.

34. Ms X did not immediately respond to this email. 48 minutes later [70] the claimant emailed Ms X saying “And then it went quiet”. Ms X replied at 10.40am the following day, 5 June 2019 [70], responding to the work matter which had been the subject of her initial email. She said “Not sure Tony was that excited about meeting me … which I can’t really understand..”. The claimant’s response 11 minutes later [69] was “I get excited whenever I meet you [smiley emoji]”.

35. Ms X did not reply to this email until 18 June 2019 [69], when she sent the claimant a relatively formal email asking on behalf of a potential client about garden sizes on two plots. The following exchange ensued:

  - claimant: “You should tell the lady that size is not everything”;

- Ms X: “Apparently it is to some people”;

- claimant: “As long as the bush is not allowed to get too big the garden will look fine”;

- Ms X: “Is that from a technical stand point?”;

- claimant: “Yes I am an expert on the size of bushes”.

36. Again, these emails amount to deliberate sexual innuendo on the claimant’s part and he intended Ms X to understand them in that way. She did understand them in that way and, to a very limited extent, responded in kind.

37. In the summer of 2019 the claimant sent Ms X a friend request on Facebook, which she accepted as she had with other colleagues. In August he “liked” a holiday photograph of Ms X which she had posted on Facebook in which she appeared in a bikini. He later sent Ms X a private message on Facebook about a picture she had posted showing her sitting next to her partner at her brother’s birthday celebration. The claimant’s message said that Ms X’s partner did not look very happy and should smile more because he was sitting next to her. Ms X responded saying that her partner was a “lucky man” [362]. The claimant replied that he would be smiling if he was sitting next to her. Ms X did not respond.

38. On 9 July 2019 the claimant emailed Ms X asking her to call him when her clients left [67]. Ms X did not respond.

39. In October 2019 when Ms X was on leave the claimant sent her two private messages over two days on Facebook asking whether she was in the office. She did not respond to the first message. She responded to the second message saying that her colleague could help him with anything he needed.

40. On 29 October 2019 the claimant emailed Ms X at 11:37am asking “Are you about this afternoon Ms [name]?” [66] and again at 2.08pm saying “You have ignored my email [sad emoji]” [65].

41. On 13 November 2019 the claimant attended Ms X’s on-site sales office, where she was working alone. They discussed the claimant’s private life and he volunteered that he was experiencing problems in his relationship. He talked about sensitive and highly personal matters relating to his partner. Ms X said that he should speak to his partner about this. The claimant then said to Ms X "Nice bikini shots [name]. I will have to download them to my personal collection". He was referring to Ms X’s Facebook photographs of some three months previously.

42. The claimant’s evidence on what happened next in this exchange was confused and contradictory. He said initially that Ms X did not say

anything and did not react at all, and that he had said straight away "Obviously I am only joking". He disagreed when it was put to him that Ms X did not take it as a joke, on the basis that she had not shown any reaction at all. He then said that in fact she had said something like "Oh, Mr Hughes". Since the claimant and Ms X were on first name terms, if she had said "Oh, Mr Hughes" this would clearly have been a flirtatious and lighthearted response. I find that Ms X did not say it.

43. The claimant then said that Ms X had said "Oh, Mr Hughes" while turning away from him and walking to the show home area, and he was not sure whether she heard him saying that it was only a joke. He then accepted that she was upset and that he had thought so at the time because she had not talked to him as she turned away from him (despite having said a few moments before that she had said "Oh, Mr Hughes").

44. The claimant also said that Ms X must have been a "confident lady" because she had put bikini shots on Facebook, and insisted that he was also upset by the exchange because he thought that he had upset Ms X. He felt that his upset reaction to the exchange was equivalent to hers.

45. The claimant's evidence about this event was dishonest and I reject it. I find that the event occurred as it was later reported by Ms X. The claimant said to her that her photographs could make a man sweat, that they made him hot under the collar and that it must have been obvious that he fancied her. He was physically close to her. Ms X said to him that the situation was weird and awkward. The claimant asked her why it was awkward. Ms X made an excuse to leave the office and left the site via the showhome area. Throughout this event the claimant unambiguously intended to make sexual advances towards Ms X and he intended for her to understand his conduct in that way. She did understand his conduct in that way. His advances were not welcome and Ms X made that clear by her responses. The claimant did not desist. Ms X felt that she had to leave the site to get away from him.

46. The following day the claimant sent Ms X a message saying "Obviously I have not downloaded the pictures" [364]. Ms X did not respond. I find that to the extent that the claimant has admitted to the exchange described above, he has only done so in order to explain the existence of this message.

47. On 25 November 2019 Ms X attended a course at the Staines office. During the breaks she went to the communal kitchen with her colleague. This occurred on three occasions during the day. On each occasion the claimant was also in the kitchen. He deliberately went into the kitchen in order to encounter Ms X and to seek to speak to her alone, having not received any response from her to his text message of 14 November 2019. He did not manage to speak to Ms X alone on 25 November 2019.

48. On 3 December 2019 Ms X emailed a colleague at 3.57pm querying a

work matter. She copied in a number of people including the claimant [98]. The claimant sent a "reply-all" response to the query, and also emailed Ms X separately at 4.26pm saying "You did not call me back [sad emoji]" [97]. This was a reference to a message he had left with a colleague of Ms X's asking for Ms X to call him. At 4.41pm the claimant again emailed Ms X saying "Still waiting" [96]. At 11.02am the following day, 4 December 2019, he again emailed Ms X saying "Still waiting [sad emoji]" [96]. Ms X responded saying that she did not understand, and later clarified that she had not received any message to call the claimant.

49. These emails from the claimant to Ms X did not relate to work issues. The work matter about which she had originally sent a group email was being discussed in parallel correspondence between the colleagues who were copied in. There was no need for the claimant to open a separate line of communication with Ms X about it. Furthermore there was no mention of the work issue in his emails to Ms X alone. In any case if there was an unresolved issue in relation to that matter, the colleague with whom he had left a message for Ms X to call him could have dealt with it herself. The claimant was seeking to make personal contact with Ms X. In part this was because he had not received any response to his text message of 14 November 2019 about the bikini photographs and he had not managed to speak to with her alone on 25 November 2019 in the Staines office kitchen. In light of all the evidence I have no doubt whatsoever that another reason why he was seeking to make personal contact with Ms X was that he was pursuing her sexually. Ms X understood his emails in this way.

50. In December 2019 Ms X made a complaint to her line manager, who I shall refer to as "Ms Y" in these Reasons to prevent jigsaw identification of the claimant, in keeping with the Rule 50 order made above. The complaint related to the claimant's behaviour towards her. This complaint was escalated to Alison Deakin (Sales and Marketing Director) who in turn discussed it with Ian Curry. Mr Curry knew the claimant as a person who could be "a little bit inappropriate at times", and was not surprised by the allegations. He had never previously raised any issues with the claimant about his manner.

51. On 19 December 2019 Mr Curry and Ms Deakin met with Ms X and had a discussion with her about whether she wished to pursue a grievance or to pursue an informal route instead. No notes of the meeting were taken. Ms X told Ms Deakin after the meeting that she wished to pursue a formal grievance.

52. Ms Deakin, Mr Curry and Andrew Wagstaff (Managing Director) decided that it was appropriate for Mr Curry to conduct an investigation because he was the claimant's Director. Mr Curry was provided with guidance from Christina Thom (HR Business Partner) on how to conduct grievance investigations and hearings [84] and with a copy of the Bullying and Harassment Policy [48].

53. Ms X provided an annotated timeline of events [82] and a copy of email correspondence between her and the claimant [62]. These documents were treated by Mr Curry as a formal written grievance. He considered that the provision in the Bullying and Harassment Policy which permitted aggrieved employees to deal with matters informally was not mandatory, and that employees were entitled to raise serious matters formally in the first instance. It was his view that this was what Ms X had done.

54. The Bullying and Harassment Policy defined harassment as follows:

    harassment is unwanted conduct related to relevant protected characteristics which are sex, gender reassignment, race..., disability, sexual orientation, religion or belief and age, that… is reasonably considered to have the effect of violating [a person's] dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for him/her, even if this effect was not intended by the person responsible for the conduct.

55. The Bullying and Harassment Policy gave examples of unwanted conduct which included unwelcome sexual advances and unwelcome jokes or comments of a sexual nature. It stated that the recipient did not need to make it clear that the conduct was unwelcome if it was such that a reasonable person would realise would be likely to offend. It stated that all bullying and harassment was misconduct and would be dealt with under the disciplinary policy. It also said that bullying and harassment would often be gross misconduct which can lead to dismissal without notice.

56. Mr Curry interviewed Ms X on 23 January 2020 [117]. He was accompanied by Ms Thom. This was a formal grievance meeting. Ms X said that initially the claimant's comments seemed flippant and were "fine", but that over time they had begun to make her uncomfortable and stopped being "a laugh". She had started to take longer to respond to the claimant's emails because it felt as though he was pushing it further. For example, in the email exchange about Tony Hadley Ms X had left it until the following morning to respond. She said that after the claimant had said "I get excited whenever I see you" she had asked her colleagues to deal with him wherever possible. She said that he made unnecessary visits to the sales office, at least once a week, and that she felt that some of his emails were aimed at establishing whether she was on her own in the office. She did not want to be alone with him. She said that when the claimant told her that he fancied her she had felt trapped and had physically recoiled from him. She said that in the kitchen at the Staines office on 25 November 2019 the claimant had looked down at her blouse, and that there had been a previous occasion when he had looked down at her blouse and she had asked him "were you looking at my blouse, Jeff?", for which he had apologised.

57. Mr Curry also interviewed the claimant on 23 January 2020 [123]. Ms

Thom was in attendance. Mr Curry explained to the claimant that he was investigating a grievance brought by Ms X and that this was not a disciplinary hearing but an investigation meeting. Mr Curry asked the claimant what his relationship with Ms X was like. The claimant said it was fine and there were no issues, and that it was a business relationship as colleagues rather than a personal relationship.

58. In relation to the Facebook message about Ms X's partner, the claimant said that he was trying to give Ms X a confidence boost as she had just been through a divorce.

59. As to the event on 13 November 2019, the claimant admitted that he had had a conversation with Ms X about his partner, that he had "joked" with Ms X about her "bikini shots" and that he had texted her afterwards to say that he had not downloaded the photographs. He did not mention Ms X saying "Oh Mr Hughes". He accepted that in hindsight what he had said to Ms X was inappropriate. However he went on to say that in his view it was "general banter". Mr Curry put to the claimant that he had told Ms X that he fancied her. The claimant's response was that he did not recall this and that there were a lot of attractive people. He said twice more that he did not recall saying that he fancied Ms X before finally denying that he had said it. He said that he did not think anything had changed between them since 13 November 2019.

60. Mr Curry took the claimant through the email exchanges described above. The claimant said he was "just trying to be nice" when he said to Ms X that he gets excited whenever he meets her.

61. In relation to the 25 November 2019 course at the Staines office, the claimant said it was a coincidence that he was in the kitchen when Ms X was there, and that he did not notice any awkwardness.

62. A few days after Mr Curry's interviews with Ms X and the claimant, Ms X telephoned him and told him that she was not sure if she had done the right thing by making a complaint. Mr Curry advised her to sleep on it. The following day she confirmed that she wished to proceed with the complaint.

63. On 28 January 2020 Mr Curry interviewed Ms Y [127]. Ms Y said that it was common knowledge in the team that the claimant favoured Ms X. She said that the claimant was visiting the site more and more often, and it was always when Ms X was there. She said he would phone the site to find out whether Ms X was there and who she was with with a view to getting her on her own. She said that Ms X had told her it was all getting too much, and that she had not complained earlier because she felt that she may have somehow encouraged him.

64. Ms Y also said that in her view the claimant was a sex pest who made inappropriate comments to women. She said that he had said to one

colleague in relation to a new uniform "if it's a blouse, you'll be popping out all over the place". He had also made a comment to her which she regarded as inappropriate about a box she was carrying. She gave two examples of the claimant allegedly making unnecessary and unwelcome physical contact with women. She said that Ms X was "a perfect Jeff victim" because she was too polite and worried about the working relationship to tell him to "fuck off or go away". Ms Y felt that the claimant was not dangerous but he was harmful and deluded and she did not trust him. She worried about what he was capable of.

65. On 4 February 2020 Mr Curry spoke to the claimant in the car park as he was leaving for lunch and asked him to come in to a meeting room. Mr Curry and the claimant walked to the meeting room together. Ms Thom was in the meeting room. Mr Curry suspended the claimant from work pending investigation of allegations of sexual harassment [142]. Mr Curry said that these allegations could amount to gross misconduct. He explained that suspension was a neutral act. Ms Thom said that when the investigation was complete a decision would be taken as to whether action needed to take place under the disciplinary policy. Mr Curry gave the claimant a formal letter of suspension dated 4 February 2020 [137] which stated that the investigation would consider allegations of sexual harassment made by Ms X, that it would be conducted impartially and fairly, and that it was not a form of disciplinary action. The Disciplinary Procedure was enclosed with the letter.

66. Later that day Mr Curry interviewed Rebecca Lawton (Technical Coordinator) [139] and Edwina Elsmore-Wickens (Sales Consultant) [140]. He asked them both whether the claimant had ever said anything inappropriate to them. Ms Lawton said that he had not and that he was "not like that". Ms Elsmore-Wickens said that there was banter but it did not bother her personally, and that the claimant had made a comment to her about the buttons popping off her new uniform. She had not found this insulting but others might.

67. On 6 February 2020 Mr Curry interviewed Olivia Squire (Sales Advisor) [145] and a site colleague of Ms X's who I will refer to as "Mr Z" [146]. Ms Squire said that the claimant had never said anything to her which was a cause for concern. She was aware of the uniform comment to Ms Elsmore-Wickens. She said that the claimant had apologised to her on one occasion for inappropriate language used by other people in a meeting. Mr Z said that the claimant made Ms X very uncomfortable, particularly after he had told her that he fancied her, and that he visited the site more often than necessary.

68. By email on 11 February 2020 the claimant asked Mr Curry for some details of the investigation process and complained about Mr Curry speaking to him in the car park on 6 February 2020, which he felt was indiscreet [196]. Mr Curry responded the following day [195] providing comprehensive answers to the claimant's questions and denying that he

had acted improperly in approaching the claimant in the car park.

69. Mr Curry produced his investigation report on 20 February 2020 [225]. This set out the facts and evidence in some detail and reached various findings, including:

    69.1. that the claimant's emails were often inappropriate, portrayed behaviour that was arguably predatory in nature and included "tasteless innuendo";

    69.2. that the bikini comment was more serious and had had a significant impact on Ms X even though it was taken back the following day;

    69.3. that the claimant had told Ms X that he fancied her, and that this when taken together with the claimant's other conduct had made the situation untenable for Ms X;

    69.4. that the claimant had displayed a pattern of behaviour that was not consistent with the respondent's values; and

    69.5. that two witnesses said that they had not noticed any inappropriate behaviour on the claimant's part, which confirmed that his focus was on Ms X.

70. Mr Curry recommended that formal action should be taken against the claimant.

71. On 20 February 2020 Mr Curry sent the claimant the investigation report and supporting documents (including the disciplinary procedure) [222] together with a letter inviting him to a formal disciplinary hearing to be chaired by Stephen Bennett on 24 February 2020 [223]. The letter informed the claimant that he had the right to be accompanied at the hearing and that the outcome could be dismissal.

72. The disciplinary hearing was postponed until 2 March 2020 at the claimant's request [278]. The purpose of the postponement was to give him time to prepare for the hearing. He was given access to a computer on the respondent's premises in order to review his emails and gather evidence consisting of mileage claims [238-277].

73. In advance of the disciplinary hearing Mr Bennett prepared carefully over several days by reading through the documents and making notes, a checklist, a list of questions and an agenda [294] [297].

74. At the disciplinary hearing on 2 March 2020 [284] Jackie Hunter (HR Business Partner) took notes and the claimant was accompanied by Nathan Barratt (Buyer). Mr Bennett said that the hearing would be conducted "in line with the Disciplinary Policy & the Bullying and Harassment Policy". The claimant did not object to this, and nor did he

state that he was not familiar with the Bullying and Harassment Policy.

75. The claimant produced a written statement [336], in which he said that "Even after trawling back through every email I had sent, I still didn't understand what the complaint was about". In this statement he said that the only time he was aware that he had made Ms X uncomfortable was when he had made the comment about her bikini photographs.

76. In response to questions the claimant said, amongst other things, that:

    76.1. some of his longstanding colleagues had not been interviewed;

    76.2. he was referencing "popping champagne" in the email about Tony Hadley, and he did not think this was a sexual comment;. Ms X was "fishing for a compliment" when she replied the following day. He was being pleasant and massaging her ego and did not understand why this would be inappropriate;

    76.3. the email about garden sizes was banter and double entendre, which he admitted in hindsight that he should not have used;

    76.4. in relation to the bikini comment, he was trying to give Ms X a compliment. He had not told her that he fancied her and had not picked up that she was anxious;

    76.5. Ms X should have said if she was uncomfortable. He had never seen her visibly distressed or upset and got "no vibe" from her that she was uncomfortable with him. If she was vulnerable then he did not think she would post bikini pictures on Facebook;

    76.6. he was upset that he had been described as a "sex pest", which he regarded as slanderous.

77. At the end of the hearing Mr Bennett took a one hour break. He completed a pro forma document entitled "Making the Right Decision" [304] to record his thought processes while he considered his decision.

78. On the resumption of the meeting Mr Bennett informed the claimant that he had decided that his conduct was gross misconduct and that he was dismissed with immediate effect. He gave reasons orally which reflected what he had recorded in the "Making the Right Decision" document. These reasons were not transcribed into the minutes of the hearing.

79. Mr Bennett sent the claimant a formal dismissal letter on 6 March 2020 [315]. The letter said that the claimant was guilty of serious breaches of the Bullying and Harassment Policy, and that there were no mitigating factors to justify a lesser sanction than summary dismissal. The letter informed the claimant of his right to appeal. A copy of the notes of the disciplinary hearing was attached.

80. The claimant appealed against his dismissal by letter dated 11 March 2020 [320]. He said that he had not been given a copy of the Bullying and Harassment Policy prior to the disciplinary hearing but had managed to obtain one by email from Ms Hunter on 4 March 2020. He set out detailed reasons explaining why he did not consider his conduct to fall within the policy. In the course of this he alleged that Mr Bennett had called a member of staff “gay boy” repeatedly at a work event, which had been accepted by the person in question as “par for the course”. He also said that at no stage before 21 January 2020 had he had “any inkling” that anything he had said had caused any offence to Ms X and that “I can honestly and truly say that I never, ever had any idea whatsoever that she found me a problem”.

81. The claimant attended an appeal hearing chaired by Neal Toland on 20 March 2020 by Skype [343]. He was unaccompanied. Marie Hernandez attended in her capacity as Head of HR and as a note taker.

82. Mr Toland summarised the grounds of appeal as follows:

    82.1. the claimant was not in receipt of the Bullying and Harassment Policy so was not aware of it; and

    82.2. the sanction was too severe as it was not the claimant’s intention to harass another employee.

83. The claimant said that he would not say that he was unaware of the Bullying and Harassment Policy because he had done some training on it, but that at no time did he think his behaviour was bullying and harassment. He said he had not been given a copy of the Bullying and Harassment Policy in the course of the disciplinary process. Later in the hearing he said that he could not remember the Bullying and Harassment Policy from his training but that it was “common sense” to him.

84. The claimant talked through his letter of appeal. He said that the letter of dismissal did not specify what the “serious breach” of the Bullying and Harassment Policy that he was alleged to have committed actually was. He reiterated that nobody had told him that he was causing distress to Ms X. He complained that Ms X had not followed the informal stage of the grievance process. He said that Mr Curry was “the most menacing person I have ever met” and that he had been prejudged and treated like a criminal.

85. In relation to the bikini comment, Mr Toland asked the claimant whether Ms X had said that she found it awkward. The claimant responded “No, she would normally have said, ‘oh Mr Hughes’ in a kind of flirty way”.

86. By letter dated 27 March 2020 [355] Mr Toland informed the claimant that his appeal was not upheld. On the first ground of appeal he found that the claimant had undergone training on the Bullying and Harassment

Policy on 3 May 2019. He also found that the claimant had been sent the Disciplinary Policy in the course of the process, which identified sexual harassment as potentially gross misconduct, and he could have requested a copy of the Bullying and Harassment Policy. On the second ground of appeal he accepted that there was a culture of banter but that the claimant had crossed the line and that "the average person would not have thought it was acceptable to inform a fellow employee that they had saved or viewed bikini photos of their colleague on Facebook". He found that Ms X had told the claimant on 13 November 2019 that his comment had made her uncomfortable, but the claimant had not stopped trying to contact her.

THE LAW

Unfair dismissal

General principles

87. By section 94 of the Employment Rights Act 1996 ("ERA") an employee has the right not to be unfairly dismissed.

88. In a claim for unfair dismissal, the employer must show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason (s.98(1) ERA). One potentially fair reason is a reason relating to conduct (s.98(2)(b) ERA).

89. If the employer has shown that the dismissal was for a potentially fair reason, the Tribunal must determine whether the employer acted reasonably or unreasonably in treating that reason as sufficient reason to dismiss the employee. In determining this question the Tribunal must have regard to the circumstances of the case, including the size and administrative resources of the employer's undertaking and equity and the substantial merits of the case (s.98(4) ERA).

90. Guidance as to the correct approach to dismissals for misconduct is given in *British Home Stores Ltd v Burchell* [1980] ICR 303, more recently summarised by Aikens LJ in *Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* [2012] IRLR 759 CA as follows:

    35... once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.

    36 If the answer to each of those questions is "yes", the ET must then

decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice.

91. The tribunal must only take into account what was known to the employer at the time of the dismissal (*W Devis & Son v Atkins* (1977) AC 931). The band of reasonable responses test applies both to the Tribunal's assessment of whether the decision itself was reasonable, and to the question of whether the process adopted was reasonable (*Sainsbury's Supermarkets Ltd v Hitt* (2002) EWCA Civ 1588) [2003] IRLR 23 CA.

Investigation and disciplinary hearing

92. Where there is a dispute about whether the misconduct has occurred, the employer must do as much investigation into the matter as is reasonable in all the circumstances of the case (*Burchell*). That is not to say that each line of defence put forward by the employee must be investigated; the Tribunal should look at the reasonableness of the overall investigation (*Shrestha v Genesis Housing Association Ltd* [2015] IRLR 399 EAT). Where the evidence against the employee is strong, the Tribunal should recognise that "common sense" places limits on the amount of investigation required (*Gray Dunn & Co v Edwards* [1980] IRLR 23 at 25).

93. If the misconduct is admitted, an investigation is not required (*Boys and Girls Welfare Society v McDonald* [1996] IRLR 129).

94. The gravity of the charges and their potential effect on the employee are relevant factors in assessing whether the investigation was reasonable. Serious allegations of criminal misbehaviour, where disputed, must always be the subject of the most careful and conscientious investigation and the investigator carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the

innocence of the employee as on the evidence directed towards proving the charges (*A v B* [2003] IRLR 405 EAT).

95. In *Strouthos v London Underground Ltd* 2004 IRLR 636 the Court of Appeal held that disciplinary charges should be precisely framed and evidence should be limited to those particulars, because an employee should only be found guilty of the offence with which he has been charged.

96. Where practicable the investigation and the disciplinary hearing should be conducted by different people (ACAS Code of Practice §6).

97. At the disciplinary hearing the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out his case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. He should also be given an opportunity to raise points about any information provided by witnesses (ACAS Code §12).

Sanction

98. In deciding on the appropriate sanction employers may be faced with a range of possible penalties, each of which might be considered reasonable. In considering whether the employer acted fairly in dismissing the employee rather than applying some lesser sanction, the Tribunal must be particularly astute to observe the band of reasonable responses test. It should ask whether dismissal was reasonable, rather than whether a lesser sanction would have been reasonable: see *Securicor Ltd v Smith* [1989] IRLR 356.

Appeal stage

99. Appeals should be dealt with impartially (ACAS Code §27). Procedural defects in a disciplinary hearing may be remedied on appeal (*Sartor v P&O European Ferries* [1992] IRLR 271 CA). The process should be considered as a whole (*Taylor v OCS Group Ltd* [2006] IRLR 613 CA; *Sharkey v Lloyds Bank plc* UKEATS/0005/15 (4 August 2015, unreported)).

Polkey

100. The Tribunal may reduce compensation for unfair dismissal on the basis that the employee would have been dismissed even if a fair procedure had been followed (*Polkey v A E Dayton Services Ltd* [1988] ICR 142 HL, *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 EAT).

Contributory fault

101. A reduction to the compensatory award for contributory fault may be made by such amount as the Tribunal considers just and equitable if it finds that the Claimant has, by any action, caused or contributed to his dismissal (ERA s.123).

102. The Tribunal may make a deduction if the Claimant was "guilty of improper conduct which gave rise to a situation in which he was dismissed and that conduct was blameworthy" (*Gibson v British Transport Docks Board* [1982] IRLR 228). The Tribunal should take "a broad, commonsense view of the situation" in deciding both whether to make a reduction and if so in what amount (*Maris v Rotherham Corpn* [1974] 2 All ER 776, [1974] IRLR 147 NIRC).

Wrongful dismissal

103. The Employment Tribunal has jurisdiction to determine a claim for wrongful dismissal by virtue of the Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994.

104. An employee is wrongfully dismissed if he is summarily dismissed in circumstances where the employer was not entitled to dismiss him without notice. If an employee has been dismissed summarily for gross misconduct, the dismissal is wrongful if he did not in fact commit gross misconduct. The measure of damages is the notice pay to which the employee would have been contractually entitled.

105. The tribunal must decide whether the contract of employment was fundamentally breached by the misconduct, rather than whether the employer acted reasonably in finding there was such a breach and dismissing the employee because of it.

THE PARTIES' SUBMISSIONS

106. Mr Tibbitts for the claimant submitted that:

    106.1. The claimant did not advance an alternative reason for the dismissal and this was not the main thrust of the case. The main thrust was the issue of fairness in circumstances.

    106.2. The respondent was a large employer with over 2000 employees and a dedicated HR department.

    106.3. This was a workplace and industry characterised by banter and inappropriate comments This was an important contextual factor.

    106.4. The claimant's training on the Bullying and Harassment Policy

had essentially been a check box exercise and was cursory. This showed that the respondent did not communicate with its employees seriously about these issues.

106.5. The relationship between the claimant and Ms X was friendly at the outset. They discussed personal matters and he confided in her.

106.6. A dismissal for sexual harassment will carry a stigma in an industry where a lot of people know each other. The gravity of the charges and the potential effect of dismissal is be relevant when considering what is expected of a reasonable investigation: *A v B*.

106.7. The investigation report mentioned the claimant being a "sexual predator". That was a significant allegation to make.

106.8. The Bullying and Harassment Policy was not drafted ideally. The respondent was looking more at the "effect" of the behaviour, but they did not pay attention to the question of whether it would be reasonable for the conduct to have that effect as would be required under s.26 of the Equality Act 2010.

106.9. Mr Curry was biased. He had pre-existing adverse views that the Claimant could be inappropriate and was "full of hot air". He thought the claimant would not be wholly truthful. He asked clearly leading questions. He omitted evidence when asking the claimant for his initial response. He made judgmental comments when he interviewed the claimant. He did not put all the allegations to the claimant. It was evident that he was listening to office gossip about the claimant.

106.10. Mr Curry had jumped to the conclusion that the claimant's comment about Tony Hadley "popping something" was sexual, when it was in the context of an email about "popping champagne".

106.11. Mr Curry may have considered the incident on 13 November 2019 and retrospectively looked back to paint the claimant as a sexual predator.

106.12. Mr Curry started off holding a meeting with Ms X on 19 December 2019 of which he had not provided clear notes or an account in his witness statement. He had supported Ms X in deciding whether to pursue her complaint and he then went on to determine the grievance and to investigate the conduct aspect for a disciplinary hearing. The claimant had raised a number of points that he wanted investigated to disprove the idea that he was a sexual predator and had acted with intention,

but no further investigation was carried out. Ultimately both Mr Bennett and Mr Toland simply adopted Mr Curry's investigation report. The investigation was such that the decision was really down to Mr Curry.

106.13. At the investigation stage the claimant was not given a reasonable opportunity to respond. There were allegations from other witnesses which seem to have formed part of the rationale which he did not have the opportunity to comment on until the disciplinary hearing at the earliest.

106.14. There had been a lack of clarity as to when the process transformed from a grievance procedure into a disciplinary procedure. It just morphed from one into the other at around the time of the claimant's suspension.

106.15. There was also a lack of clarity about when the Bullying and Harassment Policy was applied. It was not provided to the claimant in advance. The respondent did not set out what the breaches were in advance. It was referred to in passing at the outset of the disciplinary hearing.

106.16. The reason for the dismissal was not clearly stated. There was no record of it in the minutes. There was no rationale in the outcome letter.

106.17. Mr Bennett approached his decision by looking at words like "sex pest" and "perfect Jeff victim" and coming to a view that the claimant was some sort of sexual predator. He did not consider whether particular incidents had been proven or not and if so whether they amounted to gross misconduct. There were no reasonable grounds to find that the claimant was some sort of sexual predator. Mr Bennett's decision was a rubber stamping exercise.

106.18. Mr Bennett did not consider mitigation or alternatives to dismissal.

106.19. Any Polkey deduction should be 20%-30%. Similarly the 13 November 2019 incident might attract an element of contributory fault to the extent of 20%-30%.

106.20. As to the wrongful dismissal claim, the Tribunal had not heard evidence from Ms X. It was not suggested that she was entirely untruthful but there were inconsistencies in her account. The emails and the Facebook messages in October 2019 were not gross misconduct in any way. They were friendly back and forth with some double entendre. Ms X viewed them through a different lens in hindsight after the 13 November 2019 incident.

The event on 25 November 2019 was not gross misconduct: the claimant had only been accused of going into the kitchen. In the emails on 3 and 4 December 2019 the claimant was chasing up on an urgent work matter. The 13 November 2019 incident .should be seen in the context of a friendly relationship. The claimant made a stupid comment as a joke, intending to give Ms X a compliment as one does to a friend. It does not amount to gross misconduct.

107. Mr Bradley for the respondent submitted that:

107.1. The respondent had shown that the genuine reason for the dismissal was a reason related to the claimant's conduct.

107.2. Mr Curry did not take the decision to dismiss or hear the appeal. The claimant believed that Mr Curry was biased at the latest when he got the investigation report but had not raised it. His view that the investigation was biased was based on his knowledge of the industry as a whole and extended even to Mr Toland who he had never met.

107.3. The claimant's focus at the time of the disciplinary hearing, and to a lesser extent the appeal, was on whether certain individuals had been spoken to. Those witnesses could only have spoken to the claimant's character and/or his frequency of visits to other sites. None of them could have spoken to the allegation which was the reason for the dismissal.

107.4. There was no lack of clarity on the question of whether the grievance or disciplinary procedure was being followed. The claimant understood on 4 February 2020 that the matter was being dealt with under the Disciplinary Procedure. If he had been in any doubt it was clear on 11 February 2020 when he asked specific questions about the disciplinary procedure.

107.5. The Bullying and Harassment Policy was applied to the circumstances. The claimant was certainly aware of it by the time of the start of the disciplinary hearing on 2 March 2020.

107.6. The respondent accepted that that only was clear to the claimant by 2 March 2020 that he was being disciplined for breaches of the Bullying and Harassment Policy. He had been aware of that policy since May 2019 when he undertook training on it. The Policy formed the backdrop to the basis of his appeal. Even if the respondent can be criticised for not clarifying the position before then, by the point the appeal hearing happened the claimant was well aware he was being disciplined in accordance with the Policy.

107.7. By the end of the process the claimant had a reasonable opportunity to respond to the evidence given by other witnesses. He did so in some detail in the disciplinary hearing and in the appeal.

107.8. The respondent set out the allegation against the claimant clearly in the invitation letter for the disciplinary hearing, which said that he was accused of sexual harassment towards a colleague. Supporting evidence was provided to him.

107.9. The reason for the dismissal may not have been described as a breach of the Bullying and Harassment Policy until the dismissal letter. However the appeal process allowed the claimant to challenge the reason, which he did in full.

107.10. The respondent was entitled to and did rely on the evidence of Ms X in her timeline and minutes of her investigation meeting. It was also entitled to rely on the evidence of her colleagues to whom she had spoken about the incidents shortly after they occurred.

107.11. The claimant alleges that the respondent failed to take account of the workplace context. Mr Curry and Mr Bennett both gave evidence that times have moved on and the respondent's approach is different from history.

107.12. There was no evidence that Mr Bennett and Mr Toland had predetermined the matter. The claimant's assertion on this was based only on general industry experience.

107.13. Sexual harassment was an express example of gross misconduct in the disciplinary procedure. It would be an exceptional case if the decision to dismiss was one that no reasonable employer could have made, and was outside the band of reasonable responses.

107.14. Even if there were any procedural defects the claimant would have been fairly dismissed within a month of the date on which he was actually dismissed. Contributory fault should be 75%.

107.15. As to wrongful dismissal, the claimant committed an act of gross misconduct and was therefore in material breach of the contract of employment.

CONCLUSIONS

Can the respondent show (on the balance of probabilities) that the reason or principal reason for the dismissal was a potentially fair reason

(s.98(2))? The respondent's case is that the claimant was dismissed for gross misconduct.

108. The respondent has discharged its burden of showing that the genuine reason for the claimant's dismissal was a reason relating to conduct.

109. The evidence given by the respondent's witnesses was clear and credible. They all considered that the claimant had committed gross misconduct and that was the reason why the disciplinary action was pursued, he was dismissed and his appeal was not upheld.

110. Although the claimant suggested that his dismissal was predetermined, he did not suggest any ulterior purpose and the point was not pressed on his behalf in closing submissions. No evidence suggesting any ulterior purpose was adduced.

Was the investigation manager Ian Curry biased / not impartial? Was the manner in which Mr Curry conducted the investigation biased and not impartial and objective?

111. I do not accept that Mr Curry was biased or partial or that he conducted the investigation in such a manner. I find that he embarked on the investigation with an open mind and carried it out in that spirit.

112. Mr Curry's evidence as a whole was thoughtful, thorough and consistent. He was candid in admitting that he had not been surprised that the claimant had been accused of sexual harassment. He said in cross-examination that the claimant could sometimes be raucous and outspoken in the office when talking with colleagues about sport or similar topics, and that banter sometimes went a bit too far although not in an obscene way. He did not say in evidence that he expected the claimant to be untruthful, as the claimant's counsel submitted. Rather, he said in his witness statement that he had a tricky relationship with the claimant because he thought the claimant was "full of hot air". By this he meant, as he explained both in his witness statement and under cross-examination, that the claimant would claim to be getting on with things but would not be doing so quite as quickly as he should be.

113. Mr Curry also said that he had sometimes had to speak to the claimant about the blunt manner in which he wrote emails and about missing deadlines. However he had never fallen out with the claimant.

114. Mr Curry gave the question of impartiality careful thought, together with Ms Thom and Mr Wagstaff. The decision made to proceed with Mr Curry conducting the investigation was within the band of reasonable responses.

115. Mr Curry took the investigation extremely seriously and was mindful that the claimant's job could be at stake. He studied the guidance that was

provided to him by Ms Thom about how to conduct investigations. During the investigation he continued to take HR advice as necessary.

116. During the investigation interviews Mr Curry questioned the witnesses in a reasonably open manner. It is to be noted that an internal investigation undertaken by a non-lawyer need not be conducted like an examination-in-chief in court. The occasional leading question does not take the investigation out of the range of reasonable responses. For example, Mr Curry said to Ms X in interview that he had read the claimant's comment about Tony Hadley "popping something" as "quite a sexual comment". In cross-examination he accepted that this could be seen as him leading Ms X, but that it was obvious that it was a sexual comment and he was simply stating the obvious. I accept that evidence.

117. Further, I do not accept that Mr Curry was biased because he had taken part in a conversation with Ms X in December 2019 prior to her decision to pursue a formal grievance. Nor do I consider that he was biased because he had spoken to her in January 2020 and advised her to sleep on it before deciding whether to continue with the grievance. There was no evidence that these conversations led to Mr Curry taking a biased or partial attitude towards the allegations.

Was the extent of the investigation (as a whole) deficient?

118. I find that the investigation as a whole was satisfactory and fell within the range of reasonable responses.

119. The claimant suggested that certain witnesses should have been spoken to. These witnesses would have had no directly relevant evidence to give. They might have given positive character evidence, but this would have been of marginal, if any, relevance. They might have given some evidence on the question of how often the claimant visited the office in which Ms X worked. This again would have been of limited relevance to the issues, and in any event the claimant was able to rely upon his mileage claims for this purpose, to which he had been given access before the disciplinary hearing.

How did the process transform from grievance to disciplinary and was this fundamentally unfair?

120. It was clear to the claimant on 4 February 2020 when he was suspended that the ongoing investigation was now a potential disciplinary matter. Ms Thom explained to him that a decision would be made at the conclusion of the investigation as to whether disciplinary action would be taken against him. The claimant understood that the disciplinary procedure would apply. He was given a copy of the procedure along with his letter of suspension. When he was invited to a disciplinary hearing he can have had no doubt that this was a disciplinary matter. It is not the case that the

process simply "morphed" from a grievance investigation into a disciplinary investigation. No unfairness was caused to the claimant. The manner in which this was dealt with by Mr Curry and Ms Thom was within the range of reasonable responses.

At investigation stage was the claimant given a reasonable opportunity to respond and was it clearly set out what was being alleged at both investigation and disciplinary stage?

121. It was suggested that the claimant did not have the opportunity to respond to allegations made by Ms Y, Ms Elsmore-Wickens and Mr Z.

122. I find that the claimant had adequate opportunity to comment on these at the disciplinary hearing and then at the appeal hearing. Mr Curry did not act unreasonably in not reverting to the claimant for comment on these matters prior to drafting his investigation report.

123. It was also suggested that Mr Curry omitted certain parts of the evidence when asking the claimant for his response in the investigation meeting. One example was the Tony Hadley email exchange. It was put to Mr Curry that he had not read out to the claimant Ms X's original email which referred to "popping champagne". I do not agree that this omission was liable to mislead the claimant as to the nature of the conversation such that he did not have a reasonable opportunity to comment. Nor were other examples put to Mr Curry which showed his questioning of the claimant to have been unfair or unreasonable.

Was it clear whether the claimant was dismissed for being a sexual predator / sex pest and concerns on the wider business or whether the dismissal was for specific allegations against Ms X?

124. The claimant was not dismissed for being a sexual predator or a sex pest.

125. Amongst several findings in Mr Curry's investigation report was "Often the [claimant's] email messages were inappropriate, and whilst not particularly onerous in themselves, they portrayed a behaviour that was arguably predatory in nature". This was a reasonable conclusion for Mr Curry to draw from the evidence.

126. The evidence given to Mr Curry by Ms X's line manager included her opinion that the claimant was a "sex pest". This opinion was supported by examples. It was perfectly proper for Mr Curry to include the evidence in his report and for Mr Bennett to take it into account as evidence relevant to credibility. I am satisfied, however, that it did not form the reason for the dismissal. Mr Bennett decided to dismiss the claimant because he considered that the allegation was proved that the claimant had sexually harassed Ms X.

Was it unfair to dismiss the claimant for breaches of the Bullying and Harassment Policy which was only mentioned at disciplinary stage? Was it unfair not to provide the claimant with the Bullying and Harassment Policy and not make it clear that he was being disciplined for breaches for that policy?

127. The respondent did not act unreasonably in proceeding in the manner that it did in relation to the application of its internal policies.

128. The claimant was disciplined under the Disciplinary Policy for sexual harassment, which was identified as potential gross misconduct in that policy. The detailed definition of harassment was contained in the Bullying and Harassment Policy.

129. The claimant had been provided with the Bullying and Harassment Policy less than a year before the investigation took place. He had attested that he had read and understood it. Mr Curry's conclusions in his investigation report were not reached by way of any abstruse interpretation of the wording of the Bullying and Harassment Policy. The claimant was not put at any disadvantage by the failure to set out the provisions of the policy in the report.

130. The suspension letter given to the claimant on 4 February 2020 stated that the allegation against him was sexual harassment. Had he read and understood the Bullying and Harassment policy when he said he had in May 2019, he would have understood that the respondent's definition of harassment was contained in that policy. The respondent was entitled to assume that he was in fact familiar with the policy.

131. The disciplinary hearing did not take place for another month after the claimant was suspended. In the interim he was given access to the respondent's premises and to his emails and was given a postponement of the disciplinary hearing in order to prepare for it. That was sufficient opportunity for him to obtain whatever policy documentation he thought he should have.

132. The Bullying and Harassment Policy was then referred to at the beginning of the disciplinary hearing on 2 March 2020. The claimant did not say that he was surprised by this, that he was unaware of the policy or that he would like a copy of it or time to read it.

133. In his appeal letter of 11 March 2020 the claimant set out his grounds of appeal in detail by reference to the provisions of the policy. At the appeal hearing he said he was "not unaware" of the policy because he had done training on it. That was a reference to the training in May of the previous year. He had a full opportunity to expand orally on why he believed that he had not breached the policy. Thus, even if the respondent had acted unreasonably in not bringing the policy to the claimant's attention prior to the disciplinary hearing, any unfairness caused to him was remedied at

appeal stage.

Were the reasons / rationale for the dismissal set out either at the disciplinary hearing or in the dismissal letter?

134. I accept Mr Bennett's evidence that at the end of the disciplinary hearing he explained to the claimant the reasons and rationale for his decision to dismiss him. Mr Bennett had prepared carefully and at length for the disciplinary hearing. During his deliberation time he noted his reasons in the Making the Right Decision document. I do not accept that he took a broad-brush approach to making or explaining his findings.

135. It would have been preferable if this information had been contained in the minutes of the disciplinary hearing and set out in the dismissal letter. However I am satisfied that the claimant was not in doubt about the reasons for his dismissal. Even if Mr Bennett had not explained it to him at the disciplinary hearing, each of the events and communications in relation to which he had been disciplined was set out in the investigation report and had been discussed in the disciplinary hearing. In the claimant's appeal letter he made a number of complaints about various aspects of the investigation and the disciplinary process. These did not include any complaint that the rationale for the dismissal had not been explained to him. Neither did he make any complaint along these lines in the appeal hearing.

Was there sufficient evidence against the claimant?

136. I find that there was sufficient evidence against the claimant and that the respondent acted reasonably in proceeding on the basis of the evidence that had been gathered.

137. The bulk of the evidence was documentary, in the form of emails. No additional evidence would have assisted with Mr Bennett's assessment of the emails. As to the incident on 13 November 2019, the claimant did not dispute that he had made the bikini comment. Mr Bennett was entitled to conclude that the claimant's evidence about the rest of the incident was not credible by comparison to Ms X's evidence. There were no other witnesses to the incident and so no further evidence could reasonably have been obtained. As to the event in the Staines office on 25 November 2019, the claimant did not dispute that he was in the kitchen when the claimant was there. The question for Mr Bennett was whether the claimant had gone into the kitchen deliberately. No documentary or witness evidence could have been obtained to assist with that enquiry. Taken as whole, Mr Bennett did not act unreasonably in concluding that the claimant's conduct showed a pattern of behaviour towards Ms X which amounted to sexual harassment.

Did the respondent take into account the context of building sites in which loose language or use of sexualised banter is more commonplace than in other workplaces?

138. All of the respondent's witnesses accepted that some banter is traditionally encountered in the building trade. I find that in their decision making they took such account of this as was appropriate. The respondent was not bound to accept a lower standard of conduct in its workplace, because of historical or entrenched practices in the industry in which it operates, than is to be expected in other modern workplaces. It had in place a Bullying and Harassment Policy which clearly stated that sexual harassment was potentially gross misconduct. The claimant did not present compelling evidence that any particular individuals had been treated differently in relation to allegations of sexual harassment than he had, other than a reference to another employee using the phrase "12 incher". This allegation was not pursued in sufficient detail for a comparative analysis to be made.

Was the dismissal predetermined?

139. The claimant alleged that Mr Curry was biased (which I have rejected above) and that this bias infected both Mr Bennett and Mr Toland. I reject the allegation, which was unsupported by evidence.

Was the sanction reasonable? Did the respondent fail to consider mitigation and alternatives to dismissal?

140. The respondent acted reasonably in all the circumstances in dismissing the claimant.

141. Mr Bennett's handwritten notes on the Making the Right Decision document show that he considered whether there was any mitigation and whether a lesser sanction would be appropriate. No particular mitigation was suggested to me which he had failed to take account of.

142. The unfair dismissal claim fails.

Would the claimant have been dismissed fairly in any event? If so, when?

143. In light of my findings above it is not necessary for me to address this question.

Did the claimant contribute to his dismissal?

144. In light of my findings above it is not necessary for me to address this question. For the avoidance of doubt, however, I make clear that even if I had found that the claimant had been unfairly dismissed on any of the grounds advanced, I would have found that he contributed to his

dismissal by reason of his culpable conduct in sexually harassing Ms X to the extent of 100%.

Wrongful dismissal

145. I find that the claimant committed gross misconduct by sexually harassing Ms X and the respondent was therefore contractually entitled to dismiss him summarily.

146. I am satisfied that, in context, the following email comments from the claimant to Ms X amounted to unwelcome jokes of a sexual nature:

 146.1. "I am surprised Tony didn't pop something when he met you on the weekend [smiley emoji]";

 146.2. "I get excited whenever I meet you [smiley emoji]";

 146.3. "You should tell the lady that size is not everything";

 146.4. "As long as the bush is not allowed to get too big the garden will look fine";

 146.5. "Yes I am an expert on the size of bushes";

 146.6. that he would be smiling if he was sitting next to her.

147. As to the first of these, the claimant's evidence that he was suggesting that he was surprised that Tony Hadley did not pop champagne when he met the claimant entirely lacked credibility. It is quite obvious that the comment was intended to amount to sexual innuendo.

148. Ms X's occasional jokey response was insufficiently regular or frequent to show that she was willingly engaging in sexual banter with the claimant. It is equally consistent with her trying to be polite and not to upset him. That is also consistent with the fact that on occasion she did not respond to his emails or left her response until the following day. She never initiated lewd banter. Against this background, a reasonable person would understand that comments of this kind would be likely to offend.

149. Even if Ms X did willingly engage in light flirtation with the claimant to start with, the conduct which I have found the claimant committed on 13 November 2019 was wholly unacceptable and unequivocally amounted to unwelcome sexual advances and an exceptionally serious breach of the respondent's Bullying and Harassment and Disciplinary Policies. The claimant's own evidence was that Ms X had been upset and had left the site. This admission contradicted his statements in the disciplinary process: to Mr Curry that there were "no issues" in their relationship; to Mr Bennett that he had never seen Ms X visibly distressed or upset and

got "no vibe" from her that she was uncomfortable with him; and to Mr Toland that he never had "any inkling" that he had ever caused her any offence. The truth is that he knew that his conduct was not welcome and had caused Ms X distress, as would any reasonable person. This incident alone amounted to gross misconduct.

150. Thereafter the claimant's conduct must be viewed in the context of the previous incidents. He pursued Ms X by email and in person. This amounted to sexual harassment because it was part of a course of conduct which had begun with smutty emails and continued with sexual advances. He deliberately sought out Ms X in the kitchen at the Staines office on 25 November 2019. In all the circumstances his emails of 3 and 4 December 2019 can accurately be described as predatory. He knew perfectly well that he had crossed a line on 13 November 2019, which is why he had sent Ms X a message the following day saying that he had not downloaded any photos. Nonetheless he did not desist in his behaviour.

151. The wrongful dismissal claim fails.

Employment Judge Reindorf

Date 28 April 2021

JUDGMENT SENT TO THE PARTIES ON

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