**Case No: 1601390 / 2018**

**EMPLOYMENT TRIBUNALS**

**Claimant:** **Mr M Hallett**

**Respondent:** **Cowbridge Compost Ltd**

**Heard at:** **Cardiff (and video)** **On:** **4-6 October 2021**

**Before:** **Employment Judge R Brace**
**Members: Ms M Humphries and Mr P Bradley**

**Representation**
Claimant: Mr M Barrow (Counsel)
Respondent: Mr I Wheaton (Counsel)

**JUDGMENT**

**It is the unanimous decision of the Tribunal that:**

The Claimant was unfairly dismissed.

The claim of breach of contract for wrongful dismissal is not well founded and is dismissed.

The claims of sexual orientation discrimination, brought under both s.13 EqA 2010 and s.26 EqA 2010, are not well founded and are dismissed.

The claims for failure to be provided with written reasons for dismissal is dismissed and for failure to allow the Claimant a right to be accompanied at a disciplinary or a grievance hearing are also dismissed.

**WRITTEN REASONS**

Preliminary Matters

1. At a private case management preliminary hearing listed prior to the commencement of the final merits hearing, both a restricted reporting order and an anonymity order was made in respect of the four named individuals and oral reasons were provided for both orders.

2. The Claimant also sought permission to add some 14 additional documents and permission was granted to the Claimant to add an additional 6

pages to the agreed bundle of 202 pages (the "Bundle"). These documents included some mitigation documents and a Word document, that had formed part of the evidence in the criminal proceedings against the Claimant and containing Whatsapp exchanges between the Claimant and John Homfray, the Respondent's owner and Managing Director, from 7 June 2018 to 2 July 2018.

The claim

3. The Claimant's claim ("ET1") was accepted by the Tribunal on 1 October 2018 [1]. The Claimant relied upon his employment as General Manager with the Respondent which commenced in January 1978 and terminated on 2 July 2018. The Claimant had commenced early conciliation on 12 July 2018 that had ended on 8 August 2018. The Details of Complaint were brief [16] and in the ET1 (Box 8.1) and Details of Complaint, the complaints brought were of:

    a) Unfair dismissal;
    b) Sexual orientation discrimination;
        i. Direct sexual orientation discrimination (s.13 Equality Act 2010);
        ii. Harassment related to sexual orientation (s.26 Equality Act 2010); and
    c) Notice pay.

4. The Claimant claimed compensation for financial loss and injury to feelings, for unfair dismissal, two weeks' wages for failure to allow the Claimant the statutory right of accompaniment at the disciplinary and/or grievance hearing (s.10 Employment Relations Act 1999, two weeks' wages for unreasonable failure by the Respondent to provide true or adequate reasons for his dismissal (s.92 Employment Rights Act 1996), 25% uplift for failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures as well as interest at the appropriate rate.

5. The Claimant made an application within the ET1 claim for an immediate stay as he was at the time subject to a criminal investigation, as a result of allegations of sexual assault made by the four individuals subject to the anonymity order made in this case. The Tribunal claim was stayed pending the outcome of criminal investigation which resulted in the Claimant being charged and tried at Crown Court in September 2019.

6. Following that criminal trial, the stay on these proceedings was lifted and at the case management preliminary hearing before Judge Frazer on 24 September 2019, it was confirmed that the Claimant had been acquitted of 9 out of the 10 charges brought against him at the September 2019 Crown Court trial, but that the Crown Prosecution Service indicated an intention to retry the Claimant on the charge that the jury had failed to reach a verdict on; that related to the allegation made by a Mr AB, an allegation that is in issue in these Tribunal proceedings as a result of the Claimant's breach of contract / notice pay claim. Judge Frazer also made various case management orders which included provision of Further and Better Particulars of Claim, provided by the Claimant on 10 October 2019 [26] and permission for an Amended Response, filed on 28 October 2019. Judge Frazer set out a draft list of issues which included a claim for breach of contract in relation to notice.

7. The Claimant's Crown Court criminal re-trial took place in February 2020 and the parties informed this Tribunal that the Claimant was acquitted of the remaining charge at that trial.

8. On 16 October 2020, a final case management preliminary hearing took place on 16 October 2020 when Judge Jenkins set out the issues to be determined at the final hearing and listed them in the case summary ("List of Issues"). The parties were informed that if either considered the summary was wrong or incomplete, the should write to the Tribunal and the other side. If not, the list would be treated as final.

9. That List of Issues was also discussed at the outset of these proceedings and it was agreed by both Counsel that these remained the relevant issues for this Tribunal to determine. These were adopted as the list of issues for determination by the Tribunal. It is noted however that a claim in relation to failure to be provided with written reasons for dismissal, and a claim under s.10 Employment Relations Act 1999, in relation for the denial of the right to be accompanied are also brought that are not expressly dealt with in the List of Issues. Counsel for the Respondent nevertheless dealt with both claims in his written submissions.

<u>The evidence</u>

10. The Tribunal heard evidence on behalf of the Respondent from:

    a) Mr EF, employee of the Respondent;

    b) John Homfray, owner and Managing Director; and

    c) Gary Googe, Plant Operator.

11. The Tribunal also heard evidence from the Claimant.

12. All witnesses relied upon witness statements which were taken as read, and they were then subject to cross-examination, the Tribunal's questions and re-examination. The Tribunal was referred selectively to a hearing bundle of relevant documentary evidence [1-208].

<u>Findings of Fact</u>

13. The Respondent is a family run limited company, based in the Vale of Glamorgan and involved in composting biodegradable waste and acting as a waste transfer station for recyclables. It is owned by John Homfray together with his wife and son. John Homfray is also the managing director, who himself had taken over the running of the business from his own father in 2002. At the date of termination of the Claimant's employment, the Respondent employed around 7-9 permanent employees and a variable number of casual and seasonal staff. It now currently employs around 3 employees.

14. The Claimant started his employment with the Respondent business in 1 January 1978, at 13 years of age. The Claimant had for a number of years held positions as both a director and a shareholder in the Respondent limited company but, for reasons that are not relevant to this claim, had stepped

down as director and had not had any shareholding for a number of years at the point of termination of employment.

15. On 2 July 2018, the Claimant was earning a gross annual salary of around £46,000 plus bonus. He was employed as General Manager, a position he had held since around 2002. In that role he was responsible for the day to day management of the site, which included running the office and recruiting and managing staff. He was a trusted member of staff who knew the business well. He had autonomy in running it. He was 'day to day in charge', as it was termed on cross-examination, terminology that the Claimant accepted was an accurate description.

16. The Claimant was 54 years' old on dismissal. He is a gay man and had been open about his sexuality for some 15 years prior to his dismissal. The relationship between John Homfray and the Claimant was longstanding, the Claimant having worked with John Homfray's father who had operated the Respondent's business prior to John Homfray. It was of a nature that John Homfray considered the Claimant to be a personal friend. John Homfray gave evidence that his personal knowledge of the Claimant's sexual orientation was also long-standing, the Claimant having confirmed his sexual orientation to him around 2005, but that he had always assumed that had been the case prior to that confirmation; that it was of no interest or concern to him. We accepted that evidence. Other employees who worked with the Claimant knew he was a gay man and, at the time of the Claimant's dismissal, those employees who gave evidence at this Tribunal had worked with the Claimant for around 7 years.

17. The Claimant claimed that he had consistently experienced homophobic abuse in the workplace and that he was often referred to as '*the gay*' or '*the bummer*'; that such abuse was not restricted to verbal comments and that it was commonplace for such remarks to be put in text messages also. He also claimed that he had raised this informally and formally, but that no action had ever been taken to address what he termed the 'homophobic atmosphere' and that he believed that John Homfray had actively encouraged it and had been party to some sexually charged texts.

18. We found that no homophobic abuse had been directed towards the Claimant in the workplace, the Claimant had not raised any concerns, whether formally or informally, and that no such conduct had ever been encouraged by John Homfray on the basis of the following:

    a) The allegations were emphatically denied by the three Respondent witnesses on cross examination. We accepted and preferred their evidence to that of the Claimant.

    b) Despite the Claimant confirming in live evidence that he was in possession of written evidence to support his claims that homophobic abuse had been included in text messages and emails, none was available in the Bundle. Had such evidence been available, it should have been disclosed by the Claimant and could have been relied upon by him to support his claims. It was not, despite an application already having been made on behalf of the Claimant at the outset of the hearing, to adduce late additional evidence of other text/Whatsapp exchanges between the Claimant and John Homfray.

We found it more likely than not that the Claimant had no such written evidence.

c) Despite the Claimant being aware of the Equal Opportunities and Diversity Policy [54] and Disciplinary and Grievance Policy [46 and 53], procedures that he had signed as General Manager and would have been responsible for, at no time had he made any formal grievance regarding such concerns.

d) Whilst it was accepted by John Homfray that here had not been diversity training offered to employees, we also found that it would have likely been the Claimant's responsibility as General Manager responsible for recruiting and managing staff, to ensure that such training was provided if necessary.

e) We did not accept the Claimant's evidence that he had raised an verbal complaint regarding the conduct of another employee Mr CD. Rather, we accepted the evidence of John Homfray, which was that it was behaviour that the Claimant had found amusing at the time and had not complained about.

19. Rather than there be a lack of supportive management which negatively affected the Claimant's position as manager, as the Claimant had asserted, we found that the relationship between the Claimant and John Homfray was likely to have been a very good working relationship, spanning over decades, with John Homfray placing a significant amount of trust and responsibility in the Claimant to manage the Respondent's business.

20. Whilst the Claimant had permission to include within the Bundle a text, dated 14 June 2018 [207], which read '*Don't say nasty things about me Mike to all the staff it'll come back to bit you, JH';* a text that had been disclosed by the Claimant late in these Tribunal proceedings, we accepted the evidence of John Homfray that this was an irrelevant exchange and did not demonstrate a breakdown in the relationship between the Claimant and John Homfray.

*2 July 2018 Incident*

21. On 2 July 2018, a new employee, Mr AB, at around 7.30am started his new job working at the Respondent's site. He was 18 years' old.

22. It appears uncontentious that Mr AB had attended the Respondent's site the week before asking for work, accompanied by his mother. Mr AB had visited the site on occasions prior to this date, accompanying his uncle who used the site facilities, but he was not more generally known to or familiar with the Claimant. Mr AB met the Claimant that day. The Claimant had taken his telephone number and had then gone on annual leave himself to Spain for a week.

23. Despite giving evidence by way of his witness statement that he had 'assumed' that when he saw Mr AB waiting at the office when he had arrived for work after his annual leave on 2 July 2018, that Mr AB had been informed in his absence that he could start work, the Claimant confirmed in cross-examination and in his evidence to the police on 2 July 2018 (when the Claimant was questioned on the events of earlier that day,) that he had

himself texted Mr AB on the Sunday 1 July 2018 and he had agreed the Claimant could start work on Monday 2 July 2018 [59].

24. The Claimant was cross-examined on whether he had engaged in a personal text or Whatsapp exchange with the Claimant in the period between attending the site with his mother and starting work on 2 July 2018. The Claimant denied that he had maintaining that he had not taken his mobile phone on holiday with him. No such texts were available to us and we make no findings as to whether there was such contact between the Claimant and Mr AB in this period other than, on the day before he started work there was a text exchange between the Claimant and Mr AB and the Claimant told Mr AB he should attend the site the following day.

25. The Claimant's evidence that he 'assumed' the Claimant had been informed he could start work was therefore not right - he himself had told Mr AB that work was available for him to start on 2 July 2018.

26. After a few hours of working with the Respondent's other employees, and following some form of canteen break, Mr AB was shown an induction health and safety video by the Claimant. This took place in the Claimant's office and whilst the Farm Secretary was in and out of the office during the working day, as were other workers at the Respondent's site, at that time the Claimant was alone with Mr AB.

27. What happened next in that room between the Claimant and Mr AB has been the subject of two criminal trials and deliberation in this hearing. It forms the subject matter of the alleged act of gross misconduct relied on by the Respondent. This Tribunal had made findings of fact based on balance of probabilities on the evidence before it; evidence in this case which did not include live evidence from Mr AB. The Claimant does not deal in his own witness statement for these Tribunal proceedings with what physical contact he did or did not have with Mr AB in that meeting, giving live evidence on cross examination on the issue and his Counsel confirming that he was not resiling from the statement that he gave the police when questioned by them later that day [57]. We set out our findings of fact later in these written reasons in relation to that, as it is necessary to do so due to the breach of contract claim brought by the Claimant.

28. At some point, Mr AB left the office with the Claimant who drove him down the site a short distance leaving him to continue working alongside Gary Googe, a plant operator. Mr AB asked Gary Googe what the Claimant was like and Gary Googe responded '*he's a bit of an odd character*'. Mr AB then told Gary Googe that the Claimant had just put his hands down his trousers and tried to kiss him on the neck. He asked Mr AB if he wanted to make a formal complaint. Whilst Mr AB did not initially appear distressed, Gary Googe realised that he was when he heard him telling another employee that he was leaving. He asked Mr AB how he was getting home and suggested that he ask his parents to collect him offering him mobile phone to call them, as Mr AB he did not have a phone. As Mr AB did not know his parents' phone number, Gary Googe offered to take him home. Gary Googe was challenged on cross-examination why he had not stated in his witness statement that Mr AB was distressed. He responded that he did not know how to draft a witness statement and did not know it needed to be included. We considered Gary Googe to have been a candid witness, who had no motive behind the

evidence he gave, and we accepted his live evidence as reliable despite that omission.

29. By this point, it appears that Mr EF, another employee, came on site and Gary Googe repeated Mr AB's allegation to him. Mr CD, another employee, was also in the vicinity and informed of the allegation. Mr AB repeated his allegation to him. By the time he had walked to his own van, Gary Googe was himself shaking and asked Mr EF to take Mr AB home instead. Mr EF took Mr AB to his friend's house in Pencoed a few miles away, and left him there. During that journey Mr AB repeated the allegation again to Mr EF.

30. During this time, attempts were made by Gary Googe to contact John Homfray by telephone to report the incident, but there was no reply. He left text messages asking John Homfray to contact him as a matter of urgency and, just after 11.00am, John Homfray made contact and spoke to Gary Googe on the telephone who informed him that the Claimant had assaulted a new employee, Mr AB.

*Pre-Meeting*

31. At just before 11.30am John Homfray arrived at the site. He spoke to Gary Googe, Mr EF and Mr CD. The three men repeated to John Homfray the allegation that Mr AB had made to them. John Homfray determined to speak to the Claimant, who was at that time working in the office, and that Gary Googe, Mr EF and Mr CD would accompany him.

32. At this point, before the meeting with the Claimant, John Homfray had not determined to dismiss the Claimant and had not told other employees that he was going to dismiss the Claimant. We made these findings on the following basis:

    a) Gary Googe was questioned on cross examination whether John Homfray had already told him, before speaking to the Claimant, that he was going to dismiss the Claimant. Mr Googe was emphatic that he did not.
    b) John Homfray was also challenged on cross-examination on whether before meeting with the Claimant he had made his mind up to sack him. He was also emphatic that he had not and gave evidence that he had wanted to see how the discussion with the Claimant developed . He conceded that he did have dismissal in the '*back of [his] mind'*.
    c) We accepted the evidence of both Respondent's witnesses.

33. John Homfray did not speak to the Farm Secretary at that point to ascertain if she could provide any information and did not check any CCTV on site on the basis that the CCTV did not show the interior of the office, only the entry and exit.

34. What then took place in the office is a matter of dispute between the parties.

*Meeting with the Claimant*

35. We accepted the evidence of John Homfray and Gary Googe that all were in a state of shock at the allegation. Gary Googe had referred to being *'in*

*turmoil'* that day. We found that it was more likely than not that the meeting that then followed with the Claimant was tense, fraught and heated, as John Homfray had termed it in his live evidence. We did not accept that John Homfray was 'angry' or shouted. The Claimant had not referred to him as shouting in the statement that he subsequently gave to the police that night and we concluded that it was likely that if John Homfray had shouted, that this would have been included in the evidence that he gave to the police. He did not.

*36.* There is also a dispute as to how long the meeting lasted, the Claimant indicating that it was '*1-2 minutes* max', the Respondent's evidence varying between 10-20 minutes. We accepted the evidence of the Respondent's witnesses and found that the meeting was likely to have lasted around 10-15 minutes.

*37.* We also found that whilst John Homfray was accompanied by the employees, only John Homfray spoke to the Claimant. This was the recall of the Respondent's witness and was reflected in the statement that the Claimant gave the police later that day [69].

38. How the meeting was conducted and what was said is also in dispute. The evidence from the Claimant regarding the meeting that took place, contained in his written statement, is brief. We preferred the evidence of the Respondents' witnesses and made the following findings in relation to that meeting:

   a) When John Homfray entered the office, the Claimant had asked '*What have I done now?';*
   b) In response, John Homfray referred to the support he had given the Claimant during his criminal case against in 2010 and when the Claimant had asked John Homfray what he was talking about, John Homfray informed the Claimant of the detail of the allegation that had been made by Mr AB although he did not name him;
   c) John Homfray sought to obtain from the Claimant his response to the allegation but the Claimant did not engage in that meeting, which had lasted between 10-15 minutes.
   d) The Claimant did not ask who the allegation came from or communicate to any extent save for saying '*It was just a cwtch'* or words to that effect*;*
   e) At that point, and not before, John Homfray determined to and did dismiss the Claimant. He told the Claimant to collect his belongings and leave;
   f) The Claimant then left.

39. We preferred the evidence of the Respondent's witnesses for the following reasons:

   a) The Claimant had given brief evidence in his statement and in the Further and Better Particulars [30], that he had been immediately sacked for gross misconduct, that John Homfray did not say what the gross misconduct was and denied knowing what he was supposed to have done. In contrast, the statement given by the Claimant on 2 July 2018 to the police reflects that the Claimant confirmed twice to the police that he had been informed by John Homfray earlier that day that he had '*allegedly touched somebody's bum'* and kissed them on the, or their, neck. [63, 64 and 68];

b) Gary Googe had given evidence in cross-examination that when John Homfray had asked the Claimant for an explanation and response to the allegation, the Claimant had ignored him which, Gary Googe had said, had changed the dynamics of the meeting. This supported by the evidence that John Homfray had given on cross-examination that he '*couldn't get a word out of*' the Claimant;

c) All three Respondent witnesses had given evidence that the only words that the Claimant said, when he walked out, was '*it was only a cwtch'.* That had not been challenged by the Claimant's representative when cross-examining the Respondent's witnesses*.* Despite that, on cross-examination the Claimant denied that he had said '*it was only a cwtch'*, answering in response to a question from the Respondent's Counsel that he had '*never said the word 'cwtch''*, adding '*I don't understand what that means'*. When questioned again, he repeated that he did not know what the word '*cwtch'* meant. We found that response not credible. It was not credible that a person, brought up and living in South Wales for at least 40 years, would not have understood what that word meant. It is such a well worn and familiar Welsh word, a word as familiar as 'hug' and 'cuddle' even to those that do not speak Welsh;

d) These matters led us to conclude that the Claimant's account of the meeting that day was not reliable and that the evidence of the Respondent's witnesses was preferred.

40. At some point that day, Mr AB contacted the police and as a result the Claimant was arrested and questioned later that day on suspicion of sexual assault [57]. In that police interview the Claimant denied the allegations. In particular, his evidence in relation to the physical contact was as follows:

    **'***He got up. He give me a hug. I gave him a hug. We gave each other a hug, and then I walked out of the office* [63].

41. When asked why they had hugged each other, the Claimant had said he hugged '*everybody'*. We accepted that the Claimant was known by his long-standing work colleagues to hug people.

    *Letter of Dismissal*

42. On 3 July 2018, John Homfray wrote to the Claimant confirming the termination of his employment. The letter incorrectly referred to a disciplinary meeting held earlier that day. There had been no such disciplinary meeting.

43. The letter confirmed that the Claimant's actions amounted to gross misconduct and that he was summarily dismissed with the date of dismissal being 3 July 2018. He was informed of his right of appeal and that if he wished to appeal he should write to John Homfray by 6 July 2018, setting out the reasons for the appeal.

44. The Claimant did not appeal. We heard evidence from John Homfray, which we accepted, that had the Claimant appealed the dismissal, he considered it wrong for him to deal with the appeal having made the decision to dismiss the Claimant.

45. We also accepted John Homfray's evidence that later in the week, he spoke to Mr AB's mother and Mr AB himself regarding the allegations and that he also spoke again to the other members of staff, the detail of which was not in evidence before us and we make no findings of fact as to what was said.

*Criminal investigation*

46. On 5 July 2018, the police also interviewed Mr EF [148], Gary Googe [156] and Mr CD [160]. John Homfray was challenged on cross-examination that he had encouraged his staff to go to the police. His response was that he did not tell them to complain about the Claimant, but a proportion did; that he had been informed by the police that they wanted to interview staff and he told staff to co-operate. We accepted that evidence.

47. In those police statements that were included in the Bundle, it is reflected that Mr EF told the police that the Claimant would be over familiar with people and hug everybody. He alleged that 2-3 years' previously the Claimant had grabbed his bottom, squeezed it and laughed and that in September 2017, the Claimant and touched and pushed his bottom. He also alleged that in around May 2018, the Claimant had said to him '*you owe me a blow jo*b'.

48. Mr EF was only challenged on this evidence on cross-examination by the Claimant's representative, regarding the amount of times he alleged that he had been touched by the Claimant and was not challenged on whether the Claimant had said to him' *you owe me a blow job'.* We found on balance of probabilities the Claimant had touched Mr EF on at least one occasion as alleged and had said such words to him.

49. Within the police statement of Mr CD [160], who we did not hear evidence from, he alleged that the Claimant had sexually assaulted him on three occasions, grabbing and squeezing the cheeks of his bottom and that in December 2017, he had also grabbed his penis.

50. Within the police statement of a further employee of the Respondent, Mr GH, who was interviewed on 13 July 2018 [153], but again we did not hear evidence from, it was alleged that the Claimant had shown him his house including his bedroom and that the Claimant had hugged him and had grabbed his bottom squeezing both cheeks and nibbling the right side of neck. He told the police that the Claimant would often hug him and that on three occasions, when hugging him, the Claimant had squeezed his bottom cheeks.

51. We make no findings as to whether the Claimant acted in the manner alleged in relation to those two employees.

52. The Claimant was arrested again on 29 July 2018, on suspicion of sexual assault against these three individuals and further questioned later that day. He denied all the allegations to the police [75] and again repeated those denials on cross-examination.

53. On 31 October 2010, John Homfray gave a statement to the police [166] in which he confirmed his knowledge that in 2010 the Claimant had been arrested and had attended court for the sexual assault of a 14 year old child and that the Claimant had been found not guilty. He also confirmed that in 2012 he had been contacted by the head teacher of the local secondary

school and informed that they would not be sending any more children to the Respondent's recycling centre as part of their geography class, as one of the teachers had reported that they had been uncomfortable that the Claimant had been '*overfamiliar with the children'*. He reported that since 2010 no one else had made any type of formal complaint to him about the Claimant.

*54.* For completeness, the Claimant had also commenced early conciliation on 12 July 2019, which ended on 8 August 2018 and on 1 October 2018 the ET1 was accepted by the Tribunal.

*Wrongful Dismissal / Contributory fault*

55. For the purposes of the wrongful dismissal claim, the Tribunal has considered its own view of the Claimant's conduct that day on the issue of whether the Claimant engaged in physical contact with Mr AB, which included hugging or cwtching, kissing him on the neck and mouth and touching his genitals. We have been invited by the Claimant's Counsel to make an express finding that this did not happen, that there was a hug only and not a serious sexual assault.

56. This has been particularly difficult as we do not have the benefit of hearing live evidence from Mr AB.

57. That the Claimant hugged Mr AB, has always been admitted by the Claimant. In live evidence the Claimant also admitted that the extent of the hug was such that within his police statement, Mr AB had accurately described feeling the Claimant's bristles of his beard on his neck. He confirmed that during the hug, he had his arms around Mr AB's shoulder and back and that during the police investigation, the Claimant's DNA (although not saliva DNA) had been found on Mr AB's neck.

58. The Claimant was not cross-examined on whether he had touched Mr AB on the bottom or on the genitals and the Claimant denied his tongue had touched Mr AB's lip. We have not had the benefit of Mr AB's evidence and we make no findings as to whether the Claimant did engage in physical contact to the extent that he also kissed or sought to kiss Mr AB and/or whether the Claimant touched Mr AB's penis or bottom.

59. We did find that on 2 July 2018 the Claimant had engaged in inappropriate physical contact with Mr AB. This inappropriate physical contact included an unwanted close physical hug to the extent that the Claimant's face was on the neck of Mr AB and that, more likely than not, had the effect and resulted in Mr AB feeling sexually harassed by the Claimant. In making our findings we took the following into account:

a) Mr AB was a new 18 year old employee who was not known to his new workmates at the Respondent, other than Mr CD;

b) Mr AB told his account several times that day: to Gary Googe, to Mr EF and Mr CD. We accepted the evidence of Mr EF and Gary Googe, that Mr AB gave them such an account;

c) Mr AB gave a detailed description of what he says happened to him in the police in his statement. For any person, this is a serious matter, even more

so for an 18 year old on their first day in work. Whilst there may have been changes to his evidence at the criminal trial, changes that we are not privy to, Mr AB was prepared to stand by his statement, and did go to court on his allegations;

d) We found that Mr AB' work colleagues believed him, despite not knowing him but knowing their manager, the Claimant;

e) In their witness statements to police other workers; Mr EF, Mr CD and Mr GH, referenced other incidents of sexual touching by the Claimant that they had personally experienced, incidents that bore a similarity to the allegations being made by Mr AB;

f) Whilst the Claimant had been acquitted, he had previously been prosecuted in 2010 for a sexual assault on a 14 year old male. We do not know the details of this allegation;

g) A local school had stopped Year 10 students (14-15 years' old) visiting the Respondent because of over-familiarity of the Claimant;

h) When confronted by John Homfray, the Claimant did not ask who had made the allegation and had only said '*it was only a cwtch'*. We did not accept the Claimant's evidence that he felt intimidated by John Homfray and the three staff members. We concluded that he did not ask who had made the allegation as he was well aware that it had been Mr AB;

i) On cross-examination the Claimant had suggested that if the contact had made Mr AB 'uncomfortable', he would have said so and he did not. This was evidence that was at odds with the events of that day, which was that Mr AB almost immediately told work colleagues and reported the matter to the police;

j) Mr AB had told the police that the Claimant's beard was rubbing against his neck [145]. In cross-examination the Claimant accepted that the Mr AB feeling his bristles on his neck could have been accurate, that their faces had been adjacent and that the police had found evidence of his DNA on Mr AB's neck (but not his genitalia or trousers);

k) On cross-examination, the Claimant confirmed that he would have accepted, and considered appropriate, a written warning for his conduct if John Homfray had considered the hug inappropriate, querying '*What is inappropriate when I hug John?'.* This indicated to us an inability or unwillingness by the Claimant to accept that any form of physical contact with a young, new employee could be unacceptable and more likely than not to result in such behaviour being unwanted conduct from the Claimant.

**Issues and Law**

60. With unfair dismissal, we first have to consider the reason for the dismissal and whether it was a potentially fair reason for the dismissal.

61. In this regard, the Respondent bears the burden of proving on balance of probabilities, that the Claimant was dismissed for one of the potentially fair reason set out in section 98(2) Employment Rights Act 1996 (ERA 1996). The

Respondent states that the Claimant was dismissed by reason of his conduct which was a potentially fair reason for dismissal pursuant to section 98(2)(b) Employment Rights Act 1996 (the "Act").

62. After considering the reason for dismissal, on the presumption that we identified a potentially fair reason for dismissal, we then have to consider whether the application of that reason in the dismissal for the Claimant in the circumstances was fair and reasonable in the circumstances (including the respondent's size and administrative resources). This should be determined in accordance with equity and the substantial merits of the case and the burden of proof in this regard is neutral.

63. In considering the question of reasonableness, if we concluded that conduct was the reason for dismissal, then we had to bear in mind the very well-established authorities of **BHS** v **Burchell** [1980] ICR 303 EAT, **Iceland Frozen Foods Ltd** v **Jones** [1993] ICR 17 EAT; the joined appeals of **Foley** v **Post Office** and **Midland Bank plc** v **Madden** [2000] IRLR CA and **Sainsbury's Supermarkets Limited** v **Hitt** [2003] ICLR 23.

<u>s.13 EqA 2010 Direct Discrimination</u>

64. Direct discrimination is defined in Section 13(1) Equality Act 2010 as follows:

A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

65. Sexual orientation is a protected characteristic. The concept of treating someone "less favourably" inherently requires some form of comparison. Section 23 provides that when comparing cases for the purpose of Section 13 "*there must be no material difference between the circumstances related to each case.*"

<u>Section 26 Equality Act 2010</u>

66. Section 26 of the Equality Act defines harassment under the Act as follows:

(1) A person (A) harasses another (B) if – A engages in unwanted conduct related to a relevant protected characteristic which includes the protected characteristic of sexual orientation, and the conduct has the purpose or effect of

a) violating B's dignity, or

b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B

(2) A also harasses B if –

a) A engages in unwanted conduct of a sexual nature, and
b) the conduct has the purpose or effect referred to in subsection (1)(b).

(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 circumstances of the case;
c) c) whether it is reasonable for the conduct to have that effect.

67. In **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336 the Employment Appeal Tribunal set out a three step test for establishing whether harassment has occurred:

a) was there unwanted conduct;
b) did it have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them; and
c) was it related to a protected characteristic.

**Submissions**

68. Counsel for the Claimant has invited us to find that the dismissal was both procedurally and substantively unfair reminding us of the length of the Claimant's service, lack of previous disciplinary record and lack of criminal conviction; that dismissal was based on hearsay evidence.

69. The focus of the submissions on unfair dismissal related to the dismissal process itself highlighting lack of consultation, suspension and/or investigation, inviting us to find that an investigation would have ended up in a 'nil draw' as they termed it, with two conflicting versions.

70. We were reminded again of the Claimant's length of service and it was submitted that there had been no such previous conduct. We were referred to the Court of Appeal's decision in **Salford Royal NHS Foundation Trust v Roldan** [2010] EWCA Civ 522 and in particular paragraph 73 concerning the approach of employers to allegations of misconduct where the evidence consists of diametrically conflicting accounts of an alleged incident with no, or very little, other evidence to provide corroboration one way or the other, in which Elias LJ highlighted that:

> '*Employers should remember that they must form a genuine belief on reasonable grounds that the misconduct has occurred. But they are not obliged to believe one employee and to disbelieve another. Sometimes the apparent conflict may not be as fundamental as it seems; it may be that each party is genuinely seeking to tell the truth but is perceiving events from his or her own vantage point. Even where that does not appear to be so, there will be cases where it is perfectly proper for the employers to say that they are not satisfied that they can resolve the conflict of evidence and accordingly do not find the case proved. That is not the same as saying that they disbelieve the complainant. For example, they may tend to believe that a complainant is giving an accurate account of an incident but at the same time it may be wholly out of character for an employee who has given years of good service to have acted in the way alleged. In my view, it would be perfectly proper in such a case for the employer to give the alleged wrongdoer the benefit of the doubt without feeling compelled to have to come down in favour of on one side or the other.*'

71. We were invited to make no reduction for Polkey or otherwise, and to find that the dismissal fell outside the band of reasonable responses.

72. With regard to the discrimination complaints, it was conceded that the Claimant had confirmed that he had not been dismissed because of his sexual orientation on cross-examination, albeit it was suggested that the Claimant had sought to clarify on re-examination that if he had been a hetero-sexual woman, he would not have been dismissed.

73. With regard to the breach of contract claim, the Tribunal was reminded that the Claimant had denied assault and despite facing charges following allegations from four employees, including Mr AB, he had been acquitted on all. It was admitted that there had been a hug and invited the Tribunal to find that there had been a consensual hug only; there had been no saliva DNA and that Mr AB had changed his evidence during the criminal proceedings.

74. Counsel for the Respondent provided written closing submissions, which are incorporated into these written reasons by reference, and supplemented these with further oral submissions.

75. Unfair dismissal is conceded on the basis that the Claimant had not been provided with a disciplinary hearing, that no formal procedure was carried out and that a reasonable investigation did not take place.The Tribunal was invited to find that the principal reason for the dismissal was conduct and that the decision to dismiss had fallen within the range of reasonable responses.

76. We were invited to find that there had been some investigation and that it was not the case that the Claimant had been dismissed in his absence; that as the information before John Homfray appeared to get worse as the week went on, had a reasonable process followed, the Claimant would have been dismissed in any event and there would have been no difference to the eventual outcome i.e. dismissal – ‘the right thing, the wrong way’ as John Homfray had referred to it in his evidence. We were invited to make a 100% Polkey reduction and a 100% contributory conduct contribution and referred to **Lemonious v Church Commissioners** UKEAT/0253/12/KN.

77. With regard to the sexual orientation claims, we were invited to find that there was no evidence of homophobia and that there were no facts from which it could be inferred that there had been discriminatory treatment and that the conduct, that had been relied on as forming the sexual orientation harassment was related to the Claimant’s conduct.

**Conclusions**

78. In applying our findings to the issues identified at the outset, we needed to initially consider the reason for dismissal and whether it was potentially a fair reason for dismissal. The Claimant contended that the Respondent dismissed for gross misconduct in relation to his conduct on 2 July 2019 towards Mr AB.

79. In reaching this conclusion, we took into account that the Claimant was a senior employee of 40+ years, with no previous disciplinary record and no previous convictions; that he was trusted and hardworking. We also took into

account that John Homfray had been provided with hearsay evidence that he used to substantiate the dismissal, the word of staff subordinate to the Claimant. On cross-examination, his response was that whilst he could not understand or explain the allegation, he had queried why a young person who had arrived on site that day and that none of them knew, would make up such an allegation '*out of nowhere'*. We accepted that his response was genuine and supported our conclusion that the reason or principal reason was the Claimant's conduct that day.

80. That John Homfray was also very embarrassed about his reputation and concerned at the seriousness of the allegation, we concluded did play a part in the decision-making of John Homfray that day. He said so in his evidence. This did not undermine our conclusion however that the principal reason was that of the Claimant's conduct of that day and we were not persuaded that there had been any other underlying reason for the dismissal of the Claimant.

81. The Tribunal was satisfied that the Respondent had demonstrated that the principal reason for Claimant's dismissal was his conduct towards a new employee on 2 July 2018 and that such conduct was potentially a fair reason for dismissal.

82. Moving on to that question of overall fairness, in considering the section 98(4) test in the context the **Burchell** requirements, whilst we were also persuaded that John Homfray genuinely believed that the Claimant was guilty of gross misconduct; he remained resolute in his evidence and we accepted his evidence that as the week progressed after the dismissal, he became even more convinced in the misconduct of the Claimant, we also have to consider not only whether the Respondent had reasonable grounds upon which to sustain that belief but also, at the stage it formed that belief on those grounds, that the Respondent had carried out as much investigation as was reasonable in all the circumstances.

83. Whilst we concluded that the belief of the Claimant's misconduct was genuine, it could not be said that this belief was formed following a reasonable investigation.

84. We were not persuaded that there had been no investigation whatsoever before the point of dismissal.

    a) John Homfray had spoken to the three employees who had heard the allegation directly from Mr AB;
    b) He had put that allegation to the Claimant;
    c) He had given the Claimant the opportunity to respond to that allegation and we concluded that he had tried to get the Claimant to respond to the allegation;
    d) The Claimant had not engaged, had not questioned who had made the allegation and had only responded 'it was '*just a cwtch'* before he had left.

85. Whilst no oral evidence was given in these proceedings as to what Mr EF and/or Mr CD told John Homfray that day of their own allegations against the Claimant, Mr AB had told the police that they had shared information with him [130]. In his own statement to the police, John Homfray had indicated that whilst there had been no formal complaints, lots of people had made

comments about the Claimant's 'overfamiliar' behaviour, which he had always taken as 'rumours'.

86. We concluded on that basis, that it was more likely than not, that John Homfray would have discussed with Mr EF and Mr CD, their allegations that the Claimant had at some point also touched them inappropriately, when discussing Mr AB's allegation with them.

87. John Homfray had not taken the opportunity to speak to Mr AB to get first hand from him the detail of the allegation however. He had not suspended or even considered suspending the Claimant, or sending him home before investigating when matters had cooled down. Rather, he chose to confront the Claimant immediately, and chose to be accompanied with three co-workers and subordinates of the Claimant.

88. It could not be said that what had been undertaken was a reasonable investigation. This rendered any dismissal unfair.

*Polkey*

89. The Respondent contends that the Claimant would have ceased to have been employed in any event even if fair procedures been adopted. We agree.

90. Whilst we accept that this was a case where what had happened in that room would have involved a question of one person's word against the other, we did not consider that this was a case where it would have been proper to give the alleged wrong-doer the benefit of the doubt. This was not the case where there were 'diametrically conflicting accounts' with no or very little other evidence, as Mr Barrow on behalf of the Claimant has suggested when referring us to **Salford Royal NHS Foundation Trust v Roldon.**

91. We concluded that it was likely that John Homfray had in mind the fact that a similar accusation had been made against the Claimant spanning back to 2010 albeit the Claimant had been acquitted. John Homfray referred to this within not just his police statement and in his evidence in these proceedings, but also to the Claimant when confronting him with the allegation on 2 July 2018. Similar allegations had also been made by his other current and long serving employees. We also concluded that had time progressed, he would have more detailed information from the Claimant's co-workers, information that Mr EF. Mr CD and/or Mr GH provided to the police.

92. We concluded that the dismissing officer was entitled to take the view, as we did, that interviewing the Claimant later would not have added anything since the Claimant had failed to engage, save for admitting some physical contact with the employee. He considered that the Claimant was in complete denial and would not have changed his story. The Claimant did not appear to alter his denial, which he has continued through two criminal proceedings and these Tribunal proceedings.

93. We concluded that if the procedural shortcomings had been made good, i.e. if the Claimant had attended and participated in a disciplinary hearing, whilst this may have delayed the dismissal, this would have been for a matter of days only whilst John Homfray spoke to Mr AB, his mother and again to the Respondent's employees. We also concluded that Claimant would have either

continued to refuse to engage and/or would have denied the allegations had he attended any disciplinary hearing.

94. Effectively, it would have made absolutely no difference. The outcome would have been the same and dismissal would have fallen within the bands of a reasonable response in relation to the conduct of just the inappropriate physical contact that we had found established, if not the wider conduct alleged.

95. On that basis, we concluded that his dismissal would have still arisen, a proper procedure was likely to have taken a few days only to complete and that there was no real chance that the Claimant might have remained in employment had a fair procedure been followed and that it was just and equitable to reduce any compensatory and basic award to nil.

Contribution

96. Whilst we acknowledge that a 100% reduction is rare, this was a case where the conduct was 'so egregious' that this was appropriate in this case.

97. We concluded that the Claimant was well aware that any conduct that involved close physical contact of hugging or cwtching an employee, such that the bristles of his beard would have been felt by the person receiving the hug, was not appropriate.

98. Whilst the Claimant did have a long record without any previous warnings, this was a very serious offence. Unlawful discrimination, including acts of indecency or harassment were noted in the disciplinary procedure as acts of gross misconduct. The physical contact specifically was that of a General Manager, a man in his mid 50s, giving a close physical hug, or 'cwtch', to a new 18 year old employee; contact which took place within the confines of an office, with no other employee present; contact which took place with an employee who was not personally known to the Claimant and started his new job that day and just a few hours earlier.

99. This was therefore culpable conduct which contributed not just significantly to the dismissal, but wholly. In the Tribunal's judgment the Claimant's contribution is also properly placed at 100% so that of any compensation (basic and compensatory) for unfair dismissal which he would be ultimately awarded, the Claimant would receive nil on contributory conduct grounds.

Wrongful Dismissal

100. We find on the evidence before us and set out above, and on the balance of probabilities that the Claimant engaged in close physical contact with Mr AB on 2 July 2018. We also concluded that this close physical contact was more likely than not to have been unwanted and caused him to feel harassed.

101. The Claimant hugged Mr AB. He did so when the person was just 18 years' old and hours into a new job, was a casual member of staff whom the Claimant did not know and had met on a handful of occasions; when the Claimant was the General Manager in a position of seniority and a person of some 50+ years' of age. This was not comparable to physical contact with an old friend. The Claimant did so to the extent that the person could feel the

Claimant's bristles on his neck. The Claimant did so despite having been instructed by John Homfray to be careful of his conduct around young people. It was likely to have led such a person to have felt sexually harassed.

102. In the judgement of this Tribunal, that conduct could certainly be considered gross misconduct. It is behaviour which is likely to undermine the implied term of trust and confidence required to exist between employer and employee.

103. On that basis we concluded that it was reasonable for the employer to conclude that it was dealing with a matter of conduct that amounted to a fundamental breach of contract.

104. We decline to make findings on whether or not the Claimant engaged in the more extreme conduct alleged, of prolonged touching, kissing or attempted kissing, touching of genitals and bottom but neither do we consider we are required to on the basis of our finding that the physical contact of the hug alone was, in our view, sufficient to constitute conduct capable of amounting to a fundamental breach of contract

105. For the reasons which are set out above, we concluded that the Respondent had established that in this case the act of engaging in the physical contact found by this Tribunal, was of such seriousness in itself that it amounted to a fundamental breach of contract. We therefore find that by summarily dismissing the Claimant, the Respondent did not act in breach of the Claimant's contract of employment.

106. The complaint of breach of contract is not well founded and is dismissed.

107. The Claimant is not entitled to compensation representing payment in lieu of his contractual entitlement to notice, or alternatively statutory entitlement to notice.

<u>Sexual orientation</u>

108. The Claimant did not discharge the burden of proof in section 136 Equality Act 2010 in relation to either claim of sexual orientation discrimination. There were no facts from which the Tribunal could decide in the absence of any other explanation, that the Respondent had acted in a way that was unlawful.

109. We had found that there had been no homophobic abuse or even banter from the Claimant's work colleagues towards to the Claimant. If anything, had there been homophobic banter, we concluded that it was more likely than not to have been emanating from the Claimant towards his work colleagues.

110. There were no findings of primary fact from which this Tribunal found or drew any inference of a discriminatory treatment. The bare fact that the Claimant was a gay man, without more, was inadequate to indicate even a possibility of discrimination.

111. We took the evidence of the Claimant given in cross examination, that he did not believe that he had been dismissed because he was a gay man as being his true view. That he tried to draw back from that on re-examination, didn't persuade us to the contrary.

112. We accepted the evidence of John Homfray, that whilst another employee had been assisted by the Respondent in his university progression after he had left the Respondent's employment as drugs had been found in his home, that employee had not been accused of using drugs in work. The factual matrix of that comparison case, put forward by the Claimant, was materially different to the Claimant's case of a senior manager having been accused of sexually assaulting a new employee. We did not consider that this was an relevant comparator.

113. In any event, we accepted the evidence of John Homfray, given on cross examination:

    a) That he had no interest in the fact that the Claimant was gay;
    b) That had the Claimant been a heterosexual male and the complainant female, he would have reacted in same manner;
    c) that he also would have acted no differently had the Claimant been female and the complainant female or male;
    d) That he considered such a suggestion '*travesty'* and that he detested an abuse of power.

114. We concluded that the Respondent had not treated the Claimant less favourably than it treated or would have treated others because of the Claimant's sexual orientation in the manner alleged, whether in confronting the Claimant in front of staff and/or dismissing the Claimant immediately without investigation or hearing.

115. Whilst we accepted that the Claimant had been subjected to unwanted conduct, in that he had been confronted with Mr AB's allegations and subsequently dismissed on the basis of our findings, we do not accept that such conduct, or indeed any conduct relied on as forming the 'unwanted conduct' was related to the Claimant's sexual orientation for the same reasons.

116. The claims of direct discrimination because of sexual orientation, and harassment related to sexual orientation are not well founded and are dismissed.

117. For the avoidance of doubt the claim for failure to be provided with written reasons for dismissal is dismissed. A copy of the letter of dismissal was provided to the Claimant [170] which set out the reasons for the termination.

118. The claim for failure to allow the Claimant a right to be accompanied at a disciplinary or a grievance hearing is also dismissed on the basis that the Respondent did not hold a disciplinary meeting when dismissing the Claimant.

<u>Remedy</u>

119. On the basis of our conclusions on the unfair dismissal, the Claimant is not entitled to financial remedy.

**Dated: 14 October 2021**

Employment Judge Brace

ORDER SENT TO THE PARTIES
ON 20 October 2021

T Campbell
FOR THE TRIBUNAL OFFICE