EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101253/2020

Held in Edinburgh 15, 16, 17 and 22 June
Member's Meeting by CVP 9 July 2021

Employment Judge M Robison
Tribunal Member R McPherson
Tribunal Member W Muir

Mr J Sharp	**Claimant** **Represented by** **Mr F Sharp** **Father**
Kyowa Kirin International plc	**Respondent** **Represented by** **Ms L Davis** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant was unfairly dismissed and the respondent shall pay to the claimant the sum of **TWENTY THREE THOUSAND FIVE HUNDRED POUNDS AND TWENTY NINE PENCE (**£23,500.29).

REASONS

Introduction

1. The claimant lodged a claim with the Employment Tribunal on 28 February 2020 claiming unfair dismissal. The respondent lodged a response to that claim, arguing that dismissal in the circumstances was fair.

2. Following the calling of this case for a final hearing on 1 December 2020, the claimant's representative made an application to amend, which resulted in the hearing being adjourned. At a subsequent case management preliminary hearing on 8 February 2021, the claimant's application to amend was allowed, and the respondent was given three weeks to lodge an amended ET3, which

they did by 1 March 2021, pointing out that it was provisional. The respondent subsequently lodged a revised ET3 to which the claimant objected.

3. This matter was dealt with at a case management preliminary hearing immediately prior to the commencement of the final hearing. Following discussion, it was apparent that the claimant's principal objection, with two exceptions, related to delay. We noted however that in regard to most of the amendments these were in response to the claimant's amended ET1, and further, given the respondent had indicated the second ET1 was provisional and the reasons for that, we allowed all of the amendments bar one.

4. This included the amendment at new paragraph 7, because although the claimant suggested had he known earlier of this argument, he could have called witnesses to respond, we agreed with Ms Davis that any witnesses would not have relevant evidence to give.

5. There was one phrase in new paragraph 17 which we did not allow because this referenced criminal offences which had not previously been referenced at all during the course of the investigation and disciplinary and were in no way relevant to the claimant's inconsistency argument. We therefore allowed the amendment to that paragraph up to "the claimant's conduct was far more serious", the remainder being deleted.

6. Consequently, the revised witness statements of the respondent's witnesses were allowed. The Tribunal then heard evidence (by video) from Ms Lorna Mitchell, human resources business partner; and then in person from Ms Jen Chalmers, HR director, who conducted the investigation into Ms Baltaitye's grievance; Ms Hazel Kennett, Head of Quality, who conducted Ms Baltaitye's grievance hearing and the claimant's disciplinary hearing; Mr Bill Aitken, the claimant's line manager; and (by video) Mr Nathan Hawes, SVP Supply Chain, who conducted the appeal. We thereafter heard evidence from the claimant.

7. During the hearing, the Tribunal was referred by the parties to a joint file of productions (referred to by page number).

Findings in Fact

8. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved.

9. The claimant commenced employment with the respondent as an IT user support analyst on 5 May 2015. He was dismissed for gross misconduct on 30 January 2020.

Complaint from Ms Baltaitiye

10. On 23 December 2019, Ms N Baltaitiye sent a message by Whatsapp to Ms L Mitchell in her role as HR business partner advising that she needed to speak to her about the claimant (page 32). As she was then unavailable, Ms Baltaitiye telephoned her the next morning, 24 December, to advise that she would probably receive several complaints about the claimant on her return to work, in regard to inappropriate behaviour towards women. She was advised by Ms Mitchell to follow the grievance procedure if she felt she had been harassed.

11. On Monday 6 January 2020, Ms Baltaitiye returned to work following the Christmas break and advised Ms Mitchell that she wanted to take things further regarding the claimant's behaviour to her following the Christmas party which took place on 22 December, referencing "rubbing her stomach and talking about shagging up the ass". She also asked if others had complained about the claimant. Ms Mitchell subsequently advised her that the issue was serious and not appropriate for informal resolution and she needed to raise a grievance. As advised, she addressed her grievance to Ms Sian Abel in an e-mail dated 10 January 2020 (page 33 and 34).

12. On 13 January 2020, the claimant was suspended by Ms Mitchell. In a letter confirming the suspension it was stated that "the reason you have been suspended is that the company needs to conduct an investigation into allegations of an incident following the Christmas lunch at the Balmoral". That letter also stated that "you are not permitted to enter the company premises unless authorised…..this is a confidential matter and…you are not permitted to make contact with or discuss this matter with any other employees without the prior consent from me".

Investigation of grievance

13. On 13 January 2020, Jen Chalmers was appointed by Ms Abel to investigate the grievance. She conducted an investigation into three allegations namely:
Allegation 1: claimant touching Ms Baltiatiye's back and lower belly;
Allegation 2: claimant saying he was sexually aroused by taking ecstasy and insinuated something sexual with his tongue;
Allegation 3: claimant said to Ms Baltiatiye "I'm going to fuck you up the ass".

14. On 14 January 2020, Ms Chalmers met and interviewed Ms Baltiatiye and the claimant separately. During that interview with the claimant, the claimant said that he had no memory of having behaved in the way described, and when the specifics were put to him he categorically denied saying the things he was alleged to have said.

15. In regard to the second allegation, the claimant is noted as stating, "I would have said I had a wonderful time. Can I just say that I don't recall any of this. I would never want to insult someone like that. I would never say that to anyone, never to Nida. If I said that, clearly she's upset, I'm sorry that she's upset. It doesn't add up that I've said or done any of those things. On so many levels, I would not have done that….I mean Nida no harm. I am perplexed by it. I have nothing to hide. I don't want to go proving people wrong, but this doesn't seem right…I categorically dispute every part of it".

16. Of the third allegation he is noted as saying, "this is bizarre. Absolutely not. I haven't said that. I wouldn't say that. I have never. For me to say such a thing is peculiar. I'm perplexed where that came from". When asked if she asked him to repeat it, he is noted as saying "Categorically no. I have no memory of that. It seems out of character. Own sexual preferences, who it was to. It seems out of character and not normal at all. I don't recall saying it. I don't believe that was said".

17. The claimant is noted as saying, in regard to a situation when he was drunk, "I think when I'm drunk, you might have said something and not had feedback on. I've certainly not said anything of that nature. Nothing like that…..It doesn't make sense. She's a friend. I have to think that she believes that. I'm thinking,

was she drunk, did she misunderstand? She's not a malicious person, I don't see why she would make something up, it's just bizarre".

18. The claimant is also noted as saying, "If people are saying it occurred, I would accept that. From memory, I have no recollection, but I believe I would not do that. From logic, I would not do that. From my own knowledge of myself, I would not do that. Nida is my friend only, I do not see her in a sexual manner so I'm happy to say no it didn't occur".

19. During the interview, the claimant said he was intoxicated and raised the fact that he has problems with his memory and that this was part of his dyslexia, "I have problems with short term auditory and verbal memory…I have significant problems with short term memory".

20. On 15 January 2020, at 9.31, the claimant sent an e-mail to Jen Chalmers in the following terms:

"As you will appreciate I have reflected in earnest on our meeting yesterday and the allegations that have been made against me. I have absolutely no memory of the matters alleged, but accept however that at the time in question my behaviour would have been affected by alcohol. That is my personal responsibility and I do not seek to mitigate my conduct by using that as an excuse. I know Nida to be a person of integrity; I have valued her as a friend and enjoy a good professional relationship with her at work. As such, I do not believe she would have made such an allegation had there been no basis for her to do so. I have therefore concluded that I may well have acted towards Nida in the manner she has described. I am thoroughly ashamed with myself as a consequence and feel absolutely awful that I could have upset a friend and colleague in the way described. I can't turn the clock back and wish the allegations away, but would want to offer Nida my deep apology and regret for having offended her. I would further hope that Nida could be spared from further enquiry into this matter and invite you to manage this investigation accordingly".

21. That apology was not forwarded to Ms Baltaitiye at that time.

22. On 16 January 2020, Ms Chalmers interviewed Bill Aitken, Nichola Pilmer, Michelle Anderson, Julie McInnes and Sarah Birnie, employees of the respondent who were in attendance when the incident occurred on 22 December 2019.

23. On 17 January 2020, Ms Chalmers interviewed Ms Baltiatiye again (page 84). During the course of that interview, she was asked what outcome she was looking for by raising this grievance, to which she replied, "I want him removed from the organisation, dismissed. He had plenty opportunity to apologise to me and he hasn't. I don't see how I can be in the same organisation with someone who has done this psychological damage to me. Feel it impossible to be in the same workplace. Would not like to see him".

24. Ms Chalmers then asked, "are you looking for a formal sanction for James? Are you saying this behaviour is unacceptable that you find it would be difficult to continue to work with James in the workplace? I am trying to understand what conclusion you are looking for from raising your grievance". Ms Baltaitiye is recorded as having answered, "I do not want to see him again but if I had to I would deal with it. I'm not afraid to tell him everything to his face. Its definitely my preference not to see him…"

25. On 21 January 2020, Ms Chalmers prepared a grievance report, to which was attached the witness statements, the e-mail from the claimant dated 15 January 2020, and the notes prepared by Ms Mitchell (pages 39 to 86).

26. In the summary report, Ms Chalmers set out the background to the investigation; the investigation process; the evidence collected specifically on the matter of alcohol consumption of parties and witnesses; she summarised the written evidence and the witness evidence in respect of each allegation; and the facts established in respect of each allegation (as well as those which could not be established). She set out mitigating factors and other relevant information (page 49).

27. Under conclusion, she made a recommendation as follows: "Based on the circumstances of the allegations, and taking into account Nida's personal view, I do not recommend that both parties should meet".

Grievance hearing

28. The grievance hearing took place on 23 January 2020 and was conducted by Hazel Kennett. Ms Chalmers as investigating officer was present, as was Ms Mitchell as Ms Baltiatiye's supporter. The HR representative was Sarah Holland. Notes were taken by Naomi Crosbie-Iwasaki (pages 99 – 103). Ms Baltiatiye and Ms Mitchell were given time during hearing to review the investigation report. The claimant was not present in accordance with the recommendation of Ms Chalmers, nor was he represented.

29. This is the first time that Ms Baltaitiye becomes aware of the apology. She says "In this email he said he regrets it. I was hoping he would come and apologise on 6 January. I think senior people should decide what to do with this case. Felt a duty to report this, but I don't want to impose what should be done with James. It might be that he has some medical condition I'm not aware of" (page 101).

30. The following exchange is also recorded:

HK: That's fine its [the respondent's] responsibility to uphold the next stage.

NB "I believe no one in KK should behave like that or have to experience that. In these four years I have known James, I have looked on him like a friend, he comes to me to discuss his family problems. I felt sorry for the man. It was really difficult to raise this, on the other hand, I am a woman, I can't allow this to happen to anyone. I'm sorry that this happened to him".

HK: "Thanks for coming in and bringing this to KK's attention. With respect to all allegations, all three will be upheld. Sarah will go through the next part of the process".

SH: First we will confirm in writing…so you have a formal confirmation of the outcomes. We will then contact James and let him know that the grievance has been upheld. The next stage is that we will move to disciplinary. We will have a separate process around that. We will look at the gravity of the allegations, and the outcomes and repercussions. It will be the company's decision on what will happen".

HK: "One final piece with respect for the request from James. He has asked us to let you know that he is seeking help from AA. And that he would like to apologise to you. You can get that in writing, face to face or ignore it completely…."

31. Ms Kennett goes through the allegations with Ms Baltiatiye and reviews the mitigating factors. When asked if there is anything she would like to add she stated, "I can't really answer for James".

32. By letter dated 24 January 2020 (page 105) Ms Baltiatiye was advised that all three allegations were upheld.

33. By e-mail dated 24 January 2020, (page 107) the claimant was given a copy of the grievance procedure and the grievance investigation report (pages 39 – 50) but not the statements which had accompanied it at the grievance hearing (pages 51 – 86).

Disciplinary hearing

34. By letter of that same date, the claimant was advised by Ms Kennett that he was required to attend a disciplinary hearing (page 108). The three allegations were set out, as follows, "that on 20 December 2019 at the Brewhemia bar in Edinburgh, following the office Christmas party earlier the same day:
Allegation 1: you touched Nida Baltiatiye's back and front lower belly in an inappropriate way;
Allegation 2: you said to Nida that you were sexually aroused by taking ecstasy and insinuated something sexual with your tongue to Nida;
Allegation 3: you said to Nida "I'm going to fuck you up the ass" and repeated the comment went prompted".

35. The letter continued:

"You have indicated in writing (your e-mail of 11 January 2020) that whilst you had no recollection of such behaviour, you had respect for Nida, and that effectively if she said you had behaved in this way, then you believed her. An investigation into the allegations has already been undertaken in the grievance

process and I do not see any pressing need to re-investigate any points, subject of course to you raising any issues at the hearing.

The basis for the disciplinary allegations is that at the grievance hearing on 23 January 2020 in which the allegations raised against you by Nida were considered, the outcome was given to Nida to uphold her complaints. As such, we now need to consider your actions in the context of a disciplinary process.

I enclose a copy of the grievance investigation report. As I have indicated, we are not proposing to re-investigate the allegations – so this grievance investigation report will stand as a disciplinary investigation report.

We do not intend to call any witnesses to the hearing. If you wish to call any relevant witnesses to the hearing, please let us have their names as soon as possible and no later than 28 January 2020. If there are any further documents you wish to be considered at the hearing, please provide copies as soon as possible. If you do not have those documents, please provide details so they can be obtained".

The hearing will be held in accordance with the Disciplinary Procedure, which is enclosed. If you are found guilty of misconduct, you may be issued with a warning. If you are found guilty of gross misconduct, your employment may be terminated summarily (ie without notice)".

36. The disciplinary hearing took place on 30 January 2020. The hearing was conducted by Ms Kennett. She was accompanied by Sarah Holland, HR. Notes were taken by Ms Crosbie-Iwasaki (pages 111 to 124). The claimant was represented by his father, Mr F Sharp, who is a retired human resources professional.

37. The notes, which were ultimately agreed by all parties as accurate, record that following preliminaries including introductions Ms Kennett stated:

"You have been provided with the Investigation Report outlining the allegations upheld against [you and] I do not intend to go through the investigation line by line as you have already been provided with a copy, however if there are any additional points you wish to raise at any point during the hearing then please do not hesitate to do so. I have been provided with and I have reviewed the

investigation report along with the witness statements and am satisfied that the summary investigation report accurately reflects the content of the witness statements. You have notified us that you do not wish to call any witnesses at this hearing and have not provided any further documents you wish to be considered. Is this still correct.

The allegations upheld against you and confirmed to you in the letter dated 24th January 2020 are as presented under allegation 1, allegation 2 and allegations 3, in the investigation report, a copy of which you have in front of you.

Allegation 1, the evidence was received and the allegation was conclusively upheld.

Allegations 2 and 3, whilst not supported by direct corroborated evidence, the fact that Nida shared allegation 3 directly after the incident with Nichola, that Nida's recollection of events surrounding these allegations were clear and consistent with the other witnesses, and coupled with your statement that whilst you had no recollection of the incident that you believed Nida's account. On balance of probabilities, I have upheld her allegations… if there is no further evidence, we will take a 30 minute adjournment to discuss the next part of the process".

38. Ms Holland then stated, "Is there anything you would like to add", to which Mr F Sharp replied, "this is a situation on one wants to be in. Let's be pragmatic, no need to be too procedural but I'm surprised you want an adjournment so soon. I've attended hundreds of disciplinary procedures and I've never seen this as a process before. We've seen the report from Jen Chalmers and accept it as the principal source document, we're not going to dispute its content. Whilst a grievance enquiry was conducted and completed, it has been transmuted into another existence and is now being used for the disciplinary procedure. Normally these are two separate documents. I think its premature for you to proceed to an adjournment without hearing an alternative point of view….we're going to have a problem. Without hearing James's comments on the report, I find it difficult how you can uphold its findings and make a decision on it".

39. There was however no adjournment at that point and Mr F Sharp was permitted to present further information on behalf of the claimant (pages 112 to 124).

40. By letter dated 30 January, the claimant was advised that he was summarily dismissed. (page 125). That letter states that:

"I have very carefully considered the points raised at the disciplinary hearing and would address these as follows.

1. Our duty of care. As a responsible employer, we owe a duty of care to our staff. Here, that means we have to ensure that we treated all parties involved fairly. Having taken advice and considered the position, I am satisfied that the company is potentially liable for your actions on that day as although the incidents took place after the organised work Christmas party, there are sufficient indicators to mean that they still occurred "during the course of employment". Further I consider that such conduct would still be connected to the workplace, even if it was not 'in the course of employment'. As such, I am satisfied that it was appropriate to treat Nida's concerns within our grievance policy and to deal with the conduct under our disciplinary policy.

2. Process. Given the thorough investigation, and your admission that whilst you could not recall the incidents (due to your own intoxication) you believed in Nida's integrity such that if she said you had done these things, you believed her, and that the grievance allegations were upheld, it was appropriate to move from the grievance into the disciplinary process and no further investigation was required.

3. Intoxication. I am satisfied that the investigation ascertained the level of intoxication correctly of the relevant parties and the corroborating evidence supports Nida's version of events.

4. Mitigation. I have carefully considered the points made by you and your father in mitigation, namely that you offered to apologise relatively quickly once the allegations had been [read] out to you, that you effectively admitted to the conduct (notwithstanding that you could not recall the incidents) and that you have now stopped drinking alcohol and are seeking treatment. I have also taken into account your record with the company, promotions and the recognition that you have received".

Appeal

41. The claimant was advised of his right to appeal in that letter, and by e-mail dated 31 January 2020 (page 128) the claimant set out his grounds of appeal, as follows:

"1. The conduct of the disciplinary hearing by the same person who determined the outcome of the grievance presented by my accuser is contrary to the principles of natural justice

2. The penalty of dismissal is disproportionate and unfair

3. Inadequate consideration has been given to factors of mitigation

4. The decision to dismiss falls outwith the band of reasonable responses which any other employer would come to".

42. He asked for copies of relevant documents and policies and advised that he wanted to call Ms Kennett as a witness.

43. The claimant was invited to attend an appeal hearing on 6 February 2020 by letter dated 3 February 2020. The letter stated that "The purpose of the hearing is to consider your appeal under the disciplinary procedure against Hazel Kennett's decision to terminate your employment…the hearing will be limited to a review of the original decision on the grounds you raised in your e-mails".

44. Shortly prior to the appeal hearing, on or around 5 February 2020, the claimant was given copies of the witness statements which had accompanied Ms Chalmers's investigation report.

45. The appeal hearing took place on 6 February 2020 and was conducted by Mr Nathan Hawes, with Sian Abel as HR representative and notes taken by Ms Crosbie-Iwasaki. The claimant was represented by Mr F Sharp. Ms Kennett attended as a witness.

46. By letter dated 10 February, Mr Hawes confirmed to the claimant that he was not upholding the appeal, and summarised the points he made at the end of the appeal hearing, as follow:

"As discussed on the day of the appeal, the hearing was limited to a review of the original decision on the grounds raised…

1….whilst I concur that often one may have a different person conducting the grievance and the disciplinary hearings, I do not agree that as Hazel Kennett conducted both stages, this breached natural justice – principally because the allegations were not contested by you. Given that situation, in my view it was entirely appropriate for Hazel to hear the disciplinary process.

Concerns were raised in the appeal hearing over 'prejudging' of the outcome by the company, the most prominent of these being the decision to immediately suspend (without prejudice, on full pay) whilst an investigation was carried out, rather than resolve the grievance informally. However I believe this action was appropriate under the circumstances, given the serious sexual nature of the allegations, and would have been followed by any reasonable employer.

Overall I am satisfied that Hazel carefully considered all of the issues and the points made at the disciplinary hearing, and the outcome of the disciplinary process was not pre-judged…

Re 2 and 3…The three initial allegations that were upheld and uncontested clearly constitute harassment of a sexual nature, and as such fall under the definition of gross misconduct. This was not directly contested within the appeal, but the question was raised of whether dismissal was appropriate in this instance. Given the sexual nature of the upheld allegations, the impact on the person in question and the duty of care we must demonstrate to all employees, I have concluded that dismissal was an appropriate course of action in this instance.

No specific evidence was presented as to how other employers have dealt with directly comparable instances, so I cannot rule on this point. The examples given within the hearing were of allegations of a non-sexual nature and as such in my view constitute an incomparable case. In my professional judgement the conclusion that we have come to in this case is one that any reasonable employer would arrive at…

…4 your excellent record with the company is uncontested, as was your desire to apologise and the fact that this is a first offence. However, as stated above, the sexual nature of the upheld and uncontested allegations presents a very serious case, and one for which I cannot support a definition of misconduct as opposed to gross misconduct, even considering these mitigations. Therefore I

have determined that the mitigation factors have been appropriately considered"

Relevant policies and procedures

47. The respondent relied on the following policies: Disciplinary Policy (UK) (lodged at pages 155-159); Grievance Policy (UK) (lodged at pages 160-161); Harassment (Global Policy) (pages 162-165) and Conduct Policy (Global) (pages 166-167).

48. The relevant extracts from the Grievance Policy are as follows:

    i) Under grievance, "If you make an allegation in good faith, which is not confirmed by subsequent investigation, no action will be taken against you".

    ii) Under "informal resolution", "If you feel aggrieved about something, this can often be resolved successfully through informal discussions. If this is appropriate for the grievance that you have, you should first bring up any issues on an informal basis with your immediate manager and/or the person who is the source of your grievance. You may want to ask HR for advice on how best to approach the situation".

    iii) Under "formal grievance procedure", "If a resolution could not be reached informally, or if the nature of the grievance is of a serious enough nature that it is more appropriate to seek a formal resolution, you should start the grievance procedure at the formal stage".

    iv) Under "the grievance hearing", "HR will arrange for a grievance hearing; HR will appoint someone to hear and decide on the grievance; examples of attendees at this hearing will be an impartial senior Kyowa Kirin employee; HR who will observe the process and advise; yourself, with if you desire, a support person who needs to be a Kyowa Kirin colleague or a trade union representative; and the person(s) who is the source of the grievance. If the hearing has the potential to lead to a disciplinary outcome, then the person(s) who is the source of the grievance may also have representation. A note taker might also be present; appropriate notice of the hearing will be provided for all parties, but the aim is to have the open discussion as quickly as is reasonable; during the hearing, each side will give their view of the facts and any supporting documentation.

Witnesses can be called; after all the evidence is heard then the meeting will be adjourned and the person hearing the grievance will review and make a decision as to what action, if any, should be taken".

Relevant law

49. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (ERA). Section 98(1) provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Conduct is one of these potentially fair reasons for dismissal.

50. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case.

51. In a dismissal for misconduct, in *British Homes Stores Ltd v Burchell* [1980] ICR 303, the EAT held that the employer must show that: he believed the employee was guilty of misconduct; he had in his mind reasonable grounds upon which to sustain that belief; and at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

52. Subsequent decisions of the EAT, following the amendment to the burden of proof in the Employment Act 1980, make it clear that the burden of proof is on the employer in respect of the first limb only and that the burden is neutral in respect of the remaining two limbs, these going to "reasonableness" under section 98(4) (*Boys and Girls –v- McDonald* [1996] IRLR 129, *Crabtree –v- Sheffield Health and Social Care NHS Trust* EAT 0331/09).

53. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed as well as the penalty of dismissal were within the band of reasonable responses *(Iceland Frozen Foods Ltd –v- Jones* [1982] IRLR 439). The Court of Appeal has held that the range of reasonable responses test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached (*Sainsbury v Hitt* 2003 IRLR 23). The relevant question is whether the investigation falls within the range of reasonable responses that a reasonable employer might have adopted.

54. The Tribunal must therefore be careful not to assume that merely because it would have acted in a different way to the employer that the employer therefore has acted unreasonably. One reasonable employer may react in one way whilst another reasonable employer may have a different response.

55. A lack of consistency may give rise to a finding of unfair dismissal (*Post Office v Fennell* 1981 IRLR 221 and *Hadjioannou v Coral Casinos Ltd* 1981 IRLR 352).

56. Under Section 113 ERA, if the Tribunal finds that the claimant has been unfairly dismissed, it can award compensation under Section 112(4). Section 118 states that compensation is made up of a basic award and a compensatory award. Section 122(2) states that the basic award can be reduced if the Tribunal considers that the claimant's conduct was such that a reduction would be just and equitable.

57. Section 123(1) ERA states that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer. This generally includes loss of earnings up to the date of the hearing (after deducting any earnings from alternative employment), an assessment of future loss, if appropriate, a figure representing loss of statutory rights, etc. If the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, under Section 123(6) it can reduce the amount by such proportion as it considers just and equitable.

58. If the dismissal is found to be unfair on procedural grounds, it may be just and equitable to reduce compensation if the Tribunal considers there was a chance that had a fair procedure been followed that a fair dismissal would still have occurred. This is known as a "*Polkey*" reduction.

59. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRA) provides that if the ACAS Code of Practice entitled "Disciplinary and Grievance Procedures" applies and it appears to the Tribunal that the claim concerns a matter to which the Code applies and that the employer has failed to comply with the code in relation to that matter, and the failure was unreasonable, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase the compensatory award it makes to the employee by no more than 25%.

Tribunal's deliberations and decision

Observations on the evidence and witnesses

60. We heard evidence from five witnesses for the respondent; two giving their evidence by video.

61. Ms Mitchell's evidence was limited and we accepted that it was credible and reliable.

62. Ms Chalmer's role was limited to undertaking of grievance investigation, and we have accepted that it was undertaken very promptly and we accept too that it was thorough, with one significant exception. In the circumstances of this case, as discussed below, we would have expected the claimant to have been re-interviewed, if not in the context of the grievance then in the context of a disciplinary process. We did note her view that she would have expected that a separate disciplinary investigation would have been conducted.

63. Ms Kennett's answers were clear and direct and we accepted her evidence as credible and reliable. We did note however that she had some difficulty with identifying with precision her focus in the grievance hearing, that is whether the grievance was upheld or the allegations against the claimant were upheld. While it might be thought that amounts to the same thing, in the context of this case we considered it to be significant. We did note too that she was keen to

emphasise that when she was undertaking the grievance hearing she did not know that she would be asked to undertake the disciplinary hearing as well. We had particular concerns about the fact that Ms Kennett was appointed by HR to conduct both hearings, discussed more fully later.

64. We accepted too the evidence of Bill Aitken as it related to the incident in May 2019 although as discussed further below we were of the view that this was in no way comparable. We did however note that he had a very good working relationship with the claimant and rated him highly.

65. We found Mr Hawes to be somewhat distracted in the way that he gave evidence, although that might have been the result of the lack of formality of giving evidence by video. However we got the impression that he perhaps failed to fully appreciate the importance of his role in the appeal process. Nevertheless we accepted that he had a different recollection of what was specifically said at the appeal hearing. Nothing ultimately turned on that because we did not accept that any of the defects of the disciplinary process were “cured” by the appeal.

66. We had particular concerns about the way that the claimant gave evidence, since he had a tendency not to answer directly the questions he was asked. His answers were very general to the extent of repeating his general defence and/or going off on tangents, so it is not surprising that Ms Davis argued that he was evasive. Indeed, she suggested that it appeared that the claimant did not even know what was in his own witness statement. There is no doubt that that he struggled to refer to relevant sections of his witness statement when responding to the questions of Ms Davis, (which had to be picked up by Mr F Sharp in re-examination).

67. Mr F Sharp acknowledged this and put it down to the way that the claimant’s thought processes worked, linked it seemed to his dyslexia. He also said that the actual wording of the witness statement had been down to him, following lengthy discussions with the claimant. It has to be said that as a Tribunal we did note the rather unusual language which was used in the witness statement, but in our experience it is not unusual that witness statements are presented through the filter of a representative.

68. We should say that we also agreed with Ms Davis that the claimant, but Mr F Sharp in particular, did have a tendency to paraphrase the wording of the documents such that on occasion this could be argued to be a misrepresentation. We did point out to Mr F Sharp the importance of accuracy, but we have borne this in mind in our deliberations, and reverted to the precise wording of the documents when coming to any conclusions.

69. Whilst there was much time devoted in the hearing to details of what the various witnesses saw and heard or did not see and hear; and also to the question whether the claimant could be taken to have conceded that the conduct did take place (in particular given the terms of the apology and the scope of the grounds of appeal), as is well understood, the focus of our enquiry is on whether the respondent acted within the band of reasonable responses. It is not for us to decide whether the claimant did or did not do the conduct alleged, or indeed whether he did or did not concede that he had done it. Rather the question is whether it was reasonable for the respondent to have concluded that he had conceded that he had done it, and reasonable for them to have concluded that the conduct did take place, and in turn to conclude that warranted dismissal.

70. We record here that although the claimant alleged in submissions that the alleged misconduct had occurred outside the claimant's employment, Ms Davis pointed out that this was not a matter which had been foreshadowed in even the amended ET1, and Mr F Sharp accepted that following discussion. We were of the view in any event that there is no hard and fast rule that an employee could not be found guilty of misconduct "outside" of employment, and that the reasonableness question was the focus of inquiry.

71. Ultimately however we agreed with Ms Davis that there were relatively few key facts in dispute. Indeed, even on the matter which Ms Davis put to the claimant which she said was relevant to the contributory fault question, the claimant admitted that he had made a comment about Ms Mitchell at the previous year's Christmas party but he had perceived it to be a compliment and Ms Mitchell had not complained. Nothing ultimately turned on any evasiveness of the claimant, or his difficulty in recalling events.

Reason for dismissal

72. The first issue for this Tribunal to consider is whether the respondent has shown that the claimant has been dismissed and that the reason for the dismissal was misconduct. The claimant accepted that the reason for dismissal was misconduct.

73. As we understood it from the claimant's submissions, the claimant accepted that the respondent did have a genuine belief that the claimant had committed misconduct. The Tribunal therefore concluded that the first limb of the *Burchell* test had been met and that the respondent believed the claimant to be guilty of misconduct.

74. Accordingly, the respondent has shown that the reason for the dismissal of the claimant was conduct, which is a potentially fair reason for dismissal.

Reasonableness of decision to dismiss

75. The Tribunal then turned to consider whether the respondent acted reasonably in dismissing the claimant for misconduct. The question is whether it was reasonable in all the circumstances for the respondent to dismiss the claimant for misconduct. As discussed above, the issue is not whether this Tribunal would have dismissed the claimant in these circumstances but whether the dismissal was within the band of reasonable responses available to the respondent in all the circumstances.

76. In this case we have taken the view that there is an inextricable interplay between the second and third limbs of the Burchell test, to which we now turn.

Was the decision that the claimant was guilty of misconduct based on reasonable grounds following a reasonable investigation?

77. On the question whether the respondent's belief was based on reasonable grounds, Ms Davis argued that the respondent had sufficient information to support their decision. She pointed out that the evidence from Ms Baltaitiye (a person of integrity according to the claimant himself) would have been sufficient; but that they had supporting evidence from three witnesses (Nichola Pilmer, Michelle Anderson and Sarah Birnie) as well as the "unqualified"

apology from the claimant. She submitted that it was entirely reasonable for the respondent to interpret the apology as an "effective admission", the terms of which she argued are clear and unambiguous, given the claimant described it as unconditional, unreserved and unqualified. At no time prior to the claimant giving evidence does the claimant challenge the respondent's understanding of the apology. The terms of the dismissal letter communicated clearly to the claimant that the respondent considered the apology to be an effective admission, and this matter was not challenged on appeal, and Nathan Hawes approached the appeal on that basis.

78. The claimant argued equally forcefully that the respondent did not have reasonable grounds on which to sustain their belief. The claimant presented a significant challenge to the sufficiency of the evidence upon which the decision was based. Indeed, the claimant focusses much of his submissions on concerns about the respondent's decision to find the misconduct established, on the basis of the evidence and the apology.

79. While Mr F Sharp confirmed that it was accepted that the respondent does not require to be satisfied that he was actually guilty of the allegations made against him, he argued on the basis of the witness statements gathered by the respondent that the evidence was insufficient to support the conclusion reached, and in particular:

    i. The statement of Ms Baltiatiye is consistent with the claimant hugging her rather than intentional or unwanted sexual behaviour
    ii. on the evidence about the hug, the allegation of touching is not contested, but that falls well short of sexual harassment and at no time did Ms Baltiatiye object to being given a hug and she acknowledged that other employees were doing the same
    iii. The statements supporting allegations made against the claimant were inconclusive and contradictory
    iv. The witnesses' recollections were significantly obscured by the effects of alcohol

v. Ms Kennett was aware that not one single witness had corroborated the most serious two out of three allegations

vi. Ms Kennett was aware that voices were raised and that key witnesses were in very close proximity to the claimant and Ms Baltiatiye yet not one single person heard any words approximating such insults

vii. In regard to the second allegation, only Ms Baltiatiye actually mentions this and she qualifies it by saying, “he said something like” and “I got the impression that”

viii. While Ms Baltiatiye says that Nichola Pilmer must have heard it, she says that she “recalled a topic related to sex in general” and that she was not confident that the claimant had said anything about ecstasy or being sexually aroused

ix. On the third allegation, the conclusion of Jen Chalmers was that no-one heard the claimant say these words or anything like them

x. Ms Baltiatiye confirmed it was noisy and that voices were raised

xi. All key witnesses were in touching distance of each other

xii. Claimant denied saying these words and offers a credible explanation why he would not say that and that Ms Baltiatiye must have misheard

xiii. The statements confirmed that the allegations were tainted by known antagonism to the claimant by Michelle Anderson

xiv. There was a failure to ask two witnesses who were present (Dion Greenwell and Bill Aitken) whether they had heard the words which were alleged to have been uttered

xv. There was a failure of Ms Kennett to challenge obvious untruths and glaring inconsistencies, including the fact that only Ms Anderson states that the claimant and Ms Baltiatiye were standing whereas all the other witnesses said they were sitting

xvi. Ms Kennett should not have relied on the fact that Ms Baltiatiye had told Ms Pilmer later in the evening that the claimant had made the comments, which is third hand

xvii. Ms Kennett dismisses out of hand the probability, even the possibility, that Ms Baltiatiye had misheard and/or misinterpreted what the claimant may have said, and no alternative explanations or probable words are put to her

xviii. the respondent fails to consider the obvious probability that because the complainant was Lithuanian and her first language was not English she could have misunderstood both what was said and its vernacular meaning

80. On the matter of the investigation, Ms Davis submits that the investigation was reasonable, given the circumstances of this case, and specifically that the claimant, despite initially denying the allegations, subsequently one day later effectively admitted the conduct and offered what is, she argued, on any reasonable interpretation of the terms of the apology, an effective admission. Relying on *Integrated Care Ltd v Smith* EAT/0015/08, she argued that in such circumstances an employer could reasonably have decided not to undertake any further investigation into the matter (as the claimant himself requested at the end of the apology). The claimant accepted that he acted "in the manner described", not as he maintains now that "something happened" which offended Ms Baltaitiye and due to her being drunk and/or a foreigner she must have misheard (despite asking the claimant to repeat what he said to her). Notwithstanding Ms Chalmers conducted a thorough investigation.

81. Relying on *Sainsburys Supermarket v Hitt* 2003 IRLR 23, Ms Davis argued that provided a respondent carried out an appropriate investigation and gave the employee an opportunity to explain their conduct etc, it would be wrong for an employment tribunal to suggest that further investigations should have been carried out as to do so would amount to substituting their own standards of what was an adequate investigation for the standard that could be objectively expected from a reasonable employer.

82. With regard to the claimant's challenges to the sufficiency of the investigation set out in the ET1, she responded as follows.

83. On the submission that Ms Chalmers failed to interview those witnesses nominated by the claimant, Ms Davis argues that it is apparent from the terms of the interview notes that no witnesses were in fact "nominated" by the claimant, despite Ms Chalmers asking who he wanted her to speak to, to which he replied essentially that he could not remember who was there because there were people coming and going all the time.

84. On the submission that Ms Chalmers asked questions of witnesses selectively, this seemed to relate to the fact that she had not specifically asked witnesses whether they heard any specific comments even where the witnesses (Bill Aitken) had said he had not heard any conversations. It was Ms Chalmers' evidence that she asked questions of witnesses depending on whether or not they had been put forward/referred to as someone having been there at the time of the specific incident, and given that the questions were appropriate.

85. With regard to the failure of Ms Chalmers to bring to the claimant's attention the fact that "the witness statements support[ed] [his] denial that the allegations against him were untrue", Ms Davis argues that this again is a misrepresentation because no witnesses supported his denials, rather some simply did not see or hear anything of relevance. Three separate witnesses supported Ms Baltaitiye's version of events and their position was clearly set out in the report.

86. She refuted by reference to the witness statement of 17 January the assertion that Ms Chalmers attempted to persuade Ms Baltaitiye to change her grievance to a more salacious version.

87. The claimant in his submissions made additional complaints about the reasonableness of the investigation which are, as understood from a general reading of the submissions, as follows.

88. The claimant accepts that there was no requirement for the respondent to carry out a forensic investigation. Relying on *A v B* 2003 IRLR 405, given that a possible outcome was that the claimant could lose his job, he argues that the obligation was to ensure that the standard required of the investigation was high.

89. Mr F Sharp complained in submissions that Ms Chalmers was not independent (because she knew and had worked with many of the witnesses as well as the claimant).

90. He complained about the failure to pursue the claimant's line of defence, specifically his denials and assertions that Ms Baltaitiye had misheard him. In particular, he submitted that a reasonable employer would have confirmed at the grievance hearing that her employer took the allegations seriously, accepted them in good faith, had consequently completed an investigation into them and would now require the claimant to explain himself and come back to her with their decision once that had happened (para 17 of submissions).

91. Linked to that, he complained that the claimant was not given an opportunity to present his defence. He complained about the failure of the respondent to re-interview him. This meant that he was denied the opportunity to raise the issue of pre-existing prejudicial influence of Michelle Anderson. He argues that "a reasonable employer would have confronted the claimant with the outcome of her investigation and invited him to comment on those findings….that obvious and fair option was eliminated when Jen Chalmers decided to participate in the [grievance] hearing when the claimant would be found guilty before she knew that the claimant had even seen her report".

92. He argued that Ms Chalmers was only interested in evidence that proved damaging towards the claimant and she was not open to any that may assist in his defence or that he could have used to support his insistence that he would not have made these comments to anyone let alone a friend. He argued that her withholding of the claimant's apology reinforces that hypothesis.

93. In the amended ET1 the claimant argued that the accuser's response that she wanted him removed "would inexorably determine the outcome of any subsequent action the employer would chose to take", and "compromised the impartiality of the investigating officer placing her in the role of influencer at the subsequent disciplinary process".

94. In his submissions, the claimant also argued that Ms Kennett's decision of the guilt of the claimant was formed without the claimant being able to present to

his employer alternative and credible explanations or even challenge some evidence against him. He argued that Jen Chalmers manipulated the process to secure the inevitable decision that the claimant must be dismissed before his disciplinary hearing was even arranged, which undermined the ability of Hazel Kennett to reach a more balanced and fair conclusion. Her actions, he argued, also excluded the possibility of any alternative explanation being put to Hazel Kennett.

95. The investigation report only made the recommendation that Nida and the claimant should not meet but made no reference to the fact that it would be used to initiate a disciplinary hearing.

96. He complained about the inclusion in witness statements of "scurrilous attacks on the character of the claimant, with no attempt to check the veracity of these allegations or even to ask the claimant what they referred to. On the basis of "no smoke without fire", he submitted that these references must have influenced Ms Kennett's decision.

97. We took on board these concerns expressed by the claimant. We were also aware of Ms Davis concerns that a number of them had not been highlighted in the amended ET1 and that we should therefore discount them.

98. While we took account of Ms Davis's argument that the reliance on Ms Baltiatiye's evidence alone would have been sufficient, we could not accept that in this case because we did not accept that at the stage at which the respondent formed the belief that the claimant was guilty of the misconduct alleged, they had carried out as much investigation into the matter as was reasonable. That view was in any event based on a number of undisputed facts.

99. In coming to the conclusion which we did, we based our decision on the fact that the claimant was not offered sufficient opportunity to put forward his defence or to make out his case.

100. Ms Davis's position on the matter was that Ms Chalmers having put the allegations to the claimant at the investigatory meeting, and given the subsequent apology, which she presented as unqualified and unconditional,

there was no need for him to be reinterviewed or indeed for him to be given any further opportunity to respond to the allegations.

101. But these are the undisputed facts: the claimant was interviewed on 14 January in the context of the investigation of Ms Baltiatiye's grievance when he categorically denied acting as described; the next day he issued an apology (which was perceived as unqualified and unconditional); that apology was not passed to Ms Baltiatiye at the time; a number of witnesses who were present were interviewed; the claimant was not re-interviewed after the apology; Ms Baltiatiye was reinterviewed and attended the grievance hearing supported by Ms Mitchell and at which Ms Chalmers was present; the claimant was not invited to attend the grievance hearing or interviewed in connection with it; the allegations were found to be upheld at the grievance hearing; no separate disciplinary investigation was conducted; the investigation into the grievances "stood as" the disciplinary investigation report.

102. We would have expected, and indeed we understood Ms Chalmers to agree, that before coming to a decision to dismiss, there would have been in addition a separate disciplinary investigation which would have afforded the opportunity to put the allegations to the claimant and to ensure that they understood the significance of the apology. While it may well have been that interviews undertaken in the context of the grievance hearing would have been relied on, we were of the view that the belief in the claimant's guilt was formed at the point of grievance hearing. We therefore considered that it was not reasonable for the respondent to rely on the investigation report for the grievance to stand in the place of an the investigation for the disciplinary process, without any further reflection at all. As Ms Chalmers agreed, the reason for that is that while the focus of the grievance is the person who complains, the focus on the disciplinary is the person who will be disciplined. A duty of care is owed to both. The specific implications of this decision were far reaching in this case, as discussed further below.

103. In coming to the conclusion that we did, we therefore based our decision on the fact that there was no disciplinary investigation as such.

104. Even then, we may have accepted that it was reasonable to rely on the investigation conducted for the grievance had the disciplinary hearing been conducted in a more appropriate way. If not in an investigation in connection with the disciplinary, at the very least the allegation ought to have been put to the claimant at the disciplinary hearing, and the claimant ought to have been asked for his response before conclusions were reached, but that did not happen.

105. We noted that Ms Kennett had not conducted a grievance hearing before, and questioned why she might have been asked to conduct one in a case such as this. Crucially in our view, although she was at pains to point out that she did not know this at the time she was asked to do the grievance hearing, it was Ms Kennett who conducted the disciplinary hearing as well. We found this decision by HR in a company of this size to be more than surprising. This has not just the potential to be perceived as building in a bias against the claimant, that is what actually happened in this case, because Ms Kennett opened the disciplinary hearing confirming that the allegations against the claimant (which she had already found to have been upheld in the context of the grievance) were upheld against him. This is discussed further below under "procedural fairness".

106. We came to the view that we did in regard to the reasonableness of the investigation because the respondent failed to put the allegations to the claimant, but specifically failed to question him about the meaning and significance of the apology.

107. The key passages of the apology benefit from being repeated in this context: "I know Nida to be a person of integrity; I have valued her as a friend and enjoy a good professional relationship with her at work. As such, I do not believe she would have made such an allegation had there been no basis for her to do so. I have therefore concluded that I *may well have* acted towards Nida in the manner she has described" [emphasis added].

108. Ms Davis relied on the fact that during the disciplinary process itself the apology was described as unreserved, unqualified and unconditional. Her position was that the claimant did not at any time raise any concerns about how the apology

was interpreted or the respondent's reliance on it. In particular he did not raise any concern about the dismissal letter which made clear under the heading "mitigation" that they were treating the apology as him having "effectively admitted to the conduct (notwithstanding that you could not recall the incidents)".

109. The claimant asserted at this hearing that the apology ought not to be read as an admission. He explained his position in re-examination. He stated that the letter was intended purely as an apology to Ms Baltiatiye, which he had explicitly asked Ms Chalmers to pass on to Ms Baltiatiye, since he was precluded by the terms of his suspension from contacting her. It was not intended as a response to the company to the allegations. During submissions he pointed out that he was never asked by Ms Chalmers whether he was effectively admitting the allegations. If it was clear he was admitting the conduct, he argued, then they would not have required to interview a further six witnesses in the investigation. Nor was he asked this by Ms Kennett at the disciplinary hearing. Indeed Ms Kennett said, in relation to allegations two and three at least, that she had determined these on the balance of probabilities. Had they relied on the apology as an effective admission then she would not have needed to find this proved on a "balance of probabilities" if they were treating the apology as an admission of the misconduct. They could have found it proved conclusively.

110. He submitted that had not intended the apology to be taken as an admission, except to the extent that he was admitting to taking alcohol and to having hugged Ms Baltiatiye, as others were doing given the festive spirit. He had also stated at the disciplinary hearing that his behaviour was affected by alcohol which can cause people to behaviour in ways which would be out of character but which others may find uncomfortable, and that as soon as he was aware that he had offended Ms Baltiatiye he had apologised.

111. We were of the view that the apology was not as clear cut as Ms Davis suggests. In particular, we came to the view that there had to be some misgivings about the respondent relying on these subsequent assertions in the context in which they were given that the apology was unconditional,

unreserved and unqualified, to mean that the admission was unconditional unreserved and unqualified.

112. This is a case where the apology does all the "heavy lifting". It is heavily relied on when it comes to the respondent's justification for their actions, and in particular to justify not reinterviewing the claimant and appointing Ms Kennett to hear both the grievance and the disciplinary. From the claimant's perspective his actions in submitting the apology proved to be very damning for him.

113. We noted that Mr Hawes at the appeal stage relied on the fact that he considered the apology "superseded" the denials made at the investigation stage (despite the claimant only accepting that "something happened"). This would appear to have been the approach of the respondent throughout. However, the apology itself and its meaning and crucially whether the claimant intended it to mean what it was taken to mean, which was fatal for him, was never put to him. There was no further investigation meeting after he had submitted the apology despite his many denials during that the initial interview. That may not have been critical, but it becomes critical in this case because, beyond the first investigation meeting, the claimant was never asked to put his case or for any response at all to the allegations at the disciplinary hearing, before he was told that the allegations were upheld, discussed in more detail later in this judgment.

114. We did not accept that the claimant had to raise his concerns about how the apology was interpreted or the respondent's reliance on it. It was for the respondent to complete a full and fair investigation. Ultimately we thought that it was not reasonable for the respondent to rely on the apology in the way that they did, especially since their reliance on it was not directly put to the claimant during the process (or indeed at the appeal). We were also very concerned about the failure of the respondent to forward the apology to Ms Baltiatiye discussed in detail later in this decision.

115. For these reasons in particular, we conclude that the stage at which the respondent had decided that the claimant was guilty of the misconduct alleged, the respondent had not carried out a reasonable investigation. We therefore

conclude that the respondent's decision that the claimant was guilty of misconduct was not based on reasonable grounds following a reasonable investigation.

116. However there are a number of matters which were raised by Mr F Sharp during the hearing and which were addressed by both parties in submissions which we did not accept, but which it is important to address in this decision.

Finding of gross misconduct

117. In this case, the respondent categorised the misconduct as gross misconduct resulting in summary dismissal. Ms Davis argued that sexual harassment in the form of conduct described is patently gross misconduct, as referenced in the respondent's disciplinary policy. The respondent's evidence makes it clear they were aware that gross misconduct does not automatically equal dismissal, and Ms Kennett gave clear evidence that she had considered all mitigating factors and length of service and previous unblemished record.

118. Mr F Sharp in his submissions takes issue with the categorisation of the reason for dismissal as "gross misconduct". We did not however consider those submissions relevant because it was clear that the respondent accepts that gross misconduct will not necessarily lead to dismissal. Further, it cannot be disputed that the allegations amount to harassment even if they are not otherwise described as such. Clearly the question of gravity of the offence is relevant and clearly harassment will not necessarily lead to the conclusion that dismissal was inevitable or even reasonable in the circumstances.

The consistency argument

119. The claimant also argued that the respondent acted inconsistency and unfairly in dismissing him for "harassment" when they did not even investigate his own complaint of harassment.

120. Relying on *Hadjioannous v Coral Casinos* 1981 IRLR 352, Ms Davis argued that the evidence demonstrates that the conduct in question was not truly parallel, and this is clear from the evidence of Mr Hawes in particular that they were not comparable, and therefore this evidence is irrelevant.

121. Mr F Sharp argued in essence that the claimant intimated that he had been subjected to harassment consistent with that described in the policy but that it was not treated as serious enough. Here there was serious insubordination and harassment combined in one incident which did not attracted even a caution.

122. We agreed with Ms Davis that the circumstances here were "not truly parallel". At the very least the seriousness of the harassment which the claimant complained of was not on a parallel with conduct with which the claimant was accused. Indeed, Mr F Sharp argues that there should have been initial consideration to the matter being resolved informally and relies on that as a basis to argue that dismissal was not reasonable in the circumstances of this case.

The suspension

123. Ms Davis argued, relying on *Agoreyo v Lambeth LBC* 2018 ICR 1572, that the Court of Appeal has rejected the test of necessity, and the test has reverted to whether or not the employer had reasonable and proper cause. She argues the respondent undoubtedly met this test in deciding to suspend the claimant following allegations of serious sexual harassment.

124. Mr F Sharp argued that the guidance indicates that suspension should be as brief as possible, whereas here the investigation was complete by 16 January (in his submission) and the claimant was kept under suspension for another 14 days. He argued that the only justification could be to punish the claimant, give HR an unencumbered control over the process and make it easier to justify his summary dismissal; that there was no evidence that a return to work would result in a serious breakdown of working relationships; or that he would have been in a position to interfere with the conduct of the investigation. This act of prolonged suspension he argued prevented the claimant from speaking to any potentially relevant witnesses, who would have supported his denials.

125. We did not accept that the suspension in this case was inappropriate or longer than was reasonable. We do not accept that there is any evidence to support the claimant's assertions that it was to deliberately thwart his case. Indeed

relative to other cases, suspension in this case was on standard terms and relatively short since the grievance investigation was caried out speedily. We conclude that suspension in this case could not be said to have been unreasonable.

The role of Ms Mitchell

126. The claimant argued that Ms Mitchell had influenced Ms Baltiatiye to lodge a grievance, then acted as her companion at the grievance hearing, but was conflicted because she had suspended the claimant and was HR adviser in the other cases he relied on. Ms Davis responded that Ms Mitchell was clear in evidence that she did not advise Ms Baltiatiye to lodge a grievance, rather that if she thought she had been harassed then she should lodge a grievance, which was entirely appropriate advice given the seriousness of the allegations. The fact that Ms Mitchell then attended the grievance hearing as Ms Baltiatiye's companion does not impact on the procedural fairness of the dismissal in any way at all. We accepted Ms Davis's submissions in this regard, and agreed that Ms Mitchell's limited role could not be said to be inappropriate or unreasonable.

The outcome was orchestrated by HR (the conspiracy theory)

127. Nor did we accept that the outcome was "orchestrated" by HR. Mr F Sharp submitted that the outcome of the dismissal was predetermined prior to the disciplinary hearing and that the decision was made before any evidence had been obtained. He argued that this is evidenced by the prolonged suspension to prevent the claimant gathering evidence in his defence and the intentional withholding of evidence which precluded him from properly preparing his defence. His position was that there was a commitment to discipline (which would inevitably lead to dismissal) at the grievance hearing itself. This was evidenced, he said, by the reference to the fact that the claimant "would probably appeal".

128. He argued that this prior decision to dismiss was evidenced by the prominence given by Ms Chalmers to a series of completely unfounded innuendos discrediting the claimant that are promulgated by Michelle Anderson and

antagonists know to be prejudiced towards him, (and contradicted by his positive relationship with Ms Baltiatiye) which either should have been investigated or should have been excluded as extraneous. He argued that it was not credible that these did not have an influence on Ms Kennett. He argued this "taking sides" was confirmed by the act of persuading Ms Baltiatiye to change her original grievance and adopt a more condemning and salacious version of events.

129. Although the claimant may not have used the exact term "conspiracy", and may in evidence have denied it, it is quite clear from the claimant's submissions that they were of the view that the claimant's dismissal had been "orchestrated" by HR. As stated above, we did note the tendency of Mr F Sharp to re-write some statements to reflect what he thought they said (even for example in regard to the disciplinary minutes which had been agreed) and his suggestion that "he would probably appeal" falls into that category.

130. However, the claimant's position was no doubt influenced by the suggestion that the reference to James in the disciplinary hearing ought to have been to Nida, when it is clear from the terms of the note that it was not simply a slip but rather they did mean to suggest that it was James who would have a right to appeal. This, as discussed elsewhere, illustrates the knots which the respondent got into when they essentially conflated a grievance hearing at which the claimant was not in attendance with a disciplinary process.

131. Further, as discussed above, while we did accept that the decision was essentially "predetermined" by the end of the grievance hearing, we did not accept that this was because of any deliberate manipulation by HR. We did not hold therefore with the conspiracy theory and we did not agree that there was any evidence to suggest that the claimant's dismissal was deliberately orchestrated by HR. While we conclude that there were several significant errors in the way the matter was handled, we do not believe that was designed from the outset to ensure that the claimant was dismissed. We were of the view that these errors were evidence of lack of good judgment but not of a conspiracy to dismiss the claimant.

Did the respondent follow a fair procedure?

132. We have concluded in any event for the reasons set out above that the respondent did not have in mind reasonable grounds and had not conducted sufficient investigation at that stage at which the decision to dismiss was made. To that extent, the procedure adopted was unreasonable. We turned in any event to consider other aspects of the procedure which was adopted in this case.

133. The leading case on the need for a fair procedure is the decision of the House of Lords in the case of *Polkey v AE Dayton Services Ltd* 1987 IRLR 503. In that case Lord Bridge stated that in setting out the procedural steps that will be necessary in the majority of cases if an employer is to be considered to have acted reasonably in dismissing the claimant, in a case of misconduct there should be a full and fair investigation and the employee should get an opportunity to say what he wants in explanation or mitigation.

134. Ms Davis set out and addressed in turn the challenges made by the claimant relevant to this question of the fairness of procedure. She referenced the ACAS code and submitted that a fair procedure, as required by the Code was followed in this case.

The interplay between the grievance and the disciplinary

135. Ms Davis argued in particular that the conduct of the grievance process prior to the decision to move to a disciplinary process is entirely irrelevant to the question of procedural fairness vis-à-vis the dismissal, save for the decision to adopt the grievance investigatory report for the purposes of the disciplinary process. We noted that a significant proportion of the claimant's claim and evidence related to criticisms of/objections to the handling of the grievance process, to which she responds as follows:

    a. She argued that the subject of a grievance is not entitled to have sight of a grievance lodged by another; and in any event the claimant confirmed that by the middle of the investigatory meeting on 14 January 2021 he was clear as to the nature of the allegations against him and these allegations were set out clearly in the disciplinary invite

(which also contained a copy of the investigatory report which contained all of the relevant witness evidence);

b. The ACAS code does not afford the subject of a complaint the right to attend a grievance. While the respondent's grievance procedure provides for this as a possibility, giving examples of who will attend, that is neither prescriptive nor absolute. The decision of Jen Chalmers not to permit the claimant to attend due to the nature of the allegations was perfectly reasonable and sensible;

c. the claimant was provided with the opportunity to make representations about the grievance at the meeting with Jen Chalmers on 14 January;

d. the subject of a grievance has no entitlement (whether under the ACAS code or otherwise) to sight of the grievance minutes. In any event he was provided with them at the disciplinary hearing along with the notes of the follow up interview with Ms Baltiatiye;

e. there is an expectation that the person who lodges a grievance will be asked what outcome she was looking for in respect of her grievance, which the claimant's father acknowledged and is a standard element of any grievance process. In any event, Ms Kennett's gave evidence that Ms Baltiatiye's preferred outcome did not influence her decision

f. While the claimant asserts that a "commitment" by the respondent was made to discipline the claimant prior to his own disciplinary hearing, it is apparent from the notes that no such "commitment" was made. It was apparent from the discussions about putting questions to witnesses fairly that what Mr F Sharp viewed the statement that "we will now move to disciplinary" as being the same as "we will issue a disciplinary sanction" which it is not;

g. It was fair and reasonable for the respondent to adopt the grievance investigation for the purposes of a disciplinary process, given the respondent has demonstrated, as is required that a reasonable investigation was carried out for the reasons set out above. Furthermore the decision to adopt the grievance investigation for the purposes of the disciplinary process was clearly communicated to the claimant in the disciplinary invite;

h. it was fair and reasonable for the respondent to appoint the same person to hear the grievance and the disciplinary in the particular circumstances of this case, by reference to the ACAS code which provides that there should be a separation between the person conducting the investigation, the disciplinary and the appeal. Here the respondent appointed one person to investigate the grievance and a separate person to determine it (unusually for a grievance).

136. We accept Ms Davis's submissions in principle at a) that the subject of a grievance is not entitled to have sight of the grievance itself; and at d) above that they are not entitled to have sight of the grievance minutes.

137. We also accept Ms Davis's submission at b) that the subject of a grievance does not have a right to attend a grievance. Mr F Sharp argues that it is a breach of the ACAS code and the respondent's grievance policy to have refused to allow the claimant to attend the grievance hearing. In his submissions, Mr F Sharp submitted that the Acas code stated that "where a formal grievance is raised about a fellow worker, such as a complaint of bullying or harassment, the person complained about should also be allowed to be accompanied by a fellow employee or trade union representative of their choice at grievance meetings that involves them. In such cases, the person complained about should be allowed to see the relevant evidence and copies of any witness statements, and given reasonable time to share these with their chosen companion, so that they can fairly prepare for the grievance hearing". However this is the guide which accompanies the code and not the code itself.

138. He relies too on the respondent's grievance policy which he says makes it "crystal clear" that those attending the hearing "will be…the person who is the sources of the grievance". The respondent defended its refusal to allow the claimant to be present at this hearing by suggesting that it was sensitive to Ms Baltiatiye's potential distress. He pointed out however that Ms Kennett confirmed that she did not consider any alternative arrangements including inviting the parties to present their cases separately.

139. While we accept that the claimant did not have a right to attend the grievance hearing, we did agree with Mr F Sharp that alternatives could have been considered. We also accept that strictly speaking although it may be standard procedure that the accused attends, that is not an absolute requirement of the policy. Indeed, we accept that would not have been significant had it not been for the way that the respondent subsequently dealt with the disciplinary procedure.

140. While we did not agree that the respondent's grievance policy was as clear as Ms Davis sought to present it, and understood from the claimant's evidence why he might assume that he would be invited to the grievance hearing, we agreed with Ms Davis that there may be examples when it was not appropriate for an accused to attend a grievance. However, this was not one of them – this being a case where the claimant was a) not reinterviewed in the context of the grievance investigation; b) not invited to be heard at all at the grievance hearing (even outwith Ms Baltiatiye's presence) c) not interviewed in the context of the disciplinary process and d) the disciplinary hearing proceeds on the basis that the allegations were upheld.

141. We agree with the respondent's submission at c) above that the claimant was provided with the opportunity to make representations about the grievance, but as discussed elsewhere in this judgment, we do not agree that was sufficient in the context of the disciplinary process. Despite Ms Davis's assertion that it was sufficient for Ms Chalmers, during an investigation into a grievance, to put the allegations to the claimant for his comments, we did not agree. That interview took place at the very outset of her investigation, in the context of a grievance and not in the course of a disciplinary. He was not re-interviewed. We do not accept that the claimant was given sufficient opportunity (as discussed above) to make representations.

142. On the matter of e), this Tribunal (basing its view on the industrial experience of the members), did not agree that it was standard practice for a person who lodges a grievance to be asked what outcome she was looking for in the context of the investigation itself. This is a matter which would appropriately be raised at the grievance hearing, and even then we as a Tribunal did not

consider it appropriate to take into account the view that the person making the grievance thought that the perpetrator should be dismissed, but were of the view that the appropriate question was to ask how the complainer wanted the dispute resolved. While Ms Kennett's position was that this did not influence her decision, again in the circumstances of this case, it is possible to see how the claimant might have thought that it had (especially since Ms Baltiatiye was reinterviewed with the specific intention of asking her this question).

143. We also accept as discussed above in regard to the submission at f) that there was not a commitment to discipline the claimant as such at the grievance hearing, and that what was stated there was that the next stage would be the disciplinary proceedings against the claimant.

144. As will be clear from our conclusions above, we do not however accept (g) that it was fair and reasonable for the respondent to adopt the grievance investigation for the purposes of the disciplinary. Nor do we accept (h) that it was fair and reasonable for the respondent to appoint the same person to hear the grievance and the disciplinary.

145. The respondent may have been able to argue that it was appropriate to rely on the investigation into the grievance had they not made the entirely inexplicable decision to require Ms Kennett to conduct not only the grievance hearing but also the disciplinary hearing. We do not accept that in the circumstances of this case it could be said that it was reasonable for the same person to hear both.

146. Ms Davis accepted that in a case where there was a dispute as to whether or not the conduct had taken place, it would be entirely inappropriate for a person who had determined that a grievance should be upheld to then be the decision-maker in a subsequent disciplinary hearing (as the issue would be that the person would be unlikely to reach a different conclusion having already upheld the grievance). However, she argued that in a case where the conduct has been "effectively admitted" in the form of a clear and unambiguous apology, it was entirely fair and reasonable for an employer to appoint the person who had determined that the conduct complained of had

taken place to conduct the disciplinary hearing. She argued that there is a difference between deciding whether or not the conduct complained of took place (which she did not have to do as this was admitted) and determining the appropriate disciplinary sanction.

147. This presupposes that we would agree with her that the apology could be read as a complete admission that the conduct had occurred. But this is not a case where the claimant had clearly said "hands up".

148. There is a very real question to be asked about whether Ms Kennett could possibly be objective having heard and determined the grievance, not least when to find for the claimant would require her to overturn/change her mind about decisions which had been made, as Ms Davis recognises. Her evidence indicated to us for example that she was influenced by the fact of how upset Ms Baltiatiye was. Mr F Sharp aptly quoted Sir Terence Etherton in his submissions, that "it is the fundamental consideration that justice should not only be done but should manifestly and undoubtedly be seen to be done".

149. Ms Kennett herself was clearly confused in evidence as to what her role was in the grievance hearing. Was her role to uphold the grievance or was it to find the allegations upheld or proven? While it might be said that the difference is semantic, again we believe that it is important that the correct focus in order to ensure that justice is seen to be done. She appeared to realise by the time she gave evidence that the question she should focus on was whether the grievance was upheld, but that is not the language used in the minutes of the grievance hearing.

150. However we were of the view that it was entirely inappropriate for Ms Kennett to conduct the disciplinary hearing, on the basis of a report investigating a grievance, without even an intervening investigation into the allegations of misconduct in the context of the disciplinary process.

151. We heard that Ms Kennett was a complete novice, and this was not only her first grievance hearing, but her first disciplinary hearing as well. In a matter as serious as this, we as a Tribunal were at a loss to understand why an organisation the size of the respondent would have made such a decision.

152. While we do not adhere to the claimant's "conspiracy theory", these mistakes by the respondent perhaps inevitably gave rise that the claimant's belief that the respondent was intent on finding him guilty and dismissing him.

153. The result of the respondent's decision to use the investigation report as the basis for the disciplinary and to fail to undertake another interview with the claimant in the context of a disciplinary process, is that the allegations are never put in terms, beyond the very first interview in the context of a grievance, to the claimant and his response sought or recorded.

154. Indeed the error is fatally compounded by the fact that the claimant's view is not even sought at the disciplinary hearing. The opening statements at the disciplinary hearing recorded and agreed by the parties, go a long way to underlining why it was not appropriate to use the investigation report for the disciplinary and for Ms Kennett to have conducted both.

155. The relevant extracts of the meeting bear revisiting here in this context. After standard introductions, to paraphrase what is set out at paragraphs 37 and 38 of the findings of fact, Sarah Holland confirmed that the allegations had already been upheld so that there was no need to discuss them further and therefore they would move straight to discuss the next stage, that is, as we understood it, the sanction.

156. This highlights the very real danger of relying on an investigatory report for the grievance to stand in the stead of an investigatory report for the disciplinary, especially given the particular circumstances of this case. This is because it resulted in presenting the allegations as upheld at the outset of the disciplinary hearing without any reflection at all. We agree with the claimant that he was not afforded a proper opportunity to present his defence before the allegations were upheld against him. If the investigatory report had been for the disciplinary process, we do not consider that it would have been sufficient for the respondent to have said, effectively, 'you had a chance to explain yourself at the investigatory interview so we don't need to ask you for your response to the allegations at this disciplinary hearing'.

157. The claimant was not asked at any time about the understood implications (or meaning if it can be said to be clear) of the apology which came after the investigatory interview. Assumptions were simply made that he had admitted the conduct through the apology. Given the significance of any admission, we consider that it was incumbent on the respondent to have asked the claimant whether that indeed amounted to an admission. That is notwithstanding the subsequent events and the grounds of appeal.

158. It was this conflation of grievance and disciplinary investigation which could explain the confusion highlighted at the disciplinary hearing about the reference to claimant having a right of appeal. Ms Kennett says that it is an error and that it ought to have said that Ms Baltiatiye had the right of appeal but that is not at all apparent from the context in which the discussion took place. This is what comes of a lack of focus on the part of Ms Kennett and indeed HR whether the task is to uphold the grievance or not or to uphold the allegations against the claimant or not. These errors clearly contributed to the claimant's view, albeit we accept was erroneous, that the decision to dismiss was "orchestrated" by HR.

159. We therefore took account of this and concluded that this in itself rendered the procedure unfair. We concluded that it was not reasonable to rely wholesale on the investigation for the grievance and therefore there was no disciplinary investigation as such undertaken.

The failure to supply the witness statements to the claimant

160. The claimant also relied on the failure of the respondent to supply the witness statement which accompanied the investigation report.

161. In particular, in his submissions, the claimant relied on the following dicta of Mr Justice Elias in *A v B* 2003 IRLR 405 [83] which he said is directly applicable to this case. We should point out that yet again Mr F Sharp's quote in his submissions is not accurate, but having checked the judgment, the relevant extracts are at paragraph 83, under the heading "failure to provide all relevant witness statements", "Perhaps of greater significance is the fact that the statements which were taken, and may have been of some assistance to

the applicant, were not provided to him. In this context we do not accept that it was sufficient…….simply to provide [the solicitor with] a precis of what was said……There was some material in those statements which might have assisted the appellant had they been made available to him".

162. Mr F Sharp argues that at no time after 14 January was the claimant given sight of the evidence that he could have used to prepare his defence at his disciplinary hearing. He argues that consequently the claimant was prevented from assessing whether any witness evidence should be challenged or whether additional aspects of the investigation required clarification or discussion up to and including the announcement of his dismissal. He asserts that had the claimant been aware of the content of the witness statements prior to his dismissal he would have called a number of individuals to support his claim that Nida had misheard or misunderstood anything that may have been said or observed that night and that she was fundamentally wrong in making the other accusations against him.

163. Ms Davis argued that there was no requirement for witness statements to be produced. Ms Davis submitted that the issuing of witness statements obtained in the course of the grievance investigation is not a requirement of the ACAS code. The code stipulates (under the heading "inform the employee of the problem"), "If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct….and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include witness statements, with the notification".

164. Ms Davis argued that in this case, the evidence was extracted from the witness statements and included in the investigatory report (and it was Hazel Kennett's evidence that she did not rely on anything in the witness statements that was not contained within the report). Accordingly, she argued, there was no requirement to provide the witness statements as the requirement for the notification to contain sufficient information about the alleged misconduct" has been complied with. She points out that the only "contradiction" related to the

standing up/sitting down issue and this was clear from the terms of the investigatory report.

165. Ms Davis sought to get the claimant to define precisely how he was disadvantaged by the failure to have sight of the witness statements until after his dismissal. He struggled with this in cross examination, although it was picked up by Mr F Sharp in re-examination. Then the claimant confirmed that there was no reference to the "innuendos against his character" contained in the witness statements in the grievance report which he had received; it was not possible to deduce from the report who has asked what questions; the report did not refer to whether or not the apology had been given to Ms Baltiatiye, whereas the witness statements do; that ambiguities in the witness statements were not reproduced in the report; and it is not clear from the report that there were no witnesses who corroborated allegations two and three.

166. We accepted the claimant's concerns about the consequences of not seeing the witness statements in this case, and we did not in any event think it was necessary for the claimant to identify a specific disadvantage. In a case such as this, where the investigation report from the grievance is adopted, it is self-evident that the claimant should have had sight of the witness statements in order to fully appreciate the evidence which the respondent would be relying on at any disciplinary hearing.

167. While we accept that an accused may not have seen witness statements taken in connection with the investigation of a grievance, or even sight of the grievance itself, it is quite a different matter if the investigation for a grievance to be used, wholesale without any further consideration of the allegations, from the very different perspective of a disciplinary against an accused.

168. While it may have been appropriate for the respondent to use of the information from the grievance investigation, we consider that it would have been reasonable for the respondent to appoint another unconnected member of staff to at least consider whether further investigation was necessary for the disciplinary. We were of the view that then the claimant would in all likelihood have received copies of the witness statements which is, in the

industrial experience of the panel, common place. Indeed, the Acas code recognises that this "would normally be appropriate" and we were of the clear view that there was nothing unusual about this case which would justify a departure from the norm.

169. We find that the failure of the respondent to let the claimant have sight of the witness statements only after his dismissal was a serious obstacle to the claimant's ability to prepare his defence or answer any of the points raised in the witness statements which caused him concern, or even to challenge them.

The possibility of informal resolution – the withholding of the apology

170. Mr F Sharp submitted that the respondent refused to consider whether the allegations made by Ms Baltiatiye should have been resolved in an informal way as recommended by ACAS. He submitted that the evidence proved that Ms Baltiatiye was anticipating an apology from the claimant and that had that been communicated to her in a timely matter and an informal meeting brokered between the parties who were known to be friends, the matter could have been resolved in a manner not resulting in dismissal.

171. He submitted that the respondent had knowingly and intentionally failed to put the apology and tribute to Ms Baltiatiye and this was to preclude any possibility that the matter could be resolved by means other than dismissal.

172. On the matter whether an informal resolution should have been attempted, Ms Davis argued forcefully that it would have been wholly inappropriate in a case involving allegations of serious sexual harassment, in circumstances where the victim was exceptionally distressed and expressed her wish not to see the claimant.

173. Ms Davis argued that the issue of whether or not Ms Chalmers could/should have passed on the apology received by her on 15 January 2021 is not relevant to the issues in this case as a failure to pass on an apology immediately is not a procedural defect. She argued that remorse expressed is just one mitigating factor to be taken into account and is not determinative.

174. She also argued that whether or not Nida accepted James' apology is irrelevant. She argued that the respondent owes a duty of care to all of its

employees and it would have been negligent of the respondent not to take action against the claimant, irrespective of Nida's position on the matter. In any event it was Ms Kennett's clear evidence that Nida expressed preferred outcome did not impact on her decision to dismiss. As soon as Nida made a complaint (formal or otherwise) the matter became one that the employer had to deal with. Ms Kennett advised her that the decision as to what action to take was a decision for the company.

175. While we did not accept that there was any intentional or deliberate withholding of the apology to prevent resolution of the case or to ensure that the allegations were upheld, we did accept that it was a serious error of judgment for the respondent to delay in communicating the apology to Ms Baltiatiye. We were particularly concerned to note that the respondent failed to advise Ms Baltiatiye of the apology when Ms Baltiatiye actually raised that fact that she had expected one in the meeting on 17 January (after the apology had been received). While even after she became aware of the apology she still suggested that she could not work with the claimant, she also acknowledged it was a matter for the respondent. While it may well be that it would have made no difference to the outcome, we cannot know that. We accepted that had the apology been immediately forwarded as the claimant requested there is at least the possibility that the matter could have been resolved informally. That this was a possibility was supported by the evidence that the claimant and Ms Baltiatiye were friends (and he had met her family outwith work), that she was anticipating an apology; and given the context in which the misconduct occurred (that is after the Christmas party where alcohol had been consumed). This of course is a separate matter to the relevance of the apology in the context of mitigation.

176. We were of the view that the failure to pass on the apology was both substantively and procedurally unfair and had the apology been passed on the outcome may have been different.

The appeal

177. Relying on *Taylor v OCS Group Limited* 2006 IRLR 613, Ms Davis argued that any earlier procedural irregularities found by the Tribunal are cured by the appeal process.

178. In particular, Ms Davis argued that if the Tribunal were to find that this were a defect in procedure that it was "cured" at the appeal stage because the witness statements had been supplied to the claimant by then. Mr F Sharp pointed out that the witness statements were sent to the claimant less than 12 working hours prior to the appeal and amounted to 48 pages of closed typed 9 point documents. He advised Nathan Hawes this was insufficient time to read and critically assess their full evidential significance and further he had notified the claimant that the appeal would be limited to a review of the original decision. Thus the ability to introduce the relevance of these evidential documents was thereby denied, and this is not evidence of rectifying prior unfair procedures.

179. Ms Davis submitted that the claimant had the benefit of all documents, (including the witness statements) prior to the appeal and nowhere in the appeal is the issue of inconsistencies raised (other than the disparity between witnesses whether Nida was standing up or sitting down which was apparent from the terms of the investigatory report itself). She submitted that the claimant had declined the offer of an adjournment to further consider the witness statements. Further, the claimant was given the opportunity to put forward any further arguments or mitigating circumstances at the appeal and was also permitted unusually to call Hazel Kennett as a witness.

180. Mr F Sharp took particular issue with the respondent's assertion that the record of the appeal is an accurate reflection of what was discussed at the appeal hearing, but these were never sent to the claimant, and are not accepted as accurate. We did not however consider the fact that the claimant was not asked to revise the notes of the appeal hearing had any bearing on our conclusions.

181. This is because we did not accept that the very serious defects in this case could be said to be cured on appeal. The matter of the witness statements is just one element of procedural unfairness. We found Mr Hawes to be rather dismissive of the claimant's arguments. It appears that he was going through the motions and we did not get the impression that he was thinking objectively about possible errors, to the extent of justifying the decision to appoint Mrs Kennett to both the grievance and the disciplinary which we considered to be the most egregious of errors, impacting on natural justice.

Conclusion on liability

182. We were of the view for the reasons set out above that there was a failure to conduct a full and fair investigation and we did not accept that the claimant got the opportunity to say what he wanted to say in explanation before the decision to uphold the allegations and to dismiss the claimant was made.

183. It follows from the above that we have concluded that dismissal in the circumstances of this case did not fall within the range of reasonable responses and that it was both substantively and procedurally unfair.

Remedy

184. Mr F Sharp had lodged an updated schedule of loss, which Ms Davis had the opportunity of considering, and in respect of which she made a number of submissions.

185. There was agreement about the following:

- that the claimant had been in receipt of an annual salary of £35,176 gross, which is net monthly pay of £2,931.33, and daily pay of £71.43;
- the basic award (£2,887.50);
- that the claimant was unemployed between 31 January and 4 March 2020 during which time he received no benefits;
- that the claimant was appointed IT support engineer in a new role with effect from 5 March 2020 at an annual salary of £27,500, which equates to a monthly net salary of £1,799 and daily net pay of £59.14;

- that the claimant's loss of earnings from 31 January (date of dismissal) to 5 March 2020 (date he started a new job) was £2,428;
- loss of private health care (£9,507.46);
- loss of service award 2020 and 2021 (2 x £350);
- loss of statutory rights (£500).

186. Mr F Sharp had done his calculations based on the furlough pay which the claimant received from 24 March 2020 to the date of the hearing. Ms Davis argued that the respondent should not be liable for ongoing losses which were not directly attributable to their actions, and the implications of the pandemic could clearly not be laid at their door.

187. We accepted that submission, and accordingly took the view that losses for the claimant continued to run at the difference between his previous gross annual salary and his new gross annual salary, which equates to a difference of £12.29 per day.

188. It would appear that the claimant received a payrise on 1 April 2021, but the claimant has not provided sufficient information to allow the Tribunal to calculate any differential. It would appear that Ms Davis did not take that into account in her revisions. Parties may wish to make this adjustment themselves, or to make an application to the Tribunal for a reconsideration of this judgment, providing the necessary information.

189. In respect of the period from 5 March 2020 to the date of Tribunal (14 June 2021) which is a period of 465 days (18 + 372 + 75), with losses running at £12.29 per day, we calculated that the claimant's losses in respect of pay to be 465 x £12.29 = £5,714.85.

190. The claimant makes a claim for bonus for the years 2019-2020 and 2020-21. This is disputed by Ms Davis. She relies on the evidence of Mr Aitken that the claimant would not be eligible to be considered for a bonus because he was suspended. We did not accept that submission. While we accept that the claimant may well have been suspended at the time the performance appraisals were carried out, we accepted that but for the dismissal he would

have received these bonuses. Given the evidence of Mr Aitken, we had no hesitation in accepting that he would have got a "good" performance rating. We have therefore added to the losses the compensation sought for loss of bonus in 2019-2020 and 2020-2021 the sum of £2,761.63 x 2, the figures not being in dispute.

191. While Ms Davis was happy to agree losses in respect of the sums for pension loss, she pointed out that given the above adjustment, the claims are therefore too low. The claim for pension loss in respect of the period from 31 January 2020 to 4 March 2020 is therefore agreed at £337.62. For the period from 5 March 2020 to 14 June 2021, we have calculated the differential to be £6.92 per day which was the only figure with which we were presented. In the event that either party wishes that matter to be reviewed, they should make an application for reconsideration if agreement cannot be reached.

192. Ms Davis took no issue with the claimant's claim for excess travel costs (£20.16). There did appear to be an error in that calculation, but that was the figure in the schedule of loss.

193. In regard to future losses, the claimant argues that there are a negligible number of employers operating in the Borders that recruit personal staff with the competencies and experience of the claimant. Consequently the opportunity to secure a position offering comparable salary and benefits to the respondent are remote; with the pandemic significantly reducing the numbers of comparative vacancies across Scotland.

194. While the Tribunal was prepared, based on its judicial knowledge, to accept that, the Tribunal did not however accept that it would take the claimant two to three years to obtain a position of comparable remuneration.

195. The Tribunal decided that it was reasonable to assume that if the claimant made appropriate efforts that he should be able to secure a comparable position within one year of this hearing, that is by 14 June 2022.

196. With losses calculated as running at £12.29 per day, that would equate to future loss of earnings totalling £12.29 x 365 = £4,485.85.

197. With regard to loss of future pension contributions, calculated at £6.92 per day, that would total £6.92 x 365 = £2,525.80.

198. With regard to additional travel costs for subsequent years, on the basis of the information we had we were prepared to award the difference for the period of one year. We noted that Ms Davis had not taken issue with the claimant's claim for 40 pence per mile which we understand would be £14.40 per day; and on the basis of that information we award the daily rate of 236 days per year (assuming no travel on week-ends and holidays), which totals £3396.70.

199. The total compensation award before deductions is therefore £35.010.80.

Polkey reduction

200. Ms Davis argued that, if the Tribunal were to conclude that the dismissal was procedurally unfair, that this is a case where it would be entirely appropriate to apply a *Polkey* reduction on the basis that if these steps had been carried out, the claimant could nevertheless have been fairly dismissed. She argued that appointing someone else to conduct the disciplinary hearing would not have affected the outcome where the evidence was so strong, coupled with an admission of guilt and an unreserved apology from the claimant; that a separate disciplinary investigation would not have affected the conclusion; nor would the provision of the apology at the time it was made.

201. Mr F Sharp submitted that it could only be said that any failures would have made no difference if the respondent had: appointed an independent investigator not known to the claimant or his accuser; conducted a genuinely independent and objective investigation, not one tainted with bias and prejudice; not excluded the presentation of allegations 2 and 3 to the witnesses; taken account of the claimant's dyslexia; allowed the claimant to put his case to his employer before it had decided his guilt; provided the claimant with copies of witness statements to allow him to challenge the weakness of the evidence against him and call witnesses to refute the attempts to blacken his character; not maintained the claimant's suspension for a further 14 days after the conclusion of its investigation; allowed the

claimant to be present at the grievance hearing of his accuser to answer the allegations made against him, which did not need them to be interviewed together; appointed someone independent to chair the claimant's disciplinary hearing and who had not already decided and pronounced on his guilt; not prevented the claimant from contacting any other Kyowa Kirin employees to ask that they act as witnesses on his behalf; raised the realistic probability with the claimant's accuser that she may have misheard or misunderstood what was said to her; questioned her credibility and motivation in highlighting unsubstantiated imputations against the claimant to bolster her own allegations; disclosed the claimant's immediate apology to his accuser; given due consideration to the inconsistent application of the disciplinary policy with regard to the events involving the claimant the previous May; made it transparent that at the claimant's disciplinary hearing his employer was contemplating dismissal having already decided his guilt; given due credit for the claimant's exceptional good record of employment.

202. Relying on *Polkey*, he argued that the Tribunal could not sensibly reconstruct the world as it might have been, and therefore it was more than possible that the claimant would not have been dismissed. He therefore invited the Tribunal to conclude that such a Polkey reduction would not be warranted.

203. We have dealt in detail above with our conclusions on the points which Mr F Sharp made, and while we do not accept them all, we do accept Mr F Sharp's submission in general. We agreed that it could not be said that had a fair procedure been adopted the outcome would have been the same.

204. We were of the view that we could not say that if a reasonable investigation in the context of a disciplinary process had been carried out, and if the correct procedure had been followed, that dismissal was inevitable. Indeed, we were concerned in particular about the failure of the respondent to forward the claimant's apology and as discussed elsewhere we considered that the matter may have been resolved informally had that apology been passed on. This was particularly given the fact that the claimant and his accuser had been friends and the fact that the incident occurred at a Christmas party.

205. We noted that in *Ingram v Bristol Street Parts* UKEAT/0601/06 Mr Justice Elias stated that sometimes procedural failings will be casually relevant to the dismissal itself and we found this was one such case.

Acas Uplift

206. The claimant sought an uplift of 15% for the respondent's failure to follow the code by failing to disclose the complainant's grievance, witness statements and other evidential documentation prior to his disciplinary hearing; failing to appoint a person independent of the grievance hearing to consider the disciplinary hearing; preventing his attendance at the grievance hearing and deciding his guilt prior to allowing him to respond to the allegations made against him.

207. Ms Davis argued that there was no breach of the ACAS code. In order to accept that argument we would need to have accepted her argument that there was no difficulty in this case in conflating the grievance and disciplinary investigations. While she could then argue that there had been no breach of the precise provisions of the code, we did not accept that, bearing in mind our conclusion that there was no investigation into the misconduct in the context of a disciplinary process.

208. We noted that Mr F Sharp had quoted extracts from the guide which accompanies the code, but our focus is of course on the code itself.

209. We were aware that paragraph 4 of the code, referring to disciplinary or grievance processes, set outs out the key elements and includes the requirement that, "employers should carry out necessary investigations, to establish the facts of the case" and "employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made".

210. We have concluded that the employer did not carry out the necessary investigations in regard to the disciplinary allegations made against the claimant, and even if it could be argued that it was reasonable for the investigation into the grievance to stand in the place of an investigation into the disciplinary, it could not be said that this employee was given an

opportunity to put his case in response in the context of a disciplinary process and before any decisions were made, as discussed at length in this judgment.

211. We were of the view therefore that there was a breach of the ACAS code. We decided that this failure was not reasonable because the failure related to a fundamental aspect of the disciplinary process, which meant that the claimant did not have the opportunity to put his case in response to the allegations before the decision to dismiss was made.

212. We therefore accept the claimant's application for an uplift of 15% for that unreasonable failure.

213. This uplift requires to be made before any reduction for contributory fault (section124A ERA).

Contributory fault

214. Ms Davis invited the Tribunal to reduce any compensation awarded taking account of the claimant's contributory conduct, including the basic as well as the compensatory award. She submitted that the apology confirms that, at that time at least, the claimant took responsibility and was not seeking to excuse his conduct, confirmed that he had made lifestyle changes. Referring to *Hollier v Plysu Limited* 1983 IRLR 260, she argued that a reduction of 100% would be appropriate; failing which 75%.

215. Mr F Sharp argued that there could be no assumption of contributory fault. He submitted relying on the claimant's evidence that the attempts at blackening his character are not only explainable but had they been enquired into, did not reflect badly on him at all. Lorna Mitchell was unequivocal in confirming that absolutely no complaints had been made against the claimant in his almost five years' service with KKI.

216. As discussed, we noted that the claimant accepted what he had said to Ms Mitchell the previous year and that he had perceived it to be a compliment. But we did not in any event consider that any previous conduct by the claimant could be said in any way to have contributed to his dismissal. Ms Mitchell did not complain about that incident and indeed she confirmed that there had

been no formal complaints. It could not be said then that the claimant has previously been warned about any failings.

217. The position with regard to the question of contributory fault in respect of the conduct under examination in this case however is quite different. We accept, as the claimant did, that "something happened". The claimant did, as we understood it, accept allegation 1, to the extent at least that he had hugged the claimant even if he did not accept that it amounted to harassment in the context. He accepted that he was intoxicated. He wrote an apology saying that although he could not remember, he respected Ms Baltiatiye, and that he may have said these things, even if they were out of character and he had no memory of them, although he thought perhaps that she had misheard or misunderstood.

218. We were made aware in evidence that the claimant and Ms Baltiatiye had been friends. We concluded on the balance of probabilities that something had been said to upset Ms Baltiatiye such that she felt that it was important to lodge a grievance about the claimant. She would know that it was a serious allegation and she would know that it could result in him losing his job. We did not get the impression that she would have made a complaint without any substance.

219. Had "something" not "happened" that evening, then the claimant would not have found himself facing the allegations he did. Had he not been so inebriated he may not have conducted himself the way that he did, and he would not have found himself in a position that he could not defend himself from allegations of harassment because he had no memory of what had actually happened. To that extent, we conclude that the claimant was blameworthy and has contributed to his dismissal.

220. We take account of the circumstances in which misconduct occurred. We take account of the fact that this took place after, not during, the respondent's Christmas party; we take account of the fact that alcohol was consumed not only by the claimant but by other witnesses, we take account of the fact that he could not remember, and we take account of the fact that he apologised as soon as he realised he had caused upset.

221. Having found that the claimant's conduct was blameworthy, we are required to reduce the award in such proportion as we consider "just and equitable".

222. While we have found the claimant's conduct blameworthy, we do not conclude in this particular case that the employee's conduct is the sole reason for the dismissal. As discussed above, had the respondent conducted further investigations and adopted a fair procedure, there is at least the possibility of a different outcome and even of informal resolution. We took the view, in line with the *Hollier* guidelines, that this was a case where the respondent and the claimant were "equally to blame".

223. We took the view therefore that the claimant contributed to his dismissal to the extent of 50%. Both the basic and compensatory award therefore require to be reduced to that extent.

Compensation

224. Applying the ACAS uplift first, then reducing the compensatory award by 50% we conclude that the claimant is entitled to a compensatory award of £22,056.54 to be added to the basic award of £1,443.75.

225. We have concluded that dismissal in the circumstances does not fall within the band of reasonable responses and is therefore unfair. The claimant is therefore entitled to compensation and the respondent shall pay to the claimant the sum of £23.500.29

Compensation table

Head of loss	Calculation	Subtotal	Total
Basic award		£2,887.50	
Less 50% contributory fault		(£1443.75)	£1,443.75
Compensatory award			
Loss of statutory rights		£500	
Loss of earnings from 31/1/20 to 4/3/20		£2,428	

Loss of earnings from 5/3/20 to date of Tribunal (running at £12.29 per day)	465 x £12.29	£5,714.85	
Bonus for 2019/20 and 2020/21	2 x £2761.63	£5,523.26	
Loss of pension (3/1/20 to 4/3/20)	34 x £9.93	£337.62	
Loss of pension (5/2/20 to 14/6/21)	465 x £6.92	£3,217.80	
Loss of private health care		£9,507.46	
Loss of service award	2 x 350	£700	
Excess travel costs		£20.16	
Future losses -earnings for one further year	£12.29 x 365	£4,485.85	
Future losses - pension	£6.92 x 365	£2,525.80	
Future loss – excess travel	£14.40 x 236	£3398.40	
Total before adjustments		£35,010.80	
15% Uplift for breach of ACAS code	£5,753.88	£44,113.08	
Less 50% contributory fault		(£22.056.54)	£22.056.54
Total award			£23,500.29

Employment Judge: Muriel Robison
Date of Judgment: 04 August 2021
Entered in register: 12 August 2021
and copied to parties