EMPLOYMENT TRIBUNALS

Claimant: Mr M Hartley

Respondent: D Hollowell & Sons Limited

Heard at: Manchester (remotely, by CVP) **On:** 22 and 23 March 2021
14 July 2021
6 August 2021
(in Chambers)

Before: Employment Judge Feeney
Ms A Ashworth
Mr P Stowe

REPRESENTATION:

Claimant: Miss K Hodson, Solicitor
Respondent: Mr D Bunting, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's claim of unfair dismissal succeeds but he is awarded no remedy on the basis of Polkey vs A and E Dayton Services Ltd (1987) HL.

2. The claimant's claim of sex discrimination fails and is dismissed

REASONS

Introduction

1. The claimant brings claims of unfair dismissal and sex discrimination following his dismissal by the respondent in respect of four instances of sexual harassment.

Claimant's Submissions

2. The claimant submits that the respondent made assumptions about his guilt which they would not have made in the case of a female manager, and that there were significant flaws in the investigation, disciplinary hearing and appeal which rendered the dismissal unfair.

Respondent's Submissions

3. The respondent stated that they would have treated a female manager in exactly the same way and therefore there was no sex discrimination. They denied that there were serious flaws, and although it was admitted that the investigation was not perfect, they had reasons for the actions they took at the disciplinary and appeal stages. Overall, it was patently reasonable and within the range of reasonable responses to dismiss for the matters found proven.

4. The respondent stated they would have dismissed for the most serious incident in any event. If there was an unfair dismissal, the claimant should not receive any compensation on the basis of Polkey and/or there should be a 100% contribution.

The Issues

5. The issues for the Tribunal to determine are as follows:

Unfair Dismissal

(1) Was the claimant dismissed for a potentially fair reason? The respondent says the reason was conduct. The claimant suggests that the real reason was that his colleagues resented his rapid promotion and disliked him.

(2) Were the investigation, disciplinary hearing and appeal conducted in a fair manner?

(3) Was it within the range of reasonable responses to dismiss in light of the respondent's findings?

(4) If there dismissal was unfair did Polkey vs AE Dayton Services HL (1987) apply and /or should any award be reduced because of contributory conduct

Sex Discrimination

(5) In suspending and dismissing the claimant, did the respondent treat the claimant less favourably than they would have done with a hypothetical comparator of a different sex in materially similar circumstances?

Witnesses and Evidence

6. The Tribunal heard from the claimant himself, and for the respondent from Mr A Hollowell, Director; Miss A Gwilliam, independent HR Manager, and Mr Tim Leeson, ex-police officer and owner of a private investigations business.

7. There was an agreed bundle of documents.

Findings of Fact

The Tribunal's findings of fact are as follows:

8. The claimant was appointed by the respondent, a funeral business, as a driver/bearer on 12 July 2017. The claimant knew one of the owners of the business and had left his previous employment, involved in HR managing in the NHS, due to ill health.

9. The claimant was promoted to Client Liaison and HR Manager on 1 April 2018. The claimant, in his role as HR Manager, had to raise performance issues with staff from time to time and raised a number of issues with Rachel Anderton ("RA"), but he says himself he always thought they got on reasonably well despite this.

10. On 12 December 2019 a member of staff wrote to the business owner with a grievance against the claimant. This was RT, a fairly recently employed worker. She referred to "a few events that have taken place that I've found very insulting and have made me uncomfortable. As you may be aware, there have been a few instances which have been very inappropriate". The things she complained of included:

- the claimant, who recruited her, adding her as a "friend" on Facebook, which she felt she could not refuse immediately after the interview;
- that he kept requesting her to come in to have a chat;
- that he called her "honey";
- that he made a comment about being on a diet because she turned down biscuits;
- that the wage would be lower than he suggested originally;
- that he called her pet names, "honey", "babe", "chick" on multiple occasions;
- that when requesting measurements for her uniform he asked her what her vital statistics were;
- that he accused her of fluttering her eyelashes at him, which she said she had not done. He said, "are you sure, because I know what I see", and she assured him there was no flirtatious intent and she simply had a nervous twitch in her eye or was tired.

11. RT attached some WhatsApp messages and text messages. One of the text messages said, "Please give us a bell when you get into work, please. Don't worry, you haven't been naughty", with an emoji winking.

12. The next day the respondent received an email from RA, a more longstanding employee. This said:

> "Having given this matter a tremendous amount of reflection I believe I need to raise an incident which occurred at Highfield Funeral Home on Wednesday 11 December. I had some reservations about bringing this to your attention, not because I did not believe I would receive the support of the Hollowell Family but because I had concerns that I would be subject to a vitriolic campaign for doing so by Mike Hartley.
>
> On Wednesday I had an appointment at Highfield Funeral Home with Baby MN's parents as they wanted to sit with her. As I was looking after Baby M I asked Mike Hartley if he could please look under the moses basket, for something. Baby M was in the moses basket at the time and as I lifted her up, he asked me 'what am I looking up, your skirt?'. This both shocked and upset me greatly however I did not pass comment as I clearly had vitally important and sensitive matters to attend to. I asked if the underside of the moses basket was alright. He replied, 'yeah, it's fine. You do have something coming down your leg though'. Again I did not respond to this, primarily as I was unsure of how to respond but also because it had already caused me a great deal of distress and I did not wish to engage further with him before the arrival of the parents.
>
> I believe this is not only sexual harassment and discriminatory behaviour but the fact I was looking after a stillborn baby significant aggravates his conduct.
>
> I am now of the view I cannot safely work alongside Mike Hartley without being subject to the conduct described. I am formally requesting that I am not requested to have contact with him on a one-to-one basis in the future."

13. The claimant was suspended on 13 December following this and told hot to attend the workplace, however he did so, he says, in order to ensure that Baby M was placed in the proper location. He was told that he should not have come in and that he should have asked somebody to do it for him.

14. On 13 December the claimant received a letter confirming the suspension and it was said that he had been suspended until further notice pending investigation into an allegation of gross misconduct. The respondent explained it did not imply that he was guilty of any misconduct and they would pay his salary, however they did not give further details at this stage of what the actual allegations were.

15. The respondent employed an HR firm to undertake the investigation, it was conducted by Lauren Hutchence.

16. Lauren Hutchence met with the claimant on 16 December 2020. She gave him the grievances and text messages. In relation to RT, she had only worked for the company for two weeks and she did not really understand the claimant and his personality. He had tried to be warm and welcoming, especially as she had said she had been bullied in her previous role. In respect of the eye fluttering, the claimant said this comment was not true: he asked whether she was nervous, he did not say she was fluttering her eyelashes at him – he was a happily married man and had no feelings other than trying to be warm and welcoming. The claimant was sorry if he had made RT feel uncomfortable, however she had let him meet members of her family and her child had sat on his knee.

17. In respect of the question about RT vital statistics, the claimant said that as a bloke he felt uncomfortable asking for this personal information and looking back he could have said “measurements”. He said that RT had impressed him and that she was unable to fulfil the role she had applied for but he had found her a different role. The claimant denied he had mentioned whether she was on a diet when he offered her biscuits. He said the messages, although the emojis could be misinterpreted, there were no kisses or anything like that. The claimant did not believe he was being inappropriate.

18. In respect of RA, the claimant believed the conversation was misinterpreted. He did not believe he said, “what am I looking up your skirt”, he believes he said something along the lines of “don’t worry, I’m not looking up your skirt”, which was said in a jokey fashion. He also stated he does not recall the comment, “you do have something down your leg though”. He says that after this he was praising RA and how well she was dealing with this delicate situation. The claimant said he had worked with RA for 2½ years and it had not always been rosy between them due to him being RA manager, but he had always conducted himself in a professional way. The claimant did not agree that the statements were sexual harassment. He does not discriminate against anybody regardless of their gender, age, colour or religion however he would apologise to RA is he made her feel uncomfortable.

19. . Lauren Hutchence met with RT and RA on 17 DecemberLH then interviewed the complainants. In RT interview she said that In respect of fluttering her eyelashes, the claimant said this twice so there could be no question as to what he meant, and RT had said she was not fluttering her eyelashes and said, “I have a one year old child who is not sleeping and must just be tired”. RT said the claimant regularly used pet names when speaking to her such as “honey” and “chick”, from the word go, and would walk in the office and say, “honey, I’m home”. The claimant also referred to RT as a “good girl” in a text message, which made her feel uncomfortable and she felt it was inappropriate. Jh had heard the claimant call her one of the pet names and could see she felt uncomfortable. RT also referred to the text message where the claimant said, “you’ve not been naughty”. RT felt that this was flirtatious behaviour, particularly as she had only just started work. RT believed the “vital statistics” request was also flirtatious, and that the claimant had also said about her being “curvy in all the right places”.

20. There were also text messages regarding the Christmas party and the claimant had said to RT, “You cannot come to the Christmas party if you’re driving, I am getting you drunk”. Again, RT felt this as inappropriate. She also stated that somebody she knew, who knew Mr Hartley, had told her to “watch her back”.

21. Lauren Hutchence sent the claimant copies of the interviews with RT and RA on 20 December 2020 and asked him to make written comments which he did on 27 December 2020. In respect of RT the claimant referred to the following, “I may refer to people as ‘honey or chick’ (pet names as they are referred to) but in a friendly way and in no way ever intended to be anything else”. The claimant felt it was a damning assessment of him after she had only been employed for three weeks.

22. In relation to fluttering the eyelashes, the claimant said he had asked RT if she had a nervous twitch as he had observed it on a few occasions. Again, he did not make a comment about diets – he thinks RT declined the biscuits due to it not suiting her diet.

23. Regarding "vital statistics", the claimant said it was his somewhat uncomfortable way of asking a lady for her measurements. As far as he was aware, it referred to a common method of specifying body proportions for the purpose of fitting clothes.

24. In relation to role definition, at this point there is no need to go into much detail about this, however the claimant said in relation to his use of emojis they were friendly but nothing that would be deemed flirtatious and they were not of a sexual nature.

25. In respect of the "naughty" comment, no offence was intended, and he noted that RT had said that "if she knew Mike personally this might be ok". It was not intended to be flirtatious. The claimant said the "curvy in all the right places" comment was a complete fabrication as the text transcripts have been provided and this was not mentioned.

26. In respect of the Christmas party, there was a conversation about driving but the claimant said transport arrangements could be made to allow everybody to have a drink, and he had mentioned somebody that Ms Turner might be able to share a taxi with.

27. In respect of the "watch her back" comment, this had no bearing on any of the allegations. The claimant suggested that RT had heard that RA was going to make a complaint and had then decided to make her complaint. He said he firmly believed, "the allegations made and importantly the timing and submissions of these allegations is a concerted attempt from these two employees in collusion with each other to discredit my reputation within the business and an attempt to remove me from my role".

28. On 17 December Lauren Hutchence interviewed RA:

> "Rachel referred to there being a little bit history between herself and Mike. She recalled an incident where Mike had walked into her office and referred to her as 'Rachie boobies'. Rachel had told him she found this inappropriate. She confirmed there were no witnesses. She also complained that he had spoken inappropriately to a female member of the public who had come in to see a relative and he had said he would warm up the massage oil and give her a massage. She also referred to an event where someone had spoken to her and told her to be careful of Mike as he had been confrontational with them. She then explained the incident on 11 December. She repeated it in the same terms as in her email. She added that she didn't realise how upset she was, but she tried to hold back the tears and she didn't want the parents to see her upset. She found it was disrespectful to the bay as well as herself. She believed there was CCTV but there were no witnesses. She considers he targets her when there's nobody else present. She felt she couldn't be with him on a one-to-one. She couldn't go to him as the HR person with the complaint so she had had to approach Andrew."

29. The claimant's written comments on this were: comments that he had said, "don't worry, I'm not looking up your skirt" which was said to reassure her and not cause offence. He said the crib was fine and there was no issue, however he had said jokingly "however, there's something on her leg". He acknowledged that given

his position as manager the comments could have been interpreted differently to what he intended and that he was sorry for that, but it was not sexual harassment or discriminatory, and he had worked with her for a while without there being any other allegations.

30. RA made a further statement following her interview on 17 December. She said she did not raise anything at the time as in the past when she had raised things the claimant had turned on her and become verbally aggressive, and she did not want a confrontation at that point given the delicate situation. She said reflecting on it she now feels that the claimant had indeed looked up her skirt as he suggested. On a previous occasion when she had been in the office feeling stressed he had entered the office and offered her a massage. She declined, but at the time felt it was a genuine gesture due to the fact that on a previous occasion he had found her massaging the shoulders of another female colleague, however the colleague said later it was unsolicited and unwanted. She felt the level of unprofessional and inappropriate behaviour was increasing. She had heard him make a comment about warming up the massage oil with a member of a family who was attending to discuss a funeral plan

31. The claimant's response now included the “Rachel boobies” comment. He said this was one isolated occasion over 12 months ago and he had meant to greet her with “Rachibobs”, her pet name, however it accidentally came out as “Rachel boobs”. He apologised and explained his Freudian slip, “which we both laughed off immediately. At no point did she appear to be or say she was offended”. Regarding the massages, the claimant said she was inconsistent between the two statements. Regarding “being careful”, he had no recollection of any incident with the person in question. He referred to there being complaints about RA from other people and that she showed very little respect towards management or the owners of the company. The claimant had had to have difficult conversations with her. He denied he had ever been aggressive.

32. In respect of the skirt incident, the claimant confirmed this categorically did not happen. He did not and would never under any circumstances do this and stands by his original statement. He was sorry for the comment made, which was a lame joke in extremely poor taste, and he apologised for any offence caused.

33. In respect of massages, the claimant has on many occasions provided neck and shoulder rubs to family members, colleagues and friends, both male and female, and people have said how good he is at it. He would never administer one without consent. On the occasion referred to RA was struggling with a headache and as he would do with anybody else, he offered a neck rub and, as she states, this was a genuine gesture to try and help. She declined, and that was the end of it. In respect of an unsolicited and unwanted neck rub to a fellow colleague, that was fabricated and untrue.

34. Lauren Hutchence also interviewed a number of fellow workers regarding the claimant. It was said later this was to provide context, however we find this was somewhat ill advised as employees where asked generally what they thought of the claimant rather than specific questions relating to the complaints. Although not all the information was irrelevant.

35. Lauren Hutchence interviewed a JB who said he did not like the claimant prior to starting his work at Hollowell. He knew the claimant through football, he finds him to be confrontational and does not always speak to anyone in the correct manner. He did not believe anyone has a nice word to say about him, and that somebody had warned him about the claimant when they learned that he was coming to join them. He also said that when they were interviewing RT, the claimant had said (regarding the candidate) "I have picked the fit ones".

36. The claimant's response to that was that he said it was completely subjective, he was not present during any of the allegations and could not see the relevance of this statement. He did not see how his involvement with football had anything to do with his work.

37. In respect of being found confrontational, the claimant said this was because he has had to raise things with JB. He had been very supportive and sympathetic to John during a family bereavement. He exaggerated when saying that nobody would have a nice word to say about the claimant, and because of the role, the claimant would not be liked by anybody in any event. He denied he had said "I have only picked the fit ones" regarding an interview for the mortuary technician vacancy. There was a conversation regarding a former soap star who applied for the position and several members of staff commented she was attractive however she did not meet the interview criteria and was not shortlisted for interview. Of those shortlisted, five were male and three were female.

38. Lauren Hutchence then interviewed KL, another employee. KL said the claimant "could be a bit cocksure and rude on occasions. There was workplace banter but nothing was taken to heart". He believed the claimant was building an empire here, however he said he got on fine with the claimant but did not deal with him directly save for booking holidays.

39. The claimant challenged the use of the word "cocksure" and said that it could be interpreted as him being confident and assertive. "Building an empire" was subjective – he had seen him progress quickly and he could understand why he had formed that opinion, but they had a good relationship.

40. Lauren Hutchence also interviewed JH, a family member and employee. He said he had heard the claimant referring to RT as "sweetie", which he felt was not professional especially as RT had only just started with the respondent. JH said that he did not always see eye to eye with the claimant and how he conducted himself in work. He said he did not agree with how forthcoming the claimant was with females, and he referred to when the claimant had commented he would give a female client a massage who was coming to visit.

41. The claimant's response to that was that he does use pet names or terms of endearment in everyday life and it was not intended to cause offence, discomfort or provocation. He said he was a warm-hearted friendly person who had overcome many hurdles including divorce, family bereavement, premature birth of both children redundancy, bullying and severe depression. If RT had said she felt uncomfortable he would have apologised immediately and refrained from future use. He said, "Jack could have raised it, but he did not do so". The fact that JH had not seen eye to eye with him was not unusual given that he was the manager. He also added that JH

had made discriminatory remarks about an employee in respect of his age, and that there were problems with JH's timesheets which JH took offence at.

42. In relation to the massage, the claimant was asked for a massage by a member of the family who came in to discuss a funeral plan. The individual asked for him to be friends on social media and then when offering a drink and a biscuit he offered them as a massage as a joke, and which the family member took as a joke. No-one commented that they felt this was inappropriate. JH had also complained about the amount of money it had cost the business for the claimant and his wife to attend the National Funeral Awards, but this had all been authorised.

43. There was a further interview with AH, an employee and family member. He said he found the claimant to be supportive of employees and felt that sometimes he was too fair on employees. He said that the claimant had said on one occasion regarding a particular candidate for a job that he wanted to meet them as they are "hot", and it had also been brought to his attention in relation to the claimant's football playing that he had been sent off four times that season and someone had felt it relevant to bring this to AH's attention. Someone had stated they did not want to work directly with the claimant, but he provided no further details.

44. In respect of the CCTV in the morgue, he confirmed that there was no sound.

45. In respect of the "as they were hot" comment, the claimant responded that there was a former soap actress who applied for a vacancy, and several members of staff including himself commented that she was attractive, but she was not shortlisted.

46. Regarding the football, that had no bearing on the allegations, and he had never been banned from the club.

47. Regarding the business partner who did not want to deal with him, the claimant had never been made aware of this, and he was responsible for forging a consideration number of business relationships. The claimant had been given a lot of responsibility by the respondent and he respected them for that.

48. Lauren Hutchence then interviewed LHO, an employee. LHO said the claimant was a "lad's lad", he liked to have banter but he did not always feel he was professional, and that he could be inappropriate and crossed the line on several occasion. In relation to an ex female colleague LHO stated that they were standing at the back of the vehicle when the claimant made an inappropriate sexual comment to this colleague. When LHO was asked if he could recall the colleague he said he was unable to remember exactly what was said but the colleague looked visibly uncomfortable. LHO clarified this and he stated that they were at the back of the vehicle with the ex colleague when the claimant made numerous inappropriate sexual comments, some were random and some were targeted directly at the colleague and specifically about her body. "I cannot remember exactly what was said or the words but the colleague was visibly uncomfortable to the point where I hurried her along on the funeral and parted company with the claimant". LHO was disgusted by the nature of the comments made but did not confront the claimant as he was more senior. LHO hoped that the claimant would realise his comments were inappropriate and he did not want any repercussions for his colleague.

49. The claimant in responding stated that he denied there were any sexual references to the colleague, and that this had no relevance. There was banter and innuendo. He had witnessed countless occasions when inappropriate material had circulated on WhatsApp groups and discussions where sexual references have taken place within the group of drivers and female employees. The claimant mentioned that he had had to decline annual leave to LHO on a number of occasions, which LHO did not like.

50. The claimant emailed Ms Hutchence on 27 December to say that he had not been offered any support, that he was shocked to suddenly receive five witness statements, and that she had not communicated that this was being undertaken. Also, the interviews were highly subjective and in no way related to the allegations, and in fact not even work-related and in some cases completely fabricated. He felt that they were a vicious attempt to deliberately discredit his good character and reputation with the hope of forcing his exit from the business.

51. Ms Hutchence explained that the inclusion of additional staff was to gather additional information, views and opinions. This was simply an attempt to establish a clearer picture in the absence of specific witnesses to the alleged incidents or comments, and the grievance outcome would have to be decided on the balance of probabilities. She said everything would be forwarded to Andrew Hollowell for his consideration.

52. On 8 January the claimant was advised that JBR (a female ex employee) had made a further allegation and he was sent a copy of this in order that he could make any comments, but it was noted that “once your response is received you will be invited to attend a disciplinary meeting”. The meeting would be heard by Amanda Gwilliam, an independent HR advisor known to the respondent, in the week of 13 January, and the claimant was advised he could be accompanied by a work colleague or a trade union representative.

53. JBR’s letter was not dated and in summary said the following : she said that when the claimant had moved into a management role his attitude changed and he made comments, crude and sexual, making people feel uncomfortable. She could not recall specifics because it became so normal, she just let it go over her head. At one point she stated, “Michael noticed I had a white mark on my frock coat. He proceeded to make a joke about it being semen (using different words) and told me, ‘I normally just wipe mine on the curtains when I’m done as it’s so big’”. There was another occasion when he came up behind her and started to massage her shoulders (he had heard she was stressed about a funeral she was arranging). This was unprofessional, uncalled for and made her feel uncomfortable. Within the same week he had made a comment to a colleague in front of her saying, “don’t tell J, she’ll just cry”, as she had been known to get emotional in stressful situations. JBR said it made her feel pathetic and stupid for getting upset.

54. JBR then mentioned a pink link business networking group and she felt that she was there to deliver a speech and that the claimant came to offer support and help out. It was a mainly women event. He had made several comments to some of the ladies, flirting with them while standing next to a display, and that he took over and made a speech and started announcing the winners even though it was not his role. He just barged his way into somebody else’s spotlight: a favourite of his.

55. JBR mentioned other incidents but none that were relevant to the issues in this case. She said they could contact her if they wanted to discuss it further. She also then provided some references.

56. The claimant commented on JBR's letter as follows. He said it was based on her opinion as an individual and completely subjective and did not refer to any of the origin allegations, and it was just a continuing attempt to discredit him with fabrication, lies and further allegations. Regarding crude comments, the claimant said there was banter and he had said this before; that his nickname was "jammy" and he accepted that. He said there was crude material circulated on WhatsApp. He had no recollection of specific white mark on the coat conversation or of boasting as suggested, and he denied that this had ever happened. He also mentioned that JBR and RA had a discussion about space docking, which is a sexual term, and he said that this demonstrated that they showed no sign of being offended in any way.

57. Regarding the shoulder rub, the claimant stated that he offers it to anyone, and he would not do so without the person's consent. He said the "pink link" situation was incorrect, and he was obtaining evidence from a manager there to state that they did ask him to make this presentation. He also stated that JBR had been unhappy with she left because the commission she felt she earned was not paid and that there had been many complaints about her in the workplace.

58. On 14 January the claimant was invited to a disciplinary hearing to take place on 17 January, and the allegations were that he had sexually harassed RA and JBR over a period of several months in 2019 in that:

(1) He had called RA "Rachie boobies";

(2) That he had said to RA, "what, am I looking up your skirt?" and "you have something running down your leg";

(3) He had said to JBR he had joked about a white mark on her coat being semen and he went on to say, "I normally just wipe mine on the curtain when I'm done as it's so big";

(4) That he approached JBR from behind and massaged her shoulders.

59. The letter stated that sexual harassment was an example of gross misconduct and that he could be dismissed without notice or pay in lieu of notice in these circumstances.

60. RA was then re-interviewed on 15 January 2020 about the space docking comment. She said she did not know what it was. She was then told what it was, but she said she had never entered into any such discussion with JBR or anyone else about such a topic – she really did not know what the term meant. Regarding discussions of a sexual nature, she said that occasionally she would have intimate discussions with JBR about relationships but they would ensure the door was closed. They were very low key and she would never, and never did, discuss anything of a sexual nature or intimate nature with the claimant or with JBR in the claimant's presence.

61. The disciplinary hearing duly took place on 17 January 2020 with Amanda Gwilliam. The claimant complained about the investigation. He said there were

inconsistencies in JBR's facts which called her credibility into doubt, and he believed that JBR and RA had colluded and that JBR had made the statement to add weight to the allegations.

62. In relation to "Rachie boobies", the claimant said this took place approximately 12 months ago and he meant to say "Rachie bobs" or "Rachie babes" but he actually said "Rachie boobies". He apologised straightaway and the pair of them had laughed the incident off. It was a Freudian slip, a mistake. He said he always uses pet names for people in the workplace, outside of the workplace, everywhere.

63. Miss Gwilliam said that RA had said that it was inappropriate, and the claimant said that was completely untrue. The claimant agreed he used names like "sweet", "love", "chick", "honey" and "babes" – he was a warm and friendly person. The claimant said that he gave men pet names such as "mate" or "pal".

64. The claimant was asked what he would call Belinda, and he said "Belinda"; and what about Elaine, and he said "Elaine"; what about Mrs Hollowell, and he said "Mrs Hollowell" or Janet. Ms Gwilliam said, "so you don't give everybody a let name?". The claimant said he respects his elders and would not give Janet a pet name.

65. In respect of the moses basket incident, the claimant knelt to look underneath as RA had held the basket up. He demonstrated. He said physically he could not have looked up her skirt from where he was positioned, and what she said he had said was false. He did say something along the lines of "I'm not looking up your skirt". He admitted it was in poor taste but the situation was so distressing he just wanted to lighten the mood. He had followed it up with a similar comment about something on her leg. He said it was not as RA had said in her statement but more like "I've seen something on your leg", it was just a jokey comment. The claimant was asked if he thought RA was lying. He said he could not possibly say that but she must have misheard him. He said she could not prove that he had looked up her skirt. It concerned the claimant that things had changed slightly when RA submitted another statement on reflection. He had suspected RA had thought she could embellish her statement, add weight to the allegations after speaking to RT about it. Miss Gwilliam said, "why would RT collude with RA who she hardly knew?". The claimant did not know, he was just trying to be friendly to her. Miss Gwilliam said clearly her perception was different. The claimant believed that they must have colluded in submitted the statements. Miss Gwilliam said, "why would they do that, she had no experience or knowledge of RA?". The claimant said he could only assume they had been talking.

66. The claimant denied he had ever made the comment about the stain with JBR. Miss Gwilliam said, "why would JBR say this conversation had taken place, and why refer to the space docking?".

67. On the handwritten comments, the claimant also referred to JBR's description of the pink link and said this demonstrated that she had lied about one of her allegations, but this was dismissed as not relevant to the specific allegations.

68. Regarding the space docking, it had to be explained and he was genuinely floored by the conversation. The space docking was conducted in RT and JBR's office back at Devonshire Road, and he was party to the conversation. Miss

Gwilliam said she would ask them about it. She had already spoken to RA and she had said she did not know what it was. Miss Gwilliam had explained to her what it was, and she categorically said she had never discussed this with the claimant or JBR or anyone else.

69. The claimant said that RA and JBR's office was like a meeting place and "the girls" frequently spoke about topics of a sexual nature. Things got so bad it was decided that JBR was to be moved to another office to split them up and to try and stop the chitchat. There was a repeated use of WhatsApp to send images and content containing sexual material. This was disturbing to him as he had young children who have access to his phone. He removed the WhatsApp content so his children could not see it. He could not give any examples but he knew it was inappropriate. Miss Gwilliam asked the claimant that as manager had he not asked them to stop? The claimant said he had not. The claimant said that RA had referred to the boyfriend she had at the time a number of times and on occasions the conversations were of a sexual nature and that other members of staff joined in.

70. Miss Gwilliam said the claimant had admitted part of the allegation from RA when he said it was all part of trying to make light of things in the workplace. It was just meant to be humorous. He had offered context also to the massage situation. He felt like this was premeditated hostility. No other female members of staff had been asked for their opinions. The claimant asked Miss Gwilliam to approach other members of staff, particularly the one that had been in a relationship with JBR.

71. Miss Gwilliam asked the claimant why only some females would get pet names. The claimant replied it was because of the relationship he had formed with these individuals. The nature of the job had an emotional effect on some employees, and he felt that a closer working relationship with these was appropriate. He was offering warmth because that is the sort of person he was. JBR had come to him when her relationship with AB had finished. Why would she do this if she felt sexually harassed by him? The breakup had happened in May or June. The massage incident had happened over 12 months ago.

72. The claimant said it needed to be demonstrated this was not a witch-hunt: staff had negative opinions about him as he has a history with them, and they were bringing any relevant matters in order to discredit him, such as the football issues.

73. In relation to JH stating that the claimant had called RT "sweetie", he said this was proof he uses pet names and that it was not an issue. LHO had not been specific about what comments he said crossed the line.

74. In relation to the "hot" comment, the claimant said that he and a few colleagues looked up the soap actress on Facebook and the claimant had said she was attractive, and the others agreed with him. He said they would support this. The soap actress was not shortlisted as she was not suitable. Miss Gwilliam said, "have you felt it necessary to comment on her physically?", and the claimant said, "yes" and that everyone had agreed with him. JBR and JH were present and agreed and commented on her being "hot".

75. The claimant felt JBR could be annoyed with him because of the commission issue and other matters. He believed she had written the statement to support RA's allegations.

76. Miss Gwilliam asked specific questions:

AG: Why would JBR wish to discredit him?

C: To support RA's version of events.

AG: Are you alleging JBR had made up the comment?

C: She has been in collusion with RA as they are very good friends.

AG: Have you heard JBR discuss sexual innuendo in the workplace previously?

C: I think so, there's always banter, pet names, sexual jokes, it was the culture.

77. Miss Gwilliam asked, "can you provide any examples regarding the WhatsApp group? The claimant said he could not, save for sometimes there were giant floating penises coming across the screen.

78. Miss Gwilliam then asked the claimant could he confirm he had never asked anybody to stop sending inappropriate messages. That he would get involved in the banter and that he called people pet names, such as "chick", etc., "and that you did share sexual type jokes as this was the culture, although you said you wouldn't boast yourself in a sexual way like JBR suggests".

79. Miss Gwilliam asked the claimant to walk through the space docking. The claimant said they were in the hearse when it initially raised, either RA or JBR, and then when they got back to the office he could hear RA and JBR discussing it. He was in the room but not necessarily included in the conversation. She also asked him to talk through the "Rachie Boobies" comment. The claimant said he just came into her office and instead of saying "Rachel babes" or "Rachel bobs" it came out wrong, it was a mistake, a Freudian slip, he apologised, and they laughed it off. Miss Gwilliam asked. "Why would Rachel think you had looked up her skirt after you'd made a jokey comment?". The claimant suggested she had spoken with her sister who is a solicitor and she said it to add weight to the allegation. Miss Gwilliam asked, "why do you think Rachel said you said something was 'running down' her leg?". The claimant said, "It's just part of the collusion".

80. Regarding the massage, the claimant said she did decline the massage but he has given other colleagues a massage when they felt stressed, and he said he had offered them to men as well as women. He believes he gave a massage to Robert Hollowell.

81. The claimant said that if they wanted to get more data about the WhatsApp group they could ask other members of staff, and he named four male members of staff.

82. Miss Gwilliam then referred to RT witness statement. The claimant had agreed the "naughty" comment, but had denied the "curvy" comment – he said, "I categorically didn't say that". Miss Gwilliam asked about the comment that he would get RT drunk, and the claimant said he did not say that either. Miss Gwilliam asked the claimant why did he believe they were acting in collusion. The claimant believed

they had been "discussing their complaints with one another and planned to put these complaints into management within a short space of time. I think this is about jealousy. No-one likes somebody coming in and making changes".

83. Miss Gwilliam asked, "why would RT collude with RA – she is a very recent member of staff?". The claimant suggested they had discussed the issue and RA had decided to put her grievance in one day, and RT agreed to put her complaint in the day after. Miss Gwilliam pointed out that it was the other way round (that RT had put her grievance in first, and that RA had done it second) and that they worked in different offices. The claimant said they had crossed paths, though. The claimant said in respect of the eye fluttering that it looked like a nervous twitch and he wanted to make sure there was nothing wrong with her. Miss Gwilliam said, "wouldn't that make it worse if it was?". The claimant said he felt he had the right to ask because he needed to be aware of these issues. He said it was not true that he referred to her being on a diet.

84. In respect of vital statistics, the claimant was asked if he would ask male members of staff about that, and he said no – he would just ask for their measurements. The claimant felt there was a difference between asking a male and a female.

85. Miss Gwilliam asked, in relation to saying, "you picked the fit ones", what did you say? The claimant said, "I just said she was attractive [the soap star applicant] when we googled her". The claimant denied that he was a sexual predator, which is what seemed to be insinuated.

86. The claimant signed the minutes and then Miss Gwilliam did interview a number of other members of staff identified by the claimant regarding the WhatsApp group.

87. AH said that he had only ever seen one comment that could be interpreted as being of a sexual nature. It was sent in error and he had sent a disapproving comment. AB gave a further statement that he was surprised to be disciplined by the claimant for not dealing with a phone call. There was no meeting but he received a written warning. He said he had witnessed the claimant ranting and raving over someone who had said the claimant was not able to give them instructions, and he said, "if he's got a fucking problem, I deal with it". He also heard off JBR about comments the claimant had made to her, such as when they had undertaken work outside of the office, when asked if they were a couple the claimant allegedly said, "I've not seen her naked yet." She asked him whether he recalled the conversation about whether the candidate was "hot", and that the claimant had something like "she'd get the job if it was on looks alone". He had not disagreed but went along with the conversation. He was surprised the claimant was discussing the applicant's details at all with him there, as he was not part of the application process.

88. JB was interviewed and said he could not add any further to the conversation about the "hot" candidate, only that the claimant had told him that only applicants that were fit would be picked.

89. HL was interviewed. She felt that the claimant was extremely confident, bordering on arrogance, and her view was this was not the type of approach to working in a funeral home, but she had no further comment. She said the claimant

did not give her a pet name and she thought that as she was a lady of a certain she would not expect the claimant to give her a pet name such as “babe”, “chick” or “honey”.

90. EA was interviewed. She said she got on well with the claimant and he had not given her a pet name. She said he would not do so on the basis she was older and respectful.

91. R Hollowell confirmed that he had not received a massage from the claimant as suggested.

92. Miss Gwilliam then spoke to JBR but only to discuss the space docking incident. She said another member of staff had raised the topic of a sexual act that she could not recall the name of, which she had described to her and the claimant. They had laughed it off and it was not referred to again. She said that she and RA would discuss matters of a personal nature between them. They were good friends, and it was always with the door shut. She said that she was moved from RA’s office and the claimant instigated removing the door from the office to stop them talking to one another. She would not discuss intimate things with the claimant. She said there was some slightly sexual banter between peers but not with management. She said about the WhatsApp group, as far as she was aware, she never saw any pictures or images which might have been because her phone was not advanced enough. She was not asked for anymore detail regarding the ‘curtain’ comment.

93. The claimant provided a statement from a previous colleague who said that the claimant had given him a neck massage.

94. Miss Gwilliam provided the claimant with the statements she had gathered following his disciplinary interview. The claimant then provided further comments in writing, however initially he felt he had not been given sufficient time to comment on this. He felt most of the information was irrelevant. In respect of the “hot” comment, JBR had confirmed his version. In relation to the “hot” comment, it was not clear what JBR was saying and he denied he had said, “I’ve only picked the fit ones”. The soap star was an unusual thing hence there was some comment, although she was never shortlisted. Five of the shortlisted candidates were male, and a male was successful.

95. In respect of space docking, the claimant said that RA’s denials were a lie particularly as JBR’s statement referred to an incident about two years ago where James raised the topic of a sexual act. This demonstrated that such conversations do take place.

96. In respect of JBR’s re-interview, the claimant said that she should have been taken through her statement line by line and not just asked about one thing. He stated the door was removed by Robert Hollowell following RA slamming it in his face and to prevent Rachel and Jennifer’s room being used as a communal meeting room. It was to split them up. Robert Hollowell also planned to raise a formal grievance on the matter. JBR’s statement confirmed that banter took place in the office. The rest of JBR’s statement proved that she was jealous when he moved swiftly into a management position. He also had provided evidence he had been asked to undertake the presentation at the Pink Link event by the organisers.

97. AB was interviewed. He was not asked to provide examples. His view might be calling somebody "mate" is unprofessional. It does not mean his view is correct. Some of the comments were not relevant and regarding the comment reported by JBR, this was hearsay and JBR had not been questioned about it.

98. The claimant said he was 80% certain that he administered a shoulder neck run to RH, and as they have now fallen out there was a suggestion he had conveniently forgotten it ever took place. He provided evidence from a former male employee who he had previously managed who did confirmed that he did give him a neck rub.

99. On 29 January 2020 Amanda Gwilliam provided a letter confirming that the claimant was dismissed. She stated that he had said:

(1) Banter was customer and practice – jokes help lighten the mood;

(2) That he often called females "babes, "hun" and "chick" and males "pal" and "mate";

(3) He admitted he had called Rachel "Rachie boobies" but it was a Freudian slip and he apologised immediate;

(4) He admitted making comments to RA, saying that "you weren't looking up her skirt as you bent down beneath her". You admitted to have made a comment about something on her leg. You were trying to lighten the mood but you now believe the comments were not appropriate.

(5) You denied making a reference to JBR about a white mark on her garment;

(6) You admit giving JBR a massage but that it was with her consent;

(7) You said you had provided Robert Hollowell with a massage;

(8) You denied sexually harassing either female;

(9) You said that RA and JBR often had discussions of a sexual nature in the workplace and you referred to a discussion regarding space docking;

(10) You referred to the WhatsApp group where you said there were often messages of a sexual nature, but you could not describe them, apart from one message including flying penises.

100. Miss Gwilliam said she spoke to a number of witnesses at his request, "EA and HL both advised that you never used pet names with them but always referred to them by their name". They both said this was due to them being middle-aged and confirming you had never acted inappropriately towards them. A number of witnesses did confirm that jokes and banter occurred in the workplace but not of a sexual nature. JBR referred to something two years ago which was not discussed further. JBR and RA denied discussing topics of a sexual nature with the claimant, and categorically denied discussing space docking. They did not know what the term meant. A number of witnesses were able to confirm that the claimant made comments about a female application being "hot". Miss Gwilliam would add that

these were people who were reportees and not involved in the recruitment process to whom the comments were made. Robert Hollowell categorically denied he had received a massage. AH (who was a member of the WhatsApp group) said there was only ever one comment of a sexual nature, and he had raised this as being inappropriate.

101. Miss Gwilliam commented, "You have admitted to making inappropriate comments to Rachel". She quoted the sexual harassment definition and said, "Based on my findings I have decided to uphold this allegation". Miss Gwilliam put the outcome as, "You were made aware sexual harassment is an example of gross misconduct under the company disciplinary policy", and accordingly she found his conduct amounted to gross misconduct. Her decision was to dismiss the claimant with immediate effect, making his last day of employment 27 January 2020.

102. She commented further that:

"(1) Whilst the incident between you and Rachel was one word against another, in my view it is more likely Rachel's version of events is accurate. I have formed this view because you have admitted that jokey comments were made about looking up her skirt at something on her leg. She claims this matter distressed her sufficiently to put her complaint into writing. I believe as her line manager, and considering the situation where she was holding a deceased baby in a basket in her hands, and having concerns that the body may have leaked, that such comments were wholly and totally inappropriate. I am also satisfied these comments were of a sexual nature and unwanted.

(2) Considering the comments JBR alleges you made it was one word against the other, there were no witnesses. I took the view it was more likely that you did make comments about a mark on JBR's clothes and I formed this on the basis that:

(i) You admitted to making inappropriate comments to Rachel which I think were of a sexual nature;

(ii) You told me you refer to some of your female reportees as "babe";

(iii) You admitted referring to Rachel as "Rachie boobies" which in your words was a Freudian slip.

For these reasons I believe it is more likely you make made these comments to JBR.

(3) I am satisfied that Rachel was justified in feeling harassed. As a sideline, these comments were made at a very difficult time. This was not a one-off where you admitted to referring to her as "Rachie boobies". This behaviour was unwanted and of a sexual nature.

(4) She said she was satisfied the comments made to JBR were also unwanted and of a sexual nature.

(5) You have admitted to massaging JBR in the office. She claims it was without consent. You were her line manager at the time and you felt you

were giving warmth and helping people. In my view your actions are not appropriate in the workplace and towards your reportees.

(6) Whilst I have found there were some instances of inappropriate comments, the comments had not been directed towards anyone nor did my finding suggest there was a custom and practice of sexual banter, as you suggested.

(7) You asked me to consider the statements you provided from previous colleagues etc., along with the anxiety this matter has put you through. I have reviewed these documents and accept their content. I considered a lesser sanction than dismissal but felt your actions and behaviours, sexually harassing two female reportees, was too serious."

103. The claimant in evidence to the Tribunal said he did not know what a Freudian slip meant. For the avoidance of doubt, it is when someone says something which reveals their innermost thoughts, it is not the same as a slip of the tongue. Even if we accept this is true it would be unreasonable to expect the respondent to guess he was using the terminology wrongly especially when he used it three times: when on other occasions he had referred to dictionary definitions and in other respects the claimant was fairly sophisticated.

104. In evidence to the Tribunal Ms Gwilliam said she would have dismissed the claimant for the moses basket incident alone. We accepted her evidence on this she was a credible witness and it was inherently plausible particularly given she was from an HR background.

105. Miss Gwilliam advised the claimant he had five days to appeal, which he did. The respondent asked Timothy Leeson to hear the appeal. He had previously been a police officer and now ran his own company doing private investigations, however he was married to HL.

106. The claimant had obtained legal advice by this stage and his legal adviser wrote to the respondent objecting to Mr Leeson, as his wife HL was employed by the respondent and had made pejorative comments about the claimant in her witness statement. The respondent, however, continued to hold out Mr Leeson to hear the appeal, and he did hear the appeal.

107. The claimant set out his appeal points in an email of 10 February 2020. First of all, he reiterated his objections to Mr Leeson because of his wife's witness statement, and secondly because he was a business partner with the respondent family and they jointly owned a property together.

108. He posited that as he had been dismissed for four allegations, if one of the complaints failed then surely the whole gross misconduct would fail. His specific appeal points were as follows:

(1) There was no evidence to confirm whether any of the incidents took place: it was simply my word against the complainants. It was wrong to ask for staff members about their views about him. He believed it was carried out with a view to finding him guilty, not to decide whether the

allegations were true or not. They were not asked their opinions about RA, RT or JBR;

(2) That witnesses made vague and unsubstantiated allegations which were taken into account without further questioning, such as the claimant's football activities;

(3) That the respondent did not speak to JBR before adding these complaints to the disciplinary matters against him;

(4) There was no explanation why only two allegations were chosen;

(5) JBR was not asked why she had raised these allegations at this time, and he believed that she had colluded with RA;

(6) During the investigation he was only asked about RA and RT's allegations, and RT's allegations were dropped or disregarded, and he could not understand this;

(7) Amanda Gwilliam was to speak to existing witnesses and new witnesses, but a meeting was not held to discuss the new evidence obtained through this;

(8) Amanda Gwilliam failed to consider the evidence he had produced which was positive. He said that she said although she accepted the content of the documents they did not mitigate his actions, so she only considered the mitigation after she had made her decision;

(9) Re the specific allegations:

(i) "Rachie boobies" – this was not raised in Rachel's original grievances: she raised it in her interview. It was 12 months previously. He accepted it was a mistake and that Rachel had accepted his apology and they had laughed about it at the time. She was not asked about whether or not she had laughed about it at the time. In addition, it was not said why RA's version of events was preferred over the claimant's Miss Gwilliam found it was sexual harassment even though the claimant said it was an accident. He did not believe it fell under the definition of harassment.

(ii) "What am I looking up your skirt, you have something running down your leg?". His version of events was not accepted. He had agreed it was ill-judged but that it was not sexual. Rachel was not asked to comment on the claimant's version of events, as to whether she could have misheard him or misunderstood – she was simply believed. Neither was she asked about whether she was motivated by matters she was unhappy with in the claimant's management of her.

(iii) JBR white mark on coat – This was completely fabricated, he said, and although he had proved one of her allegations was untrue re the pink link event, she was still believed.

(iv) The massage – he said JBR was not asked why she waited until she left the business to raise this and why she raised it so late when it occurred 12 months before then. It was suspicious as it was the same time as RA and RT raised complaints. He said it was with her consent, and this is supported by the fact that RA confirmed that he had asked her and she had declined, so this showed that he did ask for consent. Also, that he did give it to male and females, so it was not sexual in nature.

(10) There was evidence of sexual banter but this has not been given the weight it should have been.

109. The claimant summarised:

> "The investigation and disciplinary process was flawed and undertaken with the premeditated view of finding me guilty. They were not interested in finding out the truth but to find evidence that I committed the alleged acts."

110. The claimant also believed that because the allegations were of sexual harassment, because of the current climate the company wanted to distance themselves and avoid any claims against them. The decision to dismiss him was decided from day one, and this was evidenced by Andrew Hollowell giving a negative opinion of him when giving a statement early on in the investigation. He also said he believed he had been discriminated against because he is male and the complainants were female and they have automatically been believed. He also said the respondent had not looked into whether people had made these allegations because they held a grudge against him for the way he had managed them in the past.

111. An appeal hearing was then arranged for 20 February 2020.

112. Mr Leeson went through the points the claimant had made in his letter. He had a pre-drafted list of questions and points to put to the claimant. The claimant believed that there was a lot of jealousy against him and that was partly the motivation behind the allegations. A lot of the statements were completely subjective with no evidence and were not relevant to the actual allegations. The claimant agreed that with Luke Hollowell's description that he was a "lad's lad and he likes banter" and that the additional witness statements taken by Miss Gwilliam were just character assassination. He described himself as "lad's lad, likes banter" forth coming with people would be an accurate description. He likes to go out drinking and partying with the lads: that is what he means by "lad's lad". As the majority of the workforce was male, this was how he built up a relationship:

> "I had banter with the younger females as well but have respect for some mature females. It is about gauging who will reciprocate that banter."

113. The claimant agreed that if there were no females at an event his banter would be different. He was asked if it was appropriate in the workplace when banter bordered on sexual contact, but he said that females took part in that as well. The claimant was asked whether he was a role model. He agreed but said that he operated in a relaxed manner and he was somebody to sound off to – he was always professional.

114. They talked about JBR's letter, that it was undated, that she was not an employee at the time she produced it, that she was not interviewed before the disciplinary and that he had evidence which undermined her allegations. Mr Leeson said JBR had been interviewed. The claimant said that the content of JBR's letter had been fabricated and that he believed RA and JBR had colluded. He had no evidence of that, however, just the timing.

115. The claimant believed that management must not have believed RT's allegations as they were not put to him so that Rebecca and Rachel colluded to add more weight. Mr Leeson said, when the claimant complained that a further hearing was not held after Amanda Gwilliam had taken statements and got his comments, that it was not necessary to have a further hearing.

116. The claimant said he had provided evidence to show the allegations were untrue and he believed it was a premeditated decision. He referred to "Rachie boobies" being a Freudian slip – it had happened 12 months and had never happened since. He did not feel it was harassment, it was just a mistake. The claimant was asked why he did not just simply call RA by her name. He said because of the relationship they had, "she calls me Jamie and I accept that. I use pet names for everyone in life", but he agreed not for everyone at Hollowell. The claimant said they were not just for females and there were some for men – "Jackie lad", "dodger" (for Roger",) "cats" (for Steve Catlow). The claimant was asked, "Why are the older female members of staff not afforded pet names?" He replied, "I have respect for the older members of staff. I refer to them by their first name". Mr Leeson asked, "Why do you feel the need to ascribe pet names to anyone?", and the claimant replied, "that's just me". Mr Leeson asked, "Do you not think that could be degrading, humiliating and offensive?". The claimant said he could see how it could be construed in that way, but that was the camaraderie – it was less formal, it got the best out of people.

117. At Tribunal it was pointed out that the Mr Leeson had assumed the claimant used pet names or nicknames for everyone apart from older women whereas a proper reading of the appeal minutes showed that he said he did not give names to any of his elders male or female.

118. Regarding the skirt comment, the claimant said that it had been fabricated, it was a joke that went wrong, it was in poor taste, but that Rachel's version made it sound worse. Mr Leeson quizzed the claimant about the incident when he was on the floor and RA was holding the moses basket. He asked the claimant, "why did you feel the need to say anything about looking up her skirt?". The claimant said it was in poor taste but it was just because he was bending down. He agreed he had said something similar to "you have something running down your leg" and that it was a poor joke. The claimant agreed the comment was unwanted and uninvited, but Mr Leeson asked, "but you don't agree it was sexual harassment?". The claimant said it could be taken that way but was absolutely not meant in that way. The claimant agreed he could see how it could be construed that way.

119. The claimant denied the JBR allegations and believed she was lying. He agreed he had made comments and innuendos of a sexual nature to colleagues because those conversations were taking place and it was common to have banter. The claimant said, "No-one was asked if they had made comments like this to me".

120. Mr Leeson asked the claimant was his opinion that neck rubs should not be construed as being sexual in nature as they were administered to both male and female, and the claimant said, "that is correct". Mr Leeson then said, "do you feel in hindsight that this is appropriate conduct to be taking place in the workplace, especially in light of the 'Me Too' movement?". The claimant acknowledged that but said he did not want to change the way he operated, he always asked for permission. It was supportive. In fact the claimant referred to a legal case which he believed established that massages were not sexual harassment.

121. They moved on to the point about banter, and the claimant agreed he had not challenged the banter as he said there was no need to. Regarding the WhatsApp messages, the claimant had deleted them all, and Mr Leeson referred to a document the claimant had drafted himself regarding harassment including sexual harassment, saying it was his responsibility as HR manager to challenge inappropriate or unacceptable behaviour, if he deemed it was inappropriate. The claimant added there was no intention to sexually harass anyone. He thought there was collusion, he thought jealousy had played its part and that somebody had been offended by how he had worked.

122. Mr Leeson upheld the decision to dismiss the claimant. He acknowledged he went through each appeal point and his findings were:

(1) The investigation was based on the civil burden of proof i.e. the balance of probabilities, therefore asking other staff members in general, and a listening opinion was appropriate;

(2) He felt the investigation had been conducted in an open and transparent way with no predetermination, and additional witnesses had been interviewed where identified;

(3) The claimant had been kept informed at each stage;

(4) Given that the claimant had admitted some of the allegations, it was not necessary to seek further views;

(5) Considering RT's grievance letter, none was serious enough to consider as potential gross misconduct;

(6) In respect of JBR's comments, it was relevant that the material should be considered, and a statement was subsequently obtained from JBR;

(7) There was no evidence of collusion, and Mr Leeson said the claimant agreed there was no evidence to support such an assertion;

(8) The claimant was interviewed initially in respect of RT and RA, then JBR. It appeared that the most serious allegations were pursued. The allegations by RT were supportive of the allegations by RA and JBR;

(9) Mr Leeson stated that Amanda Gwilliam had re-interviewed existing witnesses and interviewed new witnesses and that all the statements were sent to the claimant. The claimant was able to comment and there was no need to have a further hearing;

(10) Ms Gwilliam had considered the evidence the claimant had submitted;

(11) In respect of the actual allegations, the claimant had admitted calling RA "Rachie boobies" and thought this was excused as a Freudian slip. Mr Leeson said a Freudian slip was unacceptable thoughts or belief that are withheld from conscious awareness and the slips help reveal what is hidden in the unconscious i.e. what an individual is really thinking.

(12) The claimant admitted to using pet names, but Mr Leeson said, "but you don't ascribe pet names to older female members of staff. You agreed this could be construed as degrading, humiliating or offensive and that somebody come to you with a similar complaint you would have investigated it, so you were aware of the inappropriateness of this behaviour. You admitted the comments were a joke that went wrong, it was in poor taste. You agreed it was unwanted and uninvited but stated it was not sexual harassment, but that it could be construed as degrading, humiliating or offensive. Whilst you denied JBR's comment, on the balance of probabilities and taking into consideration admissions of similar behaviour, this comment is likely to have been made. The issue regarding the massage was whether consent was sought. Considering this conduct as a whole, your opinion of women and your lack of respect for younger women, on the balance of probabilities I believe the witness account over yours".

(13) Mr Leeson said the test for sexual harassment had been met. He felt that Ms Gwilliam did take into account that there was some evidence that conversations of a sexual nature took place.

(14) Regarding the WhatsApp messages, Ms Gwilliam had asked witnesses about this and Mr Leeson had no further evidence.

123. In conclusion Mr Leeson said that the claimant had made certain admissions about his conduct and about how his conduct could be construed, and those were sufficient to find that the allegations had taken place. The claimant should have understood from the policy he drafted himself that his actions amounted to sexual harassment.

124. Subsequently, the claimant brought this claim to the Employment Tribunal.

The Law

Sex Discrimination

125. The claimant brings a claim of direct sex discrimination,

126. Section 13 of the Equality Act 2010 sets out the definition of direct discrimination. This is where (1) A person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others.

127. Section 136 of the Equality Act 2010 sets out the burden of proof to be applied in discrimination cases. This says that if there are facts from which a court

could decide in the absence of any other explanation that a person (A) contravened the provision concerned the court must hold that the contravention occurred.

> "(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

128. The shifting burden of proof rule assists Employment Tribunals in establishing whether or not discrimination has taken place. In **Martin v Devonshires Solicitors [2011]** the EAT stressed that "While the burden of proof provisions in discrimination cases are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination – generally that is facts about the respondent's motivation … they have no bearing where the Tribunal is in a position to make positive findings on the evidence one way or another and still less where there is no real dispute about the respondent's motivation and what is in issue as its correct characterisation in law", and in **Laing v Manchester City Council** Justice Elias then President of the EAT said that if the Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination then that is the end of the matter. It is not improper for the Tribunal to say in effect there is an open question as to whether or not the burden has shifted but we are satisfied here that even if it has the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with sex. At the same time, he also said the Tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage. That would be to "let form rule over substance". So if the matter is not clear a claimant needs to establish a prima facie case of discrimination, which is shorthand for saying he or she must satisfy stage one of a two-stage shifting burden of proof then the burden shifts to the respondent to explain the conduct.

129. In **Laing** Elias suggested a claimant can establish a prima facie case by showing that he or she has been less favourably treated than an appropriate comparator. The comparator must of course be in the same or not materially different circumstances. A paradigm case is where a black employee as well qualified as a white employee is not promoted where they were the only two candidates for the job. However, the case obviously becomes complicated where there are a number of candidates and there are other unsuccessful white candidates who are equally well qualified. If there are no actual comparators of course hypothetical comparators can be used.

130. The question was asked in **Madarassy v Nomura International Plc [2007] CA,** is something more than less favourable treatment required? Lord Justice Peter Gibson stated in **Igen v Wong [2005]** that "The statutory language seems to us plain. It is for the complainant to prove the facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the Tribunal could conclude that the respondent could have committed such an act … The relevant act is that the alleged discriminator treats another person less favourably and does so on racial grounds. All those facts are facts which the complainant in our judgment needs to prove on the balance of probabilities. **Igen v Wong** also said it was not an error of law for a Tribunal to draw an inference of discrimination from unexplained unreasonable conduct at the first stage of the two-stage burden of proof test. It seems the difference between the

approach in **Madarassy** of Mummery in saying that a difference in treatment and a difference in status is not enough, and that of Elias in **Laing v Manchester Council**, which followed **Igen v Wong** stating that it was sufficient to establish genuine less favourable treatment if at the first stage the employer cannot rebut by evidence and it takes into account the fact that a claimant will not have overt evidence of discrimination but could have evidence of how they had been treated differently to other employees who do not share the relevant protected characteristic.

131. In the recent case of **Efobi v Royal Mail [2021] HL** it was confirmed that the burden of proof in a discrimination claim required a claimant to establish a prima facie case. As referred to above one way of doing tis is to show that a comparator was treated more favourably.

132. Another approach is to consider whether a Tribunal should draw inferences from the primary facts which would then shift the burden, and if a non-convincing explanation is provided then discrimination would follow.

133. Regarding inferences Employment Tribunals have a wide discretion to draw inferences of discrimination where appropriate but this must be based on clear findings of fact and can also be drawn from the totality of the evidence. In **Glasgow City Council v Zafar [1998]** unreasonable conduct by itself is not sufficient. However, where it is said that the unreasonable conduct is displayed ubiquitously an employee would need to provide proof of that, i.e. A was treated badly not because of his sex but because the employer treated all employees badly. There must be some evidence of this and it not just be an assertion, and likewise with unexplained unreasonable conduct.

134. Inference can be drawn from other matters such as breaches of policy and procedures, statistical evidence, breach of the EHRC Code of Practice, failure to provide information.

<u>Harassment</u>

135. We have included a section on harassment only because that is what the claimant was accused of so it is helpful o remind ourselves of the legal definition although respondents in drawing up policies or considering gross misconduct are not hidebound by the legal definition. Harassment is defined in section 26 of the Equality Act 2010, which states:

> "(1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) The conduct has the purpose or effect of –
>
> (ii) Violating B's dignity, or
>
> (iii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) …

(3) …

(4) In deciding whether conduct has the effect referred to in subsection 1(b) each of the following must be taken into account:

(a) The perception of B;

(b) The other circumstances of the case; and

(c) Whether it is reasonable for the conduct to have that effect."

Unfair Dismissal

136. Section 98 of the Employment Rights Act 1996 sets out the relevant law on unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within section 98(2). Conduct is a potentially fair reason for dismissal. In **Abernethy v Mott, Hay & Anderson [1974]** it was said that:

> "A reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee."

137. Once the employer has shown a potentially fair reason for dismissal a Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. Section 98(4) states that:

> "The determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer:
>
> (a) …depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee; and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

138. In relation to a conduct dismissal **British Home Stores Limited v Burchell [1980] EAT** sets out the test to be applied where the reason relied on is conduct. This is:

(1) did the employer Did the employer genuinely believe the employee was guilty of the alleged misconduct?

(2) were there reasonable grounds on which to base that belief?

(3) was a reasonable investigation carried out?

139. In relation to a professional job subject to a regulatory body where a finding may affect the individual's ability to continue in their chosen career the employer must be particularly careful in its investigation and in reaching its conclusions **A vs B EAT (2003**) and **Salford Royal NHS Foundation Trust v Roldan CA (2010).**

140. In respect of deciding whether it was reasonable to dismiss **Iceland Frozen Foods Limited v Jones [1982] EAT** states that the function of the Tribunal:

> "…is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted."

141. The Tribunal must not substitute its own view for the range of reasonable responses test.

142. In respect of procedure, the procedure must also be fair and the ACAS Code of Practice in relation to dismissals is the starting point as well as the respondent's own procedure. In **Sainsbury's PLC v Hitt [2003]** the court established that:

> "The band of reasonable responses test also applies equally to whether the employer's standard of investigation into the suspected misconduct was reasonable."

143. In addition, the decision as to whether the dismissal was fair or unfair must include the appeal (**Taylor v OCS Group Limited [2006]** Court of Appeal). Either the appeal can remedy earlier defects or conversely a poor appeal can render an otherwise fair dismissal unfair.

Polkey

144. The House of Lords in a decision of **Polkey v A E Dayton Services Limited [1988]** decided that where a case is procedurally unfair a decision would still be of unfair dismissal even if there was a strong argument the procedural irregularity made no difference to the outcome unless the procedural irregularity would have been utterly useless of futile. Rather the question of the irregularity making no difference would be addressed in terms of remedy. This principle has also been extended to cases where dismissal is substantively unfair, although it is most likely to apply to procedural irregularity cases. The outcome can be that it would have made no difference and the claimant, although unfair dismissed, would be entitled to no compensation or the rectification of the problem would have resulted in a delay in the claimant being dismissed and therefore the claimant receives compensation for that delayed period.

Contributory conduct

145. The Tribunal must always consider whether it would be just and equitable to reduce the amount of the compensatory award pursuant to section 123(6) of the Employment Rights Act 1996, where an employee by blameworthy or culpable actions, caused or contributed to his dismissal. If the claimant did so do the Tribunal will have to assess by what proportion it would be just and equitable to reduce any compensatory award, usually expressed in percentage terms. The three principles are:

(1) That the relevant action must be culpable or blameworthy;

(2) It must have actually caused or contributed to the dismissal; and

(3) It must be just and equitable to reduce the award by the proportionate specified.

Conclusions

Unfair Dismissal

Procedural Issues

146. We find that there were difficulties with the procedure:

(1) JBR was not spoken to as part of the investigation about her actual allegations.

(2) Individuals were spoken to for a general opinion on the claimant, which was not totally relevant -although some points were- and did serve to present a poor picture of the claimant in general

(3) The issue of collusion was not looked into during the investigation stage.

147. Regarding the disciplinary hearing, we find that there were two outstanding matters:

(1) JBR was not properly interviewed regarding her allegations. She was asked about matters which the claimant had raised, but her statement was not gone through in any detail in respect of the two sexual harassment allegations.

(2) The respondent should have looked into the collusion allegations more particularly in respect of RA and JBR. We can see that they had reasons for not doing so, however the minimum they should have done is put these allegations to the individuals involved before reaching a final conclusion.

The Appeal

148. We find it was wrong to use Mr Leeson in view of his links to the family and the evidence his wife had given criticising the claimant.

Substantive Issues

149. In relation to substantive issues, we find that the respondent had sufficient evidence to conclude that the claimant was guilty of the two allegations in respect of RA. They had undertaken sufficient investigation and that even on the claimant's own description of what was said there was plainly sexual innuendo of an offensive kind.

150. In respect of the allegations from JBR, we find that there was insufficient evidence to conclude these were correct without having taken JBR through her evidence and the matters that the claimant raised. We do not think the 'pink link'

issue showed JBR was a liar as the claimant maintained, she did not know about the behind the scenes request to the claimant by the organisers.] However it was a leap too far to accept her evidence without making some enquiries as to when it happened, where were they, why she did not mention it at the time.

151. Whilst the respondent had reasons for not doing this, we find it was breach of a fair procedure and therefore the matters they could rely on for dismissing the claimant were the two allegations in relation to RA.

Range of Reasonable Responses

152. We find that to dismiss for those two matters was within the range of reasonable responses. We do not find that the respondent consciously took the "Me Too" movement into account, or anything inappropriate. It is perfectly proper to be sensitive to these issues, and indeed in the employment sphere employers have been fully aware of sexual harassment and the nature of these complaints for over 30 years, and indeed there is a particular definition now in the Equality Act 2010 which assists employers in ascertaining whether something is sexual harassment or not. The incidents with RA were plainly sexual harassment.

153. Whilst it may be true that the claimant did not know what a Freudian slip meant, as he said in his evidence, it was completely reasonable of the respondent to believe that he did know what it meant when he referred to it at the disciplinary hearing and at the appeal. It is surprising he did not look up the definition of this as there were several occasions during this process where he did look up definitions of various phrases and repeated them back to the respondent with his own explanation of how the allegations did not fit into those definitions.

Summary

154. However, as we have found that the dismissal was procedurally unfair, we have gone on to consider the question of **Polkey**.

155. In our view, the matters we have raised as potentially breaches of procedure would not have made any difference whatsoever to the final outcome. Whilst they may have changed the view of JBR's allegations, we believe it is more likely than not they would have strengthened them, we have found that there was insufficient evidence to find the JBR allegations upheld at the time, even in the context of all the other matters the respondent considered.

156. However, the RA allegations were plainly correctly upheld, and whether or not there was collusion they were still correctly upheld. We find that it was entirely reasonable for the respondent to believe Ms Anderton's version of events, which was given very quickly after the event and with which she was not inconsistent in her accounts. Whilst she later elaborated and said she now thought he was looking up her skirt it is no surprise that she started to think this after reflecting on what happened. It was unnecessary to dwell on that and the respondent did not take that into account when making the decision to dismiss the claimant. Neither did it mean her original testimony was untrue.

157. If there was collusion it was simply about the timing of matters and the bringing up of old matters. Whilst collusion is a pejorative word, we find that had RA

said to JBR that she had complained about this incident it would be natural for JBR to then offer up her experience. JBR also offered up other matters about the claimant which were not related to sexual harassment which in our view strengthens the case that the complaints were genuine as she was not focusing on just the one issue. Further we accept that Ms Gwillian's observation was valid for the purposes of this exercise – that if she was going to make things up she would have said a lot more. This does not undermine the integrity of RA's complaints. Further, the respondent was right to take into consideration his use of pet names.

158. We also find that anyone undertaking the appeal would have upheld the RA complaints also and found that it was reasonable to dismiss for those two allegations alone. We find that incident was so serious, and it was admitted in the main part by the claimant. Even if he had not been the manager its likely he would have been dismissed. As the manager his comments were totally unacceptable.

159. Accordingly, although it was unfair dismissal, there is no remedy as the claimant would have been dismissed anyway.

Contributory Conduct

160. Contributory conduct was 100% in this case. We have considered it in case we are wrong on **Polkey**. It is rather an artificial exercise as we have found that the respondent came to a reasonable conclusion that the claimant had been responsible for the RA events as described, and that these were sexual harassment. If we are wrong on those, the second one certainly was sexual harassment, and it was a dismissible offence. Accordingly, there would be a 100% contribution.

Sex Discrimination

161. We have considered the matters from which the claimant states we should draw inferences. The claimant is correct in raising these:

(1) The inadequacies in the investigation process;

(2) The issue of collusion not being explored.

(3) That he had not said that he did not call older women pet names – his answer was that he did not call older people pet names

162. The claimant also alleged that the decision to find him guilty of these offences was predetermined and that the outcome was influenced by the "Me Too" movement, which meant that the individuals conducting the hearings automatically believed the women rather than himself. Rather the point was had the claimant not realised he should be more careful after the Metoo publicity.

163. In respect of the pet names issue the context of the question implied it was about females and he never volunteered that he behaved the same towards men. However, in our opinion it was inappropriate to directly compare his pet names for men with those for women in any event. Calling someone mate or lad is not a 'pet' name in our opinion it is a nickname - they are not demeaning (although to call someone boy could be but that was not the issue here) however chick, babes, bobs, honey, hun and sweetie are all demeaning and infantilising ways of referring to women and the respondent was right to consider these as relevant context ,making it

more likely the claimant made the comments as described by RA and not in the different (but only slightly less offensive way) the claimant argues he had said them.

164. We have decided not to draw an inference from these matters as it was overwhelmingly the case that the claimant had made the “Rachie boobies” comment and had made inappropriate and disgusting comments to RA in distressing circumstances. We have no doubt that had a female made similar (or more accurately equivalent) comments to a male of the same nature, or to a female within a sexual context as was the case here, that they also would have been dismissed.

165. In the light of this we cannot find that there is anything in the inferences which would displace such a conclusion, and accordingly we find that there was no less favourable treatment of the claimant because of sex.

166. In addition, the fact that the respondent believed JBR we find had nothing to do with the fact that he was a man and she was a woman, but to do with the picture they had built of his previous conduct in relation to RT, RA, calling individuals pet names, not calling older women pet names, etc., his tolerance and leading of banter even though he was the HR person in effect.

167. Accordingly, the claimant's claims of unfair dismissal and sex discrimination fail and are dismissed.

Employment Judge Feeney
Date: 25 August 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 3 SEPTEMBER 2021

FOR THE TRIBUNAL OFFICE