EMPLOYMENT TRIBUNALS

Claimant: Mr J Woods

Respondent: ACAS

Heard at: London Central **On:** 15-17, 21-23 & 25 June 2021

Before: Employment Judge Khan (sitting alone)

Representation
Claimant: In person
Respondent: Mr J-P Waite, Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that:

(1) The claimant was unfairly dismissed.

(2) No compensation shall be awarded to the claimant because he would have been dismissed on the same date had a fair process been conducted and it would be just and equitable to reduce any basic and compensatory award by 100% because of his culpable conduct.

REASONS

1. By an ET1 presented on 5 December 2019, the claimant claims that the respondent unfairly dismissed him. The respondent resists this claim.

The issues

2. I was required to determine the following issues which were based on the list of issues enumerated in the Case Management Order of Employment Judge Joffe, sent to the parties on 28 September 2019, and amended following discussion with them during the hearing:

Unfair dismissal

(1) Was conduct the principal reason for the claimant's dismissal which is a potentially fair reason of in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

(2) Was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'? The parties agree the following issues arise:

a. Did the respondent hold that belief on reasonable grounds?
b. Did the respondent carry out such investigation as was reasonable in the circumstances?
c. Was the dismissal procedurally fair?
d. Was summary dismissal a permissible sanction?

Remedy for unfair dismissal

(3) If the claimant was unfairly dismissed and the remedy is compensation:

a. What adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been fairly dismissed either at the time of dismissal or later?
b. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
c. Did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

The relevant legal principles

3. If the employer is able to show that it had a potentially fair reason for the dismissal the general test for fairness under section 98(4) ERA must then be applied. This provides:

> "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

4. The test to be applied in a conduct dismissal was articulated by the EAT in British Home Stores v Burchell [1980] ICR 303 as follows:

> "What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

5. The first element of the Burchell test is relevant to the requirement under sections 98(1) and (2) ERA, it is for the employer to show that it had a potentially fair reason for the dismissal. In respect of the second and third elements, which are relevant to the fairness of the dismissal under section 98(4) ERA, the burden of proof is neutral.

6. As to the standard of proof, the respondent is not required to show that it had conclusive evidence of the misconduct alleged, it is only required to show that it had formed a reasonable belief on the balance of probabilities, based on a reasonable investigation, when it dismissed the claimant.

7. The correct approach for a tribunal is to consider whether the employer's actions, including its decision to dismiss the claimant for the conduct in question fell within the 'band of reasonable responses' which a reasonable employer could have made in the circumstances (see Iceland Frozen Foods v Jones [1982] IRLR 439. The tribunal must not substitute its own view for that of the employer but must instead recognise that different employers may act reasonably in different ways in response to a particular situation.

8. The band of reasonable responses also applies to the procedure which the employer has followed (see Sainsbury's Supermarkets v Hitt [2003] ICR 111). The procedure followed by the respondent must be viewed as a whole, so that any deficiencies in the disciplinary process are capable of remediation by the appeal process.

9. When considering the reasonableness of the dismissal process a tribunal must also consider the reason for the dismissal (see Taylor v OCS Group Ltd [2006] IRLR 613, CA; and Sharkey v Lloyds Bank Plc [2015] UKEAT/0005/15).

10. A decision to reinvestigate must be fair in light of all the circumstances of the case (see Christou v LB Haringey [2013] EWCA Civ 178, CA; and North Healthcare NHSFT v Chawla [2016] 1WLUK 46, EAT).

11. A tribunal must also give consideration to the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) ("the Code"). Under section 207 of the Trade Union and Labour relations (Consolidation) act 1992, the

Code shall be admissible in evidence and any of its provisions which appear to be tribunal to be relevant shall be taken into account in determining that question.

Paragraph 9 of the Code provides:

> *If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information that the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.*

Paragraph 12, which deals with the conduct of a disciplinary hearing, provides:

> *…The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses.*

Paragraph 27, which deals with the conduct of an appeal, provides:

> *The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case.*

Paragraph 46, which deals with overlapping grievance and disciplinary cases, provides:

> *Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Whether grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently.*

12. Under section 122(2) ERA a basic award shall be reduced where a tribunal is satisfied that this would be just and equitable with reference to any conduct of the claimant which preceded the dismissal.

13. Section 123(1) ERA provides that

> *…the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in the all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

14. Under section 122(6) a tribunal shall reduce the compensatory award by such amount as is just and equitable where it is satisfied that the claimant's conduct was culpable or blameworthy and that this conduct caused or contributed to his dismissal. It is for the tribunal to determine, as a matter of fact, whether the employee committed the impugned conduct and, if so, how wrongful it was, see Steen v ASP Packaging [2014] ICR 56, in which the EAT identified the following four questions which a tribunal shall address:

(1) What was the conduct which is said to give rise to possible contributory fault?
(2) What that conduct blameworthy irrespective of the employer's view of the matter?
(3) Did the blameworthy conduct cause or contribute to dismissal?
(4) If so, to what extent should the award be reduced and to what extent would it be just and equitable to reduce it?

15. A tribunal will be expected to consider making a reduction of any compensatory award under section 123(1) ERA where there is evidence that the employee might have been dismissed if the employer had acted fairly (see Polkey v AE Dayton Services [1988] ICR 142, HL; King and ors v Eaton (No.2) [1998] IRLR 686, Ct Sess (Inner House); and also Software 200 Ltd v Andrews and ors [2007] ICR 825, in which the EAT provided the following guidance:

> "(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
> (2) If the employer seeks to contend that the employee would or might have ceased to have been employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself…
> (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made.
> (4) Whether that is the position is a matter of impression and judgement for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.
> …
> (7) Having considered the evidence, the tribunal may determine:
> (a) That if fair procedures had been complied with, the employer has satisfied it – the onus being firmly on the employer – that on the balance of probabilities the dismissal would have occurred when it did…
> (b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.
> (c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself…
> (d) Employment would have continued indefinitely."

The evidence and the procedure

16. The respondent called the following witnesses: Kate Nowicki, Director of Strategic Planning, Performance and Change; James Vincent, Director of Digital, Data and Technology; and Susan Clews, Chief Executive.

17. The claimant gave evidence himself.

18. Under a Privacy Order dated 22 December 2020 made by Employment Judge Joffe pursuant to a High Court Order relating to section 251B of the Trade Union and Labour Relations (Consolidation) Act 1992: the names of certain individuals were redacted and ciphers used instead (i.e. A, B, E, F, L, P, Q, VA, Y and AA); evidence relating to the "poaching" and "section 251B" allegations was not disclosed to the public; the tribunal sat in private when hearing evidence relating to those allegations; and any related documentary evidence was contained in either a private hearing bundle or, where this was not practicable, in the public hearing bundle, in redacted form.

19. There were therefore two hearing bundles: a public hearing bundle which exceeded 1100 pages and a private hearing bundle of 555 pages. I read the pages in these bundles to which I was referred.

20. By agreement, I allowed into evidence some additional documents disclosed by the respondent which related to the investigation process and some photos and emails relied on by the claimant.

21. I also considered written and oral submissions from both parties.

22. At the start of the hearing I refused the claimant's applications:

    (1) for a witness order in relation to Rob Mackintosh because it was not clear what evidence would be given nor how this would be relevant to the issues I was required to determine and I was not therefore satisfied that such an order was required for fairness;
    (2) to strike out the response under rule 37(1)(c) because I was not satisfied that any non-compliance by the respondent in relation to the production of the bundles and disclosure of witness statements in the circumstances which also included the tribunal's administrative delay in dealing with the extension applications made by the respondent warranted this draconian sanction, and when the claimant agreed that this had not prejudiced his ability to have a fair hearing.

The facts

23. Having considered all the evidence, I make the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.

24. The respondent is an independent public body that works with employers and employees with the aim of improving and workplace relationships and resolving workplace disputes. It has advisory, dispute resolution, training and research functions and also produces statutory codes of practice as

well as non-statutory guidance.

25. The claimant was employed by the respondent for over 39 years from late 1979 until his dismissal on 10 July 2019. At the date of his dismissal, he was employed as Deputy Chief Conciliator and Head of Collective Conciliation and Arbitration. He was in a senior leadership role and position of trust. In oral evidence, he agreed that he was required to conduct himself in a manner which set an example to other staff.

Relevant policies and procedures

26. The respondent's Bullying and Harassment Policy defines harassment, in the terms similar to the statutory wording set out in section 26 of the Equality Act 2010, as follows:

> "unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating and individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual".

This also includes the following guidance:

> "Unwanted conduct may be persistent or an isolated incident. The key is that the actions or comments could be reasonably viewed as demeaning and unacceptable to the recipient, regardless of whether the behaviour was intentional."

27. This policy also provides that where a formal procedure is necessary the same process which is set out in the Disciplinary Policy is applicable.

28. In relation to anonymisation of a complaint made of or evidence given, the Bullying and Harassment Policy provides (under section 4) that:

> "Staff shall be protected from intimidation, victimisation or discrimination for filing a complaint or assisting an investigation…Any complaint made will be taken seriously and treated in the strictest confidence to ensure the staff will be protected from any type of retaliation."

29. The respondent's Staff Rules also contain the following provision in relation to anonymisation (at paragraph 3.21):

> "Acas recognises that staff may want to raise a concern in confidence and will respect any request for anonymity as far as possible, restricting it to a 'need to know basis'. However, if the situation arises where it is not possible to resolve the concern without revealing the staff member's identity, Acas may need to continue with the investigation and may not be able to guarantee anonymity…"

30. The respondent has also produced external non-statutory guidance on Conducting Workplace Investigations (2015) which provides, in relation to witness evidence:

> "Some employees may be reluctant to provide evidence for an investigation. An investigator should explore why an employee is reluctant

to give evidence, provide reassurance and seek to resolve any concerns they have.

An investigator should try to avoid anonymising witness statements whenever possible. This is because an employee under investigation is likely to be disadvantaged when evidence is anonymised as they will not be able to effectively challenge the evidence against them.

Only in exceptional circumstances where a witness has a genuine fear of reprisals should an investigator agree that a witness statement is anonymised…"

31. The respondent's Disciplinary Policy provides, so far as is material:

"**2. Principles**

2.1 Employees must be told of any allegations being made against them in advance of a disciplinary meeting and be given a chance to reply to the allegations at the meeting.
At every stage in the formal procedure an employee will be advised of the nature of the complaint against them and given the opportunity to state their case before any decisions made.

2.2 … Formal disciplinary action will only be initiated by managers at Grade 9 or above who have received appropriate training.

The Procedure:

4. Formal Disciplinary Meeting

4.1 If, after investigation, the manager…decides that formal disciplinary action may be needed, the manager will write to the individual giving notice…This notification will set out the problem and the reasons for managers concerns, together with the names of any witnesses to be called (or those who will be asked or have made witness statements).

7. Dismissal

7.1 A final disciplinary meeting will be arranged if:

…

(c) After a formal investigation, management consider that there has been gross misconduct.

…

7.5 At the conclusion of the meeting, the Assistant Director (or Director, if the AD has already been involved) will summarise the main point of discussion all the individual's…

7.7 …The decision to dismiss will be confirmed in writing and the employee will be provided, as soon as reasonably practicable, with written reasons for dismissal, the date on which employment will terminate, and the right of appeal.

…

9. Gross misconduct

Gross misconduct is serious enough to render the future working relationship untenable warrant dismissal without previous warning."

The Disciplinary Policy provides a non-exhaustive list of examples constituting gross misconduct which include "Serious examples of inappropriate behaviour including those that are found to be bullying or harassment" and "breaches of the Civil Service Code. Depending on the level of impact, intent and culpability, it could include gross misconduct".

32. Appendix 1 of this policy sets out guidance on the scope and process to be followed where there is a formal investigation. This refers to "cases of suspected fraud or theft or other forms of serious or gross misconduct" (1.1); in which a "Control Officer" shall be nominated by a relevant senior manager and HR to conduct the investigation and, where sexual harassment is alleged and the putative harasser is of a different sex to the complainant, a team of two investigators shall be appointed comprising a man and a woman (1.2); and which ends with a written investigation report and the following action:

> "9.1 the control officer will satisfy him/herself that the terms of reference have been met. Where this is the case, he/she will pass the report to the appropriate senior manager who will consider all irregularities which should be dealt with under the disciplinary procedure. If disciplinary action is considered appropriate the issues will then be put to the member/s of staff concerned. The staff will not be given a copy of the investigators' report but may be given a summary of the evidence that led to the allegations against them…"

<u>The initial allegations by Q</u>

33. On 12 April 2018, Q then an employee of the respondent submitted a grievance against the claimant. She complained that the claimant had abused his power as a senior employee in relation to a consensual sexual relationship they had had between January and November 2017.

34. Q met with Susan Clews, then the Chief Operating Officer, on 25 April 2018, when she made further allegations against the claimant. Ms Clews commissioned an external investigation which was conducted by Maria Tonks, an external Diversity and HR Consultant. The terms of reference ("TOR") for this investigation were to:

    (1) Determine whether there was evidence that the claimant had behaved inappropriately towards Q ("TOR1").
    (2) Consider whether the claimant had used his position and status within the organisation inappropriately in relation to Q ("TOR2").
    (3) Examine whether the claimant exhibited inappropriate behaviour or used his position / status inappropriately in relation to other staff (identified either by Q in her grievance or by the investigation process) ("TOR3").

35. Ms Tonks was assisted by Sherri Dewsbery, Senior Case Work Adviser, and Nicki Osborne, HR Business Partner. She interviewed 17 people. This included the claimant who was interviewed on 24 May 2018. Ms Tonks completed her investigation on 10 July 2018. She concluded, in relation to TOR1

> "There was evidence of a pattern of behaviour of JW making approaches towards new, young female colleagues. He is described as being persistent and employees not being able to deal with the behaviour due to his seniority and individuals being new to the organisation."

In relation to TOR3:

> "The investigation identified inappropriate behaviour / comments by JW going back 5 years. There is some evidence which supports the fact that JW is perceived as being very powerful and influential within Acas."

No findings or conclusions were made under TOR2.

36. Ms Tonks also produced a separate short report headed "The Culture in Acas". This listed some of the comments given during the investigation process about the claimant and the wider workplace culture, and made several recommendations including launching a "#Metoo [sic]" campaign, and amplifying the written guidance available to staff in relation to standards of behaviour.

37. Ms Clews wrote to Q on 13 July 2018 confirming the findings of this investigation in relation to following four allegations:

    (1) The claimant's behaviour towards her was inappropriate and controlling: Although there was no direct evidence of inappropriate behaviour, comments made by other witnesses supported her evidence and the claimant's behaviour constituted harassment under the respondent's Bullying and Harassment Policy.
    (2) The claimant behaved inappropriately towards other women, both Acas staff and external stakeholders: This was not dealt with under the grievance process as it did not relate to Q but was being dealt with as a general concern. Ms Clews confirmed "I will instruct that any evidence gathered should be used in consideration of any disciplinary process" against the claimant.
    (3) The claimant held photos / videos of Q on electronic devices that she wished to be deleted: This fell outside the scope of the employment relationship and therefore the ambit of grievance process.
    (4) The claimant's behaviour was symptomatic of wider cultural issues at Acas: Ms Clews agreed that the evidence showed that "there are aspects of Acas culture which should be addressed".

    Ms Clews confirmed that she had commissioned OD & HR to consider disciplinary action against the claimant.

38. The claimant received an anonymised investigation report and an invitation to a disciplinary hearing on 20 July 2018. He submitted a grievance in relation to this investigation.

39. The disciplinary and grievance hearings took place on 8 August 2018 when the claimant was accompanied by his union representative. The hearing was chaired by Rob Mackintosh, Director of Finance, Estates and People, who wrote to the claimant on 24 August 2018 to confirm that he

had decided to apply the disciplinary sanction of a final written warning, to remain on his file for 12 months, in the following terms:

> "I have concluded that your behaviour towards some female staff, has on occasion, been unacceptable. The corroborative evidence provided by a number of staff confirms a pattern of behaviour that you have demonstrated towards young and more junior staff which is not either acceptable or consistent with Acas values…"

The claimant was warned that if any further misconduct issues arose formal disciplinary action including dismissal would be contemplated. In arriving at this outcome, Mr Mackintosh relied on the Tonks report and had not reviewed the witness evidence itself. Mr Mackintosh also dismissed the claimant's grievance.

40. The claimant appealed both decisions. These appeals were heard by Ian Wood, Director of Strategy, on 3 October 2018, who confirmed his decisions by letter dated 9 October 2018. The disciplinary appeal was dismissed. The grievance appeal was partially upheld on the basis that a male as well as female investigator should have been appointed, however, Mr Wood concluded that the investigation had not been impaired by this procedural defect. Notably, one of the other grounds of grievance appeal which was dismissed related to the omission from the disciplinary investigation report of witness statements, in respect of which Mr Wood wrote:

> "The panel recognise that the denial of access to witness statements is a serous consideration and should only occur in exceptional circumstances, however, in this case it was fair and acceptable in order to recognise a genuine fear of reprisals from those witnesses in question."

41. Prior to this date, Q had written to the claimant, on 14 September 2018, copied to Ms Clews, in which she complained that the claimant had breached her confidentiality in relation to the grievance. Q also threatened the claimant in the following terms:

> "I am also in the position to breach your confidentiality with sending all of your Acas colleagues, family and friends the investigation report which outlines your sexual predatory behaviour towards women over a period of five years…"

When Ms Clews spoke to the claimant about this a week later he denied this allegation and was reminded of the ongoing need for confidentiality in relation to this issue. Q resigned later that month.

42. The claimant then submitted another grievance in relation to the investigation and disciplinary process on 12 November 2018. Anne Sharp, then Chief Executive, responded on 22 November 2018. She agreed to treat the claimant's grievance as a second disciplinary appeal made out of time. Ms Sharp dismissed the claimant's complaints which included the non-disclosure of witness statements about which she wrote:

> "I note your deep unhappiness about the fact that evidence witnesses interviewed part investigation was not made available to you. I have looked at our external guidance and internal procedures in this respect: I

agree with Ian Wood that denial of access to witness evidence should only occur in exceptional circumstances.

> "In this case, some witnesses were given specific assurances about the confidentiality of the meetings with the investigator. The ACAS bullying and harassment policy states that matters will be treated in strictest confidence to ensure the staff will be protected from any type of retaliation. In these matters a balance needs to be struck between interests of those who were interviewed and your interests as the subject of the disciplinary process. In my judgement you have sufficient information on which to reply to the allegations against you."

Overall, Ms Sharp concluded:

> "In my reading of the appeal meeting I noted remarks which indicate that you are aware that aspects of your behaviour may not reflect what is now considered appropriate in the workplace. I would suggest that this is the area for focus…"

Q email dated 9 December 2018

43. On 9 December 2018, Q emailed around 20 ex-colleagues, including the claimant and Ms Clews, when she made further allegations against the claimant. Although these allegations overlapped with those which related to the claimant's alleged treatment of Q, which had already been investigated, Ms Clews felt that there were new and more serious allegations.

44. Following an initial email to recipients to refrain from circulating Q's allegations, Ms Clews invited those affected to meet with Sharon Leid, Head of OD and People Development, to discuss its contents and any concerns they had.

Leid factfinding investigation

45. Ms Clews asked Ms Leid to conduct a factfinding exercise on 13 December 2018. Her evidence was that this had the dual purpose of establishing whether there was a potential case to warrant a disciplinary investigation and of supporting affected staff.

46. Ms Leid completed this exercise on 14 January 2019 having interviewed five witnesses, including the claimant. When Ms Leid interviewed E she said that whilst the claimant's behaviour had been inappropriate she had not found it "sexually threatening" at the time, however, Q's email had caused her to reconsider this. She also complained about the claimant's coercive behaviour at work and referred to a recent incident relating to a collective consultation case.

47. Mr Mackintosh then met with the claimant on 25 January when he was told that there would be a disciplinary investigation and the broad issues that would be investigated. I find that it is likely, as the claimant contends, that in between these two dates Mr Mackintosh met with Ms Leid and Ms Dewsbury and a fourth colleague to discuss the factfinding and it was decided by Mr Mackintosh to authorise an investigation. Ms Clews was not involved in this process.

The Nowicki / Chick investigation

48. Mr Mackintosh appointed a team of two investigators: Kate Nowicki, Director of Strategic Planning, Performance and Change and John Chick, People, Places and Service Transformation Programme Lead. Their starting point was Ms Leid's report and Q's December 2018 email. There were three areas of concern:

    (1) Possible harassment or discrimination on the grounds of race, sex or sexual orientation.
    (2) Possible inappropriate and unprofessional behaviour which could amount as abuse of power and position and / or displaying a lack of integrity and discretion.
    (3) Possible interference with promotion and career opportunities of a member of staff.

49. Following input from Ms Dewsbury, the final TOR were:

    (1) Is there any evidence that the claimant's behaviours, actions or language are, or could be perceived to be harassment or discrimination on the grounds of race (TOR 1) or sexual orientation (TOR 2) or sex (TOR 3)?
    (2) Is there any evidence that the claimant has displayed inappropriate behaviour which could be seen as displaying a lack of integrity and discretion and / or abuse of power and position (TOR 4)?
    (3) Is there any evidence of inappropriate intervention amounting to unprofessional behaviour in collective conciliations (TOR 5)?
    (4) An issue which related to poaching (TOR 6).
    (5) Is there any evidence that the claimant had hindered or in any way interfered with due process or career prospects of A (TOR 7)?

50. The investigation took more than three months. 16 substantive witnesses were interviewed between 11 February and 17 April 2019: A, B, Malcolm Boswell, Dave Cook, E (twice), F, Barry Hamilton, David Prince, Leigh Staples, David Brandes, Sarah Podro, L (twice), Paul Beard, Matt Penfold, Mel McRae and P. Mr Prince was contacted again and four others were contacted for limited fact-checking: Jenny Long; Louise Lenton; Gareth Petty; and Richard Clifton. Some of these witnesses (A, B, Mr Cook, E, Mr Prince, Ms Podro, L and P) had been interviewed by Ms Tonks in 2018. Q was contacted and declined to provide any further information. The claimant was interviewed on 28 February and 28 March.

51. Mrs Nowicki and Mr Chick devised a cipher for the 16 witnesses (A to P) for consistency and ease of reference, and also, in some cases, to preserve anonymity. On advice from Ms Dewsbury, each witness was told that any comments they made would not be attributable to them, to ensure anonymity, without their agreement. As Mrs Nowicki said in oral evidence, this was deemed necessary to reassure hesitant witnesses so that they were able to proceed and give evidence. I was not taken to any evidence which showed that the investigators actually explored whether and why any of the witnesses were reluctant to give evidence. It is notable that the investigation report confirmed that the rationale for anonymity was "the sensitive nature of the enquiry" and not fear of reprisal. Some of the

witnesses waived anonymity, others did not, and some witnesses were content to be named in relation of some of the evidence they gave but not all. The investigators acknowledged the potential difficulty this posed for the claimant:

> "We recognise that the mixed nature of some individuals' evidence i.e. partially attributed and partially not, is challenging for others reading this report and for JW in particular. We are balancing the right of JW to know as much as possible about the case against him and the rights of colleagues who find some of this evidence extremely difficult and sensitive to relate. We believe that we have been able to strike a reasonable balance which meets the needs of JW and respects the wishes of witnesses. Where possible we have had agreement to attribute evidence and we also offer our honest view on integrity of anonymous testimony."

52. Ms Dewsbery wrote to the claimant on 13 February 2019 to confirm that this investigation had commenced. The names of the investigators and the TOR were also provided.

53. The claimant wrote to Ms Clews, now Chief Executive, on 21 February. He stated that he felt that his position was untenable although he did not resign. The claimant complained about what he perceived to be "an all-embracing inquisition into practically every aspect of my character and behaviour at work". He also complained that he had not received the TOR until the investigation had already begun. He enumerated the following alleged process errors in relation to the previous disciplinary and grievances:

    (1) Ms Tonks had been appointed as sole investigator in breach of the Bullying and Harassment Policy.
    (2) His grievance (in relation to the Tonks investigation) had been acknowledged at the third request.
    (3) The respondent had refused to stay the disciplinary process to hear this grievance.
    (4) The respondent had refused his request to record the disciplinary hearing and also to amend the record of this hearing.
    (5) Ms Tonks had not followed Acas' best practice guide on Conducting Investigations. The allegations had not been weighed objectively. The majority of allegations were not put to the claimant and he had seen them for the first time in the report.
    (6) The appeal had not been heard by the Chief Executive as the Bullying and Harassment Policy provides but by a manager at the same level who heard the disciplinary / grievance who was assisted by a manager at the same grade as the claimant.
    (7) The conclusion that the absence of a male investigator would not have made a difference was speculative.
    (8) Ms Sharp had dismissed his allegation that the process was not impartial on grounds which lacked objectivity.
    (9) Almost six months since receiving his disciplinary sanction the respondent had failed to provide any guidance on the conduct which he was required to improve despite three requests, the respondent's agreement on 9 October 2018 that this should be

provided and Ms Sharp's confirmation on 22 November 2018 that HR were looking into this.

54. Ms Clews responded on 27 February 2019 when she agreed to refer the process issues to Mr Mackintosh to identify any learning points. She also agreed that the claimant should have been provided with guidance on improved conduct when he was given his disciplinary warning and she confirmed that she had instructed HR to take this action. This guidance was never provided to the claimant.

55. The claimant was interviewed on 28 February and 28 March 2019. At the second interview the names of the other witnesses were disclosed in relation to four allegations. He raised the issue of 'double-jeopardy'. He explained that this was why he had sent a copy of the Tonks report to Mrs Nowicki. When he emailed the investigators about this on 1 May, Mrs Nowicki replied to assure the claimant that she would raise these concerns with Mr Mackintosh when the report was submitted so that he could address this issue (there is no evidence to show that she took this step). She confirmed that she and Mr Chick had not read the Tonks report.

56. The investigation was completed on 14 May 2019. The claimant sent some additional material in relation to five items of new evidence which had been forwarded to him the day before. I do not find that this material was considered by the investigators despite Mrs Nowicki's evidence to the contrary. Not only did Ms Dewsbury inform the claimant by email on 14 May that this information had not been considered, because it had been sent after the stipulated deadline (it had not), the investigation report made no reference to the claimant's comments. However, this material was considered subsequently by the respondent during the disciplinary process.

57. The investigation found that there was evidence to substantiate TORs 3-5. In relation TOR3, the report cited the following definition of harassment found in the Sue Owen report into Bullying Harassment and Misconduct for the Civil Service:

> "Harassment is unwanted actions or comments that are demeaning and unacceptable to the recipient, it may be related to any personal characteristic of the individual, and maybe persistent or an isolated incident"

and concluded:

> "There is strong and clear evidence that JW's behaviours and actions and language could be considered consistent with the above definition of harassment on the grounds of sex."

58. The report stated that 10 out of 15 female witnesses interviewed gave evidence of the claimant's conduct towards women which ranged from flirtation to "inappropriate comments and behaviour" some of which had been unwanted. Whilst acknowledging that the historic nature of some of these allegations had impacted on the claimant's recall, the investigators also found that the claimant's reliance on having a poor memory was unconvincing and that some of his evidence lacked credibility as he had

obfuscated, rambled and sought to mislead; whereas the complainants were found to have given credible and coherent evidence whose clear recall reflected the impact the incidents had had on them. There were additional factors which the investigators felt were relevant to the claimant's credibility: the claimant had stated during the first interview, on 28 February, that he had been faithful to his wife, which was contrary to what Mrs Nowicki had understood, and when Mr Chick queried this at the second interview, on 28 March, the claimant changed his account; and the claimant agreed that he had lied to L that their friendship would have to end because senior managers had told him his job was at risk and there were rumours that they were having an affair.

59. In relation to TOR3, the report found that the following allegations of harassment were substantiated:

    (1) The claimant had made unacceptable comments to and about women. The claimant's evidence to the contrary was found to lack credibility and to be inconsistent with the findings that four female colleagues (L, E, P and K) had rebuked him, in E's case telling the claimant to "fuck off" on several occasions. The claimant was found to have made comments to L about her appearance and had asked P, in the context of an interview for promotion "Did you do a Basic Instinct?" which had made her feel uncomfortable. The claimant had not responded to this allegation. He had agreed that he commented on the legs of one female colleague to another colleague and had made other comments about the appearance of female colleagues.
    (2) The claimant had sent texts to E and L which they had described as "innuendo, compliments and kisses". E had described the volume of texts as a "barrage" and although she did not feel threatened by them at the time now felt that the claimant was grooming her. These texts had been sent in and outside office hours and one text, the claimant had commented "was that beyond the pale in office hours". E had provided screenshots of eight texts. L had not provided any. The report highlighted three of E's screenshots which included the following content:

> "My weakness, anyway, is my fascination with changeling looks… your face alters so much, from soft, classically beautiful to…well, all sorts of things. But is that you, your mood? Or me, seeing something that others don't? Interesting, at least it is for me. But then again, I'm pretty shallow. Finally, can you please return to a minimum reply time of two days in replying to my texts - if you reply at all? Give them the respect they deserve, for heaven's sake…"
>
> "Oddly enough, I find you rather sweet… Strange really. It reminds [me] of girls at school who would tell Johnny to meet them behind the bicycle sheds if you wanted to see their knickers and you never saw their knickers and they would bend your fingers right back and give you Chinese burns and they would take your dinner money off you and told you not to tell your Mum otherwise they would tell Miss Stiffness that you had touched her breasts. Wasn't fair."

In his oral evidence, the claimant agreed that he had sent E a barrage of texts, which included sexual references, he was romantically interested in E and he hoped to spark a response from her.

(3) The claimant had sent E a photograph of L in a bikini, which L was not concerned about but E was. He had admitted this allegation.

(4) He also sent a photo of his legs to L with a caption to the effect that he was wearing her knickers. The claimant had been unable to recall this and suggested "it would have been a joke". The investigators did not make any findings on what impact this had on L.

(5) He placed a pair of kickers on L's desk before covering them up with an envelope. The claimant had been initially unable to recall this incident but subsequently commented that he returned the item in an envelope to L at her desk. The investigators found that this was potentially embarrassing and demeaning and had made L unhappy.

(6) He had suggested sex bets with E and L, which neither colleague had found offensive at the time and which E now felt was inappropriate. Although he had been unable to recall this, he agreed that he could have done this without "salacious intent".

(7) The claimant had propositioned L during a residential training course. The claimant could not doing recall this. The report noted that L now felt that the claimant's conduct was "creepy" and stated that her evidence had been "clear and confident, albeit uncomfortable for her to recall".

(8) The claimant placed his hand "into" P's thighs to retrieve his mobile phone. The report noted that some of the "identifying context" had been removed at P's request. The investigators found that this was uncomfortable for P and inappropriate. This was one of the five items of new evidence which the claimant had commented on and to which the report made no reference. In this case, the report stated erroneously that the claimant had not provided any comment. In his comments, on which the claimant expanded in submissions which were considered by the dismissing manager, he was unable to recall this incident and queried why P had not passed the ringing phone to him and he was within his rights to pick up the phone "as long as I did nothing improper?"

(9) Although not an allegation of harassment itself but something which they found to be consistent with the claimant's alleged pattern of behaviour, the investigators concluded that new female starters had been warned about the claimant's flirtatious and inappropriate behaviour towards women. This included P who alleged that she had received such a warning and stated that the claimant had been persistent in asking her out for drinks and to the theatre, she had agreed to appease him and because she felt it could otherwise jeopardise her career.

60. Under the heading 'Pattern of behaviour', the report noted that Q, P, E and L were all women who were between 20-30 years younger than the claimant and K, also a woman, was around 15 years younger than him, and concluded that they had:

> "been subject to JW's attentions and to varying degrees and at different times some of those attentions have been unwanted and explicitly rejected."

The report also noted the claimant was a member of the senior leadership team who was in a position of trust and whose role involved mentoring and supporting junior colleagues, and found that the evidence presented was consistent with:

> "someone who fails to keep professional boundaries, does not act in the best interest of colleagues, and who exploits the vulnerability of those at a lower grade."

61. In relation to TORs 3 and 4, the investigators had considered the claimant's objection to using incidents which had taken place outside work and concluded that these were relevant because these had involved relationships with work colleagues and had given rise to concerns in the workplace and, in any event, the majority of incidents investigated had taken place at work.

62. The investigators also found that there was evidence to substantiate the alleged misconduct under TORs 4 and 5 which were dealt with together. The report referred to E's evidence that she now felt that the claimant had "groomed" and "gaslighted" her and she had accepted his coercive, manipulating and threatening behaviour at the time. The investigators found that the claimant had abused his power and position when he had asked E out to the pub for a drink which turned into dinner after she had failed to attend a promotion panel which the claimant had chaired. They accepted E's evidence that whilst she did not question this at the time, she had agreed to the drink because she felt "she ought to". The claimant had not recalled this incident initially but subsequently commented that they had gone to the pub to discuss the panel and had a drink and a meal there.

63. The report also stated that some of the witnesses involved had reported that the claimant's conduct had jeopardised their ability to work with him in the future. It did not refer to them by name or cipher. The claimant says this related to E and B.

<u>Disciplinary process and dismissal</u>

64. Mr Mackintosh determined that there was a disciplinary case to answer. I find that he did so without consideration of the double-jeopardy issue. The investigators had not considered this issue because of the need to maintain a firewall between the two investigations and they had not referred this to Mr Macintosh, and nor was there any evidence that he considered this potential issue on his own initiative. This meant that the risk that the claimant would be disciplined in relation to the same allegations and evidence was not considered at the stage when the respondent decided to instigate this second disciplinary process. Mr Macintosh appointed James Vincent, Director, Digital Data and Technology to chair this process. Mr Vincent had not received training as required by paragraph 2.2 of the Disciplinary Policy.

65. Mr Mackintosh emailed the claimant on 23 May 2019 attaching a letter, dated 20 May 2019, confirming that there was a disciplinary case to answer and that he had been suspended, with immediate effect, "in view of the circumstances of your case and the seriousness of the alleged offences". The investigation report was also attached. This report had two sets of appendices. The Leid factfinding report was listed in the first set but was omitted. The second set of appendices were also omitted. These included an appendix of witness statements which provided a cipher key and the notes of the investigatory meetings and telephone conversations. The claimant had therefore been provided with an investigation report which referred to 16 witnesses identified as A to P. The cipher key which he had not been given identified ten of these witnesses by name. Without this omitted material, the claimant had to guess the identities of the anonymised witnesses, he understood that there was a greater number of witnesses than was the case and had to rely on the excerpts of the witness evidence in the report instead of the complete notes of the investigation meetings. The claimant told the tribunal that he had been able to identify around 80% of the witnesses. Although Mrs Nowicki's evidence was that all salient points were taken from the interview notes and used in the report, and I find this to be the case in relation to P's evidence but not in relation to L's evidence (an issue to which I shall return below), but she agreed that it would have been fairer for the claimant to have been provided with the interview notes in order to defend himself. As the report had acknowledged, some of the incidents under investigation were historic and this was likely to impact on the claimant's ability to recall them in detail.

66. Mr Vincent wrote to the claimant later that month to invite him to a disciplinary hearing to consider the following alleged conduct:

    (1) Sexual harassment
    (2) An abuse of power
    (3) A lack of integrity
    (4) Unprofessional behaviour
    (5) Inappropriate interventions in collective conciliations

    These headings aligned with the summary of the investigation report: (1) related to TOR3, (2) and (3) to TOR4, and (4) and (5) to TOR5. Mr Vincent confirmed that he would explain the allegations of misconduct against the claimant and the evidence that had been gathered. The claimant was reminded of his right to bring a companion and also that dismissal was a potential outcome.

67. In related correspondence on 6 June, Mr Vincent explained that the investigation had been completed and his role was to chair the disciplinary hearing, and he told the claimant that he was able to provide witness statements and to call witnesses. In his reply, the claimant asked to call E on the basis that she had incited Q to send the December 2019 email. Having sought advice from Ms Dewsbury, Mr Vincent refused this request on the basis that E did not appear to be relevant and in related correspondence, he told the claimant that he would need to provide a compelling reason to cross-examine any witnesses because it was

necessary to balance his right to ask questions with the rights of witnesses not to be put in distressing situations.

68. The claimant submitted written representations on 30 June which included annotated excerpts of the investigation report. The disciplinary hearing took place the next day, on 1 July, having been rescheduled twice. It was chaired by Mr Vincent who was supported by Ms Dewsbury. The claimant attended together with his union representative, Denis Calnan. The hearing took around three hours with adjournments. Afterwards, the claimant forwarded his comments in relation to the eight texts which E had provided to the investigators.

69. At the start of the hearing, Mr Calnan raised the double-jeopardy issue in relation to the "sexual harassment" allegations. He complained that these related to the same time period and allegations which had been dealt with by the Tonks investigation and had resulted in a final written warning which remained live. Although he acknowledged the respondent's prerogative to conduct an investigation, Mr Calnan queried whether the sanction of dismissal would be justified, regardless of the merits of the investigation outcome. The claimant complained that he had not known who the witnesses were in the first investigation, although he had been able to identify some of the witnesses who had given evidence in both investigations, and he asserted that P had been hostile towards him in both, and the same evidence was being used twice. Mr Vincent stated that he was not able to comment on the first investigation. He was also adamant that he would not agree to de-anonymise the witnesses. In an email to Ms Dewsbury on 3 July, the claimant complained that this meant he had been unable to "relate what actually happened" as it would mean that the name of a witness (he referred to P). During the hearing, the claimant questioned whether any new evidence, even that which "you find totally shocking" should make any difference because he had already been given a warning for inappropriate behaviour found to have taken place over the last five years, although he later conceded that the first process did not give him blanket cover in relation to new evidence.

70. I accept Mr Vincent's evidence that he considered the investigation report and the claimant's written submissions as well as the representations made by him at the hearing. Like the claimant, he had not been provided with the interview records. He did not review the Leid factfinding report or the Tonks investigation report. I was taken to a version of the Nowicki / Chick report which had been marked up by Mr Vincent before the hearing in which, under the TOR section, he had written "no relevant evidence" in relation TORs 1, 2, 6 and 7. As the record of the hearing shows, Mr Vincent focussed on the allegations of harassment under TOR3.

    (1) The claimant did not say that the investigators lacked impartiality but he did complain that they had relied on his failure to recall and comment on historic allegations as evasiveness and that he lacked credibility.
    (2) Under TOR3 Mr Vincent used the label of sexual harassment and harassment on the grounds of sex interchangeably and he and the claimant both used the same label of sexual harassment during the disciplinary hearing. I find that the claimant understood what the

allegations were and also that regardless of the label used, knew that Mr Vincent was relying on the definition of harassment set out in the investigation report.

(3) In fact, the claimant complained that this definition of harassment was different from that used in the Tonks investigation. Mr Vincent replied that the definition was "quite a broad church". I do not find that this imported a new definition of harassment as the claimant contends but reflected Mr Vincent's view that this was not a narrow concept to be applied formalistically. I accept Mr Vincent's oral evidence that he felt there was no material difference between the definition of harassment which the second investigation had used and the definition contained in the Bullying and Harassment Policy: the key word was 'unwanted' for conduct which was related to a protected characteristic and although the policy used the same language for purpose or effect as the statutory wording its guidance used the same language of "demeaning and unacceptable" as the Owen definition used by the second investigation. The claimant agreed that he did not need to be told what sexual harassment was and was capable of drafting guidance on this subject.

(4) The claimant referred to two of the witnesses (i.e. E and L) with whom he had had a close friendship and he queried whether comments made in this context and outside work were within scope of the investigation. He said that E had reassessed his conduct from friendship to "gaslighting". In relation to the eight texts which E had provided, the claimant noted that six had been sent over the weekend and did not impinge on work. They had been sent to E's work mobile because the claimant did not have her personal number. The claimant agreed that his references to "knickers" and "breasts" was not appropriate.

(5) The claimant agreed that he had sent E a photo of L in her bikini. He had also sent L a photo of himself in his legs on the beach when he had been wearing his own swimming trunks with the caption about wearing L's knickers as a joke. He recalled returning L's knickers to her at work in an open plan office and although he maintained that he had put them in an envelope he speculated whether he may have shown them to her by opening the flap of the envelope. He said that neither of them wanted colleagues to know that they had been on holiday together so he would not have deliberately drawn this to their attention. The claimant said that had he known this would be an issue for L he would have returned this item to her outside of work. He therefore acknowledged the potential sensitivity around returning L's knickers to her at work. In his written representations, he agreed that L's evidence "is fair in many respects" but that her memory was "hazy in some areas".

(6) The claimant agreed that it was likely that he suggested sex bets with E and L as they had alleged, although he was unable to recall the specific details and whether this took place at work. He said that they would have treated this as a joke at the time although he noted that E had since reassessed this.

(7) In relation to the allegation that he propositioned L during a residential course, the claimant stated "That is interesting, I cannot believe that." He noted that L had not mentioned that Mr Penfold had also been with them prior to the alleged incident.

(8) In relation to the allegation that he had given interview feedback to L in a pub, the claimant said that L's recollection was mistaken as this was a mock panel interview and not feedback and this took place in a local pub because there was limited space in the office, L offered to buy him supper because he had been helpful. He did not deny that this meeting took place nor that he had initiated it.

(9) The claimant said that he had been able to identify the anonymous witnesses. In relation to P, the claimant said that he would not contradict her evidence even when he had no recollection of the events she had alleged. He was able to recall with some specificity the circumstances of the car journey when P had alleged he retrieved his phone from between her thighs, notwithstanding the omission of this context by the investigators. He was unable to recall the incident itself and queried why, on P's account, she had left the phone ringing on her lap. In his written representations, the claimant agreed that "all of P's evidence seems to be credible, but there are nuances to some of it" and he speculated that the phone was on P's lap and "I don't think I would have "put my hand into her thighs" as she states".

(10) In relation to the "Basic Instinct" comment which was not discussed at the hearing, the claimant accepted in his written representations that whilst unable to recall this, he could not refute this allegation with confidence and the film reference rang true, he had misjudged his joke and its impact on P. In his oral evidence, he said that he had not watched this film until after his appeal and agreed that the effect of this comment was to suggest that P had shown her vagina to the interviewer and he also agreed that this was demeaning and unacceptable behaviour which violated P's dignity and did not meet the requirement for him to set an example.

(11) The claimant agreed that he had a flirtatious manner but did not agree that this was the same as sexual harassment. He also agreed that he preferred the company of women to men but was friendly and outgoing towards colleagues of both these sexes.

(12) He did not dispute that he had made the comment that another female colleague "had a nice pair of pins". He agreed that it was not acceptable for professional colleagues to comment on each other's appearance although he said that this was commonplace within the organisation.

(13) Although his comments in relation to the "Basic Instinct" allegation came closest to this, the claimant expressed no remorse in relation to any of the allegations which he admitted or agreed were likely to have occurred. He also said that "Things have changed since the MeToo movement, I don't like it but I can understand it. It seems that the rules have changed".

71. Mr Vincent concluded that the claimant had not denied many of the allegations of harassment, had admitted the facts where he was able to recall them and showed no remorse. As set out above: the claimant had admitted that he had sent inappropriate comments in texts to E, he had sent a photo of his bottom half in swimming trunks to L, he had sent E a photo of L in her bikini, it was likely he had suggested sex bets with E and L, and also that he made the Basic Instinct comment to P, and whilst he was unable to recall retrieving his phone from between P's legs he did not

dispute the veracity of the evidence P had given generally. He had also admitted that he had a flirtatious manner and preferred the company of women. I therefore accept Mr Vincent's evidence that having reviewed the investigation report and listened to what the claimant had to say, he concluded that the claimant's conduct towards more junior female colleagues had been inappropriate and amounted to harassment. I also accept his evidence that he found the claimant had exploited his position of seniority in targeting junior, female colleagues for potential sexual relationships and presented an ongoing risk to such women in the organisation. He had therefore concluded that the claimant had committed gross misconduct.

72. The claimant emailed Ms Dewsbury and Mr Vincent on 2 July when he questioned the use of anonymity in relation to five male colleagues who gave evidence on flirting and in relation to E, L and P, although he noted "I can, I think, work out the identities of the anonymous witnesses and put their evidence in a wider context". He also queried whether he should have been provided with the factfinding investigation. Mr Vincent replied that the claimant had been given a month to ask questions and provide submissions and it was not appropriate at this stage to engage in further discussion. The claimant also wrote to Ms Clews on 7 July to outline some concerns he had about his treatment which he anticipated were likely to feature in an appeal, should one be necessary, but which he asked to be treated as a formal grievance. Ms Clews replied that she would decide how to address these issues once the disciplinary outcome had been confirmed. She was also cognisant that she would have conduct of the appeal process, if one took place. She subsequently wrote to the claimant on 15 July to suggest that his complaints were dealt with at a separate grievance hearing on the same date as an appeal hearing, if the claimant submitted one.

73. Because of the double-jeopardy issue which the claimant and his representative had raised, Mrs Nowicki and / or Mr Chick were asked to review the Tonks investigation report and witness evidence to consider the degree of any overlap between the two investigations. They were also asked to obtain further evidence from Mr Penfold in relation to the allegation that the claimant had propositioned L. Mrs Nowicki agreed to do this. She concluded, in a report, dated 4 July, that although there was some overlap between the respective TORs, there was limited evidential overlap.

    (1) There were eight witnesses in common to both investigations. Evidence in relation to the claimant's attitude towards women was provided to both investigations although Mrs Nowicki concluded that such evidence was "expressed more clearly and by more witnesses in the second investigation". Similarly, whilst there was evidence in both investigations in relation to a warning about the claimant's conduct towards new female colleagues, this was hearsay evidence in the first investigation whilst the second one included both direct and hearsay evidence.
    (2) In respect of the witnesses in common: there was only limited overlap in the evidence given by Mr Cook and Mr Prince; none of the substantive evidence which E and L gave to the second

investigation had been disclosed to the first investigation; substantive evidence given by P to the first investigation was not used because she had withdrawn her consent and was given in greater detail to the second investigation.

74. In relation to P, I find that whilst the Tonks investigations made reference to more general evidence given by P about the claimant's behaviour it did not use any of the specific allegations made by this witness including those which featured in the second investigation, presumably on the basis that P withdrew her consent.

75. When E had been interviewed by Ms Tonks she said she could not recall any inappropriate behaviour from the claimant. I accepted Mrs Nowicki's evidence that E and other witnesses she had interviewed had said that they had lacked confidence in the Tonks investigation. Ms Tonks was external to the organisation. There had been a lack of trust and rapport. Mrs Nowicki's assessment was that the Tonks investigation was seen as a fishing expedition. This is consistent with the evidence P gave to the second investigation that she had misgivings about the Tonks investigation. Mrs Nowicki felt that she had built a rapport with witnesses who had been able to disclose the evidence they gave. These women were nervous, shaky and peeled back the layers of their skin which was evidently difficult for them and not done lightly but with weighty reflection and a not inconsiderable degree of emotion. I found this account to be cogent and compelling and Mrs Nowicki's evidence to be credible and, in the main, reliable. However, whilst Mrs Nowicki and Mr Chick found E and other witnesses to be credible in relation to the evidence they had given to their investigation, they had not explored the extent of any inconsistencies in the evidence given to both investigations or reassessed their credibility in light of this. Nor was this considered by Mr Vincent: he had not reviewed the two sets of interview notes and, as I have found, he had already made up his mind that the claimant had committed gross misconduct.

76. Although the claimant agreed, when giving oral evidence, that there was not a significant overlap between the two investigations (on the basis that the Tonks investigation lacked any substantive evidence), he did not know this at the time. Nor was the claimant, absent disclosure of this witness material and because of the anonymisation or part-anonymisation of the complainants in a position to substantiate his complaint of double-jeopardy i.e. that the same allegation of harassment covering the same five-year period was investigated by both investigations by reference to some of the same evidence.

77. Mr Vincent wrote to the claimant on 9 July 2019 to confirm his decision to dismiss him on the grounds of gross misconduct with effect on 10 July. He also confirmed that he had commissioned a review to identify the extent of any overlap between the two investigations and was satisfied that there was none. This was in error, as Mr Vincent conceded in oral evidence, but was mitigated by the inclusion of Mrs Nowicki's findings that there was limited evidential overlap. Mr Vincent also confirmed that he had considered TORs 3-5 only and had concluded, in relation to TOR5 that there was insufficient evidence to take formal action. I accept his evidence that this played no part in his decision: he had no professional interest in

conciliation and agreed that there was a lack of clarity in relation to the practice of conciliation. He had concluded that TORs 3 and 4 were well-founded:

> "I have concluded that there is sufficient evidence of inappropriate behaviours which displayed a lack of integrity and discretion and / or an abuse of power and position. In addition your behaviours, actions and / or language amounted to harassment on the grounds of sex."

Mr Vincent explained that he had treated these two terms of reference as one because of the claimant's seniority and the requirement for him to act as a role model for the respondent's core values and the Civil Service Code. He noted that the claimant had admitted to "behaviours that are unacceptable" and he did not accept the claimant's assertion in mitigation that others had been guilty of similar conduct. This letter also included the further evidence obtained from Mr Penfold in relation to the allegation that the claimant had propositioned L which Mr Vincent confirmed had not made any material difference.

78. This letter failed to set out which of the specific allegations Mr Vincent had relied on to dismiss the claimant. His explanation for this omission, which I accept, was that there had not been many factual disputes to resolve: they had been either admitted or not properly contested. When the claimant complained about this lack of detail, Ms Clews asked Mr Vincent to provide further information which was forwarded to the claimant on 7 August 2019. It is plain from these documents that Mr Vincent took the decision to dismiss the claimant based on his conclusion that the claimant's conduct which the second investigation had found constituted gross misconduct and he took no account of the Tonks investigation, which Mr Vincent had not read, nor the extant final written warning. Mr Vincent referred to some of the allegations which the claimant had either admitted or not denied (he was flirtatious, he had commented on another colleague's appearance and made the "Basic Instinct" comment) and a non-exhaustive list of other allegations which the claimant had denied but which the investigation had upheld (he had: sent a photo of his legs with the caption about wearing a colleague's knickers, placed a pair of knickers on a colleague's desk, suggested sex bets, been told to "fuck off" in response to unacceptable comments and invited a colleague to a drink in the context of a promotion panel). I find that he relied on the findings of the investigation report which related to TORs 3 and 4, in their totality.

<u>The appeal</u>

79. The claimant appealed against his dismissal on 24 July 2019 when he noted the respondent's failure to provide him with guidance in relation to his behaviour, and, in mitigation, referred to his length of service and success as a conciliator. He submitted additional documents to support his appeal on 12 August. It is clear from these documents that the claimant understood the basis for the decision to dismiss him.

80. The appeal was heard by Ms Clews on 14 August 2019 who was supported by Nadine Smith, HR Advisor, when the claimant was accompanied by Mr Calnan. Ms Clews confirmed her decision to dismiss this appeal by letter dated 16 September 2019. This was a review of Mr

Vincent's decision and not a rehearing of the disciplinary case. Like the claimant and Mr Vincent, Ms Clews was not provided with the witness material. Between these dates, the claimant received the respondent's note of the appeal hearing which he amended and returned and these were reviewed by Ms Clews. The following grounds of appeal (which included the complaints set out in the claimant's email of 7 July) were considered:

(1) Ms Clews' status as appeal chair. Prior to this hearing the claimant raised this issue because he understood that Ms Clews had been involved in the decision which led to the disciplinary investigation and had suggested Brenda Barber, then Chair, as an alternative. Ms Clews had responded to clarify that she had taken no part in this decision to instigate the second disciplinary process. She had only been involved in commissioning the factfinding. Nor did Ms Clews consider that her involvement in hearing Q's grievance against the claimant meant that she could not deal with the claimant's appeal. In her oral evidence, she noted that Mr Barber had given evidence to the Tonks investigation.

(2) The respondent had failed to deal appropriately with Q's December 2018 email which the claimant described as "libellous and malicious" and had validated the accusation that he was a sexual predator. The claimant said that the respondent should have deleted this email instead of allowing it to circulate. Ms Clews disagreed. This email contained allegations which could not be ignored. This had not impacted adversely on the investigation process.

(3) The anonymisation of some of the witness evidence was in contravention of the Conducting Workplace Investigations guidance and had impaired the claimant's ability to defend himself. It had restricted his ability to respond to the allegations. Although the identities of the witnesses were "obvious", Mr Vincent had not allowed the claimant to provide rebuttal evidence as this would have had the effect of de-anonymising the witnesses. Ms Clews disagreed. She concluded that giving the witnesses the option of anonymity was justified in the context of this harassment investigation and that whilst this could have given the impression that there were more witnesses and this impacted on the claimant's ability to recognise the evidence it did not impact significantly on the claimant's ability to defend himself. In her oral evidence, Ms Clews said the respondent took a position on anonymity which was more supportive towards witnesses than the guidance suggested and this was justified in the circumstances to protect the witnesses who would be sharing their stories. She also conceded that it was possible that anonymity made it harder for the claimant to substantiate the double-jeopardy issue.

(4) The claimant had not been provided with the factfinding report. Ms Clews confirmed, as I have found, that Mr Vincent did not consider this report and concluded that it had not impacted on the decision he made or impaired the claimant's ability to defend himself.

(5) The investigators had failed to examine the motivation of two of the witnesses in particular (i.e. E and L) who had been close friends of his at the time of the alleged incidents of harassment and who had

not provided this evidence to the Tonks investigation. The claimant asserted that E had been motivated by malice which had resulted from a collective conciliation case and this animus had been exacerbated by Q's December 2018 email. Ms Clews found that the investigators had addressed the issue of credibility and were cognisant that E had been exercised by the collective case and there was no basis to overturn their findings or Mr Vincent's reliance on the same. She acknowledged that E's view of the claimant's conduct had become more negative and noted "this is not uncommon with victims of sexual harassment". She concluded that even had E's evidence been disregarded there remained significant evidence to uphold the allegations although she did not identify what this was. In her oral evidence, Ms Clews agreed that the issue of witness motivation should have been considered in relation to witnesses who gave different evidence to the second investigation and she conceded that the failure to consider any inconsistencies at an early stage presented a risk that the second investigation failed to explore the issue of witness motivation and therefore credibility. This was a failure of oversight.

(6) The investigation report revealed a bias against the claimant which was demonstrated by the comments about his credibility; and also on the grounds of his age. The claimant also complained that the investigators had not given him credit for the admissions he had made and questioned his credibility when he had been unable to recall some of the allegations, and in relation to the allegation that he had taken more women than men with him to collective conciliation meetings, Mrs Nowicki had challenged him tendentiously. Notably, the claimant admitted for the first time in unambiguous terms the sex bet and "Basic Instinct" allegations, although he contended erroneously that he had "confessed" to Mr Vincent about the latter. In relation to age, Ms Clews concluded that it was reasonable for the report to note the variance in age between the claimant and several of the complainants because this indicated a pattern of behaviour relevant to considerations of "coercion or inappropriate behaviour". She found that the claimant's actions were more likely to have impacted adversely on younger colleagues because of his seniority. Ms Clews had addressed the credibility issue under ground (5) and she found that the claimant had changed his evidence or recalled matters previously forgotten.

(7) The double-jeopardy issue. Whilst Ms Clews agreed that both investigations had looked at broadly the same conduct, she was satisfied that the second investigation was focused on the allegations raised in Q's December 2018 email and did not look at the same issues as the first investigation; new evidence of wrongdoing had been raised in the second investigation (the claimant agreed that there was some new evidence). Mr Vincent had not read the first investigation. Ms Clews had also considered Mrs Nowicki's review.

(8) The complete version of the Tonks investigation report had not been provided to the claimant. Ms Clews concluded that this was not relevant.

(9) The claimant's operational expertise had not been considered in mitigation. Ms Clews found that the claimant's competence did not mitigate his unacceptable behaviour.

(10) The disciplinary sanction in 2018 was not based on specific evidence but on the generic findings set out in the Tonks report. Ms Clews concluded that this was not within scope of the appeal.

(11) Mr Vincent had placed undue emphasis on the claimant's relationships with colleagues outside of work. Ms Clews found that the majority of issues on which Mr Vincent had relied were work-related. It was reasonable for Mr Vincent to examine the claimant's conduct in and outside of work. As Ms Clews said in evidence, this conduct involved work-based relationships and had the capacity to impact on these relationships.

(12) The claimant's suspension had not been reviewed. Ms Clews was satisfied that this had been reasonable in the circumstances.

81. Having already noted that he had not been provided with guidance on the expected improvements to his behaviour, the claimant queried whether any steps had been taken to implement Ms Tonks' recommendations in relation to the wider workplace culture. Ms Clews explained that the Board had discussed recommendations concerning raising awareness to staff about how to make complaints of sexual harassment. She cited MeToo. Echoing comments he made at the disciplinary hearing, the claimant amended the record of the appeal hearing with the correction or clarification that the "MeToo campaign had lowered the bar for sexual harassment". At the end of the hearing, when asked what outcome he sought, the claimant acknowledged that whilst he loved his job, reinstatement was not a possibility because of the time it had taken to conduct the investigation and subsequent disciplinary process and that it would be difficult to work with some of the individuals involved, and he suggested that the "penalty" of gross misconduct could be rescinded and amended to some other substantial reason ("SOSR").

Conclusions

Did the respondent hold a genuine belief that the claimant had committed the misconduct in question?

82. The claimant agreed that Mr Vincent held a genuine belief that his actions amounted to gross misconduct. Although the claimant did not accept that Ms Clews also held such a genuine belief, this was not required in the circumstances in which she was reviewing Mr Vincent's decision and was not rehearing the case. For completeness, I find that Mr Vincent and Ms Clews held a genuine belief that the claimant's actions constituted gross misconduct because the focus of Mr Vincent's decision and therefore Ms Clews' review was TORs 3 and 4 which were about the claimant's alleged misconduct which the investigation found were substantiated and which were relied on by Mr Vincent to dismiss the claimant. This conduct was apt to be treated as gross misconduct under the Disciplinary Policy.

Did the respondent have reasonable grounds for holding that belief following a reasonable investigation and fair procedure?

83. I have found that in dismissing the claimant, Mr Vincent relied on the findings of the Nowicki / Chick investigation and considered the written and oral representations made by or on behalf of the claimant before and during the disciplinary hearing. He concluded that the claimant's conduct amounted to both harassment on the grounds of sex (TOR3) and a lack of integrity and discretion and an abuse of power or position (TOR4) and constituted gross misconduct. At appeal, Ms Clews found that the Mr Vincent's decision was sound and the process which culminated in his decision fair.

84. In relation to the double-jeopardy issue, the fact that the respondent had already investigated the same broad allegation of harassment towards more junior women in relation to the same period with some of the same witnesses, including E, L and P did not, as the claimant conceded, provide blanket cover for any new evidence that emerged. Not only was there limited evidential overlap between the two investigations but there was new evidence which was capable of amounting to harassment as well as a breach of integrity / discretion and abuse of power: it is not in dispute that E and L provided new evidence to the second investigation and P provided evidence which was not used in the first investigation. This new evidence warranted investigation: as the claimant also conceded in part, not only did the respondent have a duty to protect its staff from such conduct, it was duty-bound to investigate when it was on notice of this potential conduct. I therefore find that the decision to instigate a second investigation in relation to the allegations of harassment was within the band of reasonable responses.

85. However, for the following reasons, I find that the dismissal process conducted by the respondent meant that the claimant was unable to fully interrogate and challenge the evidence which the respondent relied on to dismiss him and that his dismissal was unfair notwithstanding that the respondent held a genuine belief that he was culpable of gross misconduct.

86. Firstly, I find that the following deficiencies made the process unfair in the circumstances in which there was an overlap or potential overlap between the two investigations and a risk that the claimant would be disciplined twice in relation to the same evidence:

    (1) The respondent failed to evaluate the risk that the claimant would be disciplined twice in relation to the same evidence before it instituted the second disciplinary process. Although Mrs Nowicki conducted this exercise and found that there was limited evidential overlap she did so after a decision had been taken by Mr Macintosh that there was a disciplinary case to answer and after Mr Vincent had considered the investigation report and the claimant's representations, and concluded that TORs 3 and 4 were well-founded.
    (2) A further and related deficiency was that neither Mrs Nowicki nor Mr Vincent gave consideration to the extent to which any of the

witnesses, particularly E, gave divergent or contradictory evidence to the two investigations when they assessed credibility. Whilst Mrs Nowicki and Mr Chick found that the complainants gave credible evidence to the second investigation for the reasons set out in their investigation report, they did not consider the issue of credibility with reference to the evidence the same witnesses gave to both investigations. Nor did Mrs Nowicki's review remediate this oversight. As Ms Clews conceded, this meant that there was a risk that the issue of credibility and motivation was not fully considered by the respondent at the investigation stage nor was this fully explored at the disciplinary stage.

(3) Nor was the claimant able to interrogate this issue fully. He was not in a position to substantiate his challenge to the credibility / motivation of the witnesses, particularly E, because he had not been provided with the evidence which the witnesses gave to both investigations and, as Mr Vincent made very clear, the respondent would not entertain further discussion in relation to the witnesses because of the need to maintain their anonymity (notwithstanding that in E's case, her identity had been revealed via the texts she had provided to the investigation). In his evidence, the claimant highlighted three areas in which he disputed the veracity of E's evidence: that she felt he had groomed her and her reactions in relation to being sent a photo of L in a bikini and the sex bet.

(4) The appeal process did not remediate these defects.

(5) In relation to the appeal, I do not find that Ms Clews was independent because she had overseen Q's grievance in 2018, adopted the findings of the Tonks investigation and commissioned OD and HR to consider disciplinary action against the claimant. Unlike Mr Vincent, she was therefore cognisant of both investigations and their findings. Whilst there was limited evidential overlap, there was a risk that the findings of the Tonks investigation that the claimant had sexually harassed younger female colleagues informed Ms Clews review of Mr Vincent's decision which related in large part to the same headline allegation albeit in relation to different complainants. It is relevant that the respondent had the option of appointing Mr Barber to conduct the appeal. Although Mr Barber gave evidence to the Tonks investigation his involvement was very limited and he had no involvement in the second investigation which stemmed from the factfinding commissioned by Ms Clews and his independence to hear the claimant's appeal was not compromised.

87. Secondly, I find that the respondent's treatment of the witness evidence was unreasonable in the circumstances.

(1) The respondent anonymised the witness evidence relating to historic allegations which meant that the claimant had to guess who the witnesses were and as the investigators found this was likely to have impacted on his ability to recall the events in question.

(2) Further, the absence of a cipher code also made it harder for the claimant to identify the witnesses; as did the decision to cut and paste excerpts from the witness evidence instead of providing the claimant with the witness material.

(3) In relation to the phone allegation, contextual information had been removed to protect P's identity.

(4) A related issue is that the use of excerpts taken from the witness statements deprived the claimant of the ability to challenge evidence, which the respondent relied on, by reference to the context in which it had been given. For example, had the claimant been provided with the witness material he would have seen that E first used the words "innuendo, compliments and kisses" in relation to the impugned texts he sent her and this description was not volunteered by L in relation to the same issue when she was interviewed on a later date but was one which Mrs Nowicki suggested.

(5) The need to maintain anonymity meant that the claimant was at a disadvantage because he was unable to offer rebuttal or contextual evidence in relation to individual witnesses.

(6) The respondent was required to strike a balance between its duty to investigate these serious allegations of misconduct and abuse of power, the claimant's right to a fair process and the complainants' right to protection from retaliation. The steps taken by the respondent in relation to anonymity went beyond its own internal and external policies and guidance, and as Ms Clews conceded were weighted more towards the complainants than the Conducting Workplace guidance provided for. It is relevant that the respondent started from the presumption that the evidence would be anonymised instead of exploring whether and why any of the witnesses were reluctant to give evidence; that none of the witnesses had expressed a fear of reprisal if their identities were revealed to the claimant; and that for some of the witnesses only part of their evidence was anonymised.

(7) The investigators relied on the claimant's delayed or partial recall of events as a factor which undermined his credibility but failed to make clear what weight, if any, they had given to the potential difficulties they acknowledged the claimant faced in recollecting and addressing historic and anonymised allegations.

88. Thirdly, for the reasons set out above, I also find that the respondent failed unreasonably to comply with the following relevant provisions of the ACAS Code of Practice on Disciplinary and Grievance Procedures: the anonymisation of witness evidence and the failure to disclose witness statements to the claimant contravened paragraphs 9 and 12; and Ms Clews' involvement as appeal officer was in contravention of paragraph 27 of the Code.

89. Fourthly, I also take into account the fact that the respondent is responsible for the provision of codes of practice and guidance on workplace procedures and also on advising the public on their application and that in this case, the respondent's senior employees, including its chief executive, had conduct of the disciplinary and appeal process. As the respondent is well-placed to understand, the importance of written policies and guidance is that they set norms and expectations, and codify the scope and application of rules and procedures in the workplace. Because of the respondent's mandate and functions, it is expected to follow its own internal and external policies, codes of practice and guidance or to have

reasonable grounds for departing from them. As I have found, it failed to show this.

90. For these reasons I do not find that the claimant's dismissal was within the band of reasonable responses. His dismissal was therefore unfair.

What adjustment should be made, if any, to the compensatory award to reflect the possibility that the claimant would still have been fairly dismissed?

91. However, I find that the claimant would have been fairly dismissed on the same date had the respondent conducted a fair process so that no compensatory award shall be made.

(1) I have found that the respondent held a genuine belief that the claimant was culpable of gross misconduct.

(2) Had the respondent given consideration to the double-jeopardy issue and commissioned Mrs Nowicki to conduct her review at an earlier stage then it is likely that the respondent would have found that there was a disciplinary case to answer because there was limited evidential overlap between the two investigations and the second investigation found new evidence which was capable of amounting to gross misconduct.

(3) Had the respondent provided the claimant with de-anonymised interview records from both investigations so that he would have been in a position to interrogate fully the credibility and motivation of the witnesses, particularly in relation to E, and had the claimant been permitted to question E directly or indirectly in relation to her evidence, so that this issue would have been fully explored by the respondent, it is likely that the respondent would still have concluded that E's evidence was credible. I have accepted Mrs Nowicki's evidence that some of the complainants common to both investigations were suspicious of the Tonks investigation, that Mrs Nowicki was able to build rapport with the same complainants and that she found them to be credible. It is also relevant that E was not the only complainant and the respondent was entitled to consider the overall pattern of conduct which the evidence revealed; that the claimant accepted many of the allegations of misconduct although he refuted any intent to harass and also that his conduct had that effect on the complainants; and also that he told the respondent that he accepted the veracity of P's evidence and L's evidence was "fair" albeit "hazy in some areas". It is therefore likely that the respondent would still have concluded that E and L had found the claimant's behaviour unwanted, inappropriate and demeaning even though they had not originally complained about them or viewed this treatment in this way.

(4) It was evident that the de-contextualisation of P's phone allegation did not ultimately impair the claimant's ability to recall and address this allegation. He was able to identify who P was and to recall that the alleged incident was said to have taken place in his car. The claimant agreed that de-anonymising this allegation would have made no difference.

(5) Had the claimant been provided with the witness evidence in unexpurgated form it is likely that his recall in relation to some of the allegations would have been improved. However, I find it is unlikely that this would have had any material impact on the findings of the investigation report that there was evidence to substantiate TORs 3 and 4. In relation to the claimant's credibility, I find it relevant that the claimant amended his evidence during the investigation in relation to his fidelity during his marriage, he agreed that he had lied to L about the reason why their friendship had to end, he admitted to the "Basic Instinct" and sex bet allegations only once he had been dismissed, and he agreed that many of his alleged behaviours had taken place.

(6) The respondent would have been required to determine whether on the balance of probabilities those allegations which were in dispute took place and also whether the impugned conduct which the claimant either admitted or it had upheld was unwanted, unacceptable and demeaning and also demonstrated a lack of integrity and discretion, and abuse of power. I find that that it is likely that Mr Vincent would have arrived at the same conclusion and sanction he did in relation to the claimant's culpability, for the reasons given above in this paragraph.

(7) The claimant's actions were apt to be treated as gross misconduct for which the sanction of dismissal was warranted. It is relevant that the claimant was in a senior leadership role and a position of trust as well as authority. I have found that the claimant expressed no remorse in relation to those allegations that he admitted or did not deny. It is also relevant that the claimant expressed the view at both dismissal and appeal hearings that the MeToo movement had "lowered the bar" for what a complainant was required to substantiate harassment.

(8) For these reasons, I also find that had the respondent appointed an independent appeal chair, the claimant would have been dismissed by reason of gross misconduct.

Contributory conduct

92. I also find that justice would be served by reducing any basic and compensatory award by 100% by reference to the claimant's conduct. I am satisfied that the claimant's conduct was culpable and that it was this conduct entirely which caused his dismissal.

(1) I find that the claimant's conduct which the respondent relied on to dismiss him was capable of amounting to harassment on the grounds of sex as defined by the Bullying and Harassment Policy and the Owen definition and a lack of integrity and discretion and abuse of power. Some of this conduct was also capable of amounting to sexual harassment under the terms of the EQA in that it was unwanted conduct of a sexual nature as distinct from conduct which was related to the protected characteristic of sex.

(2) The claimant admitted to the following conduct: he made the "Basic Instinct" comment to P; he sent inappropriate texts to E; he suggested sex bets with E and L; he sent E a photo of L in a bikini; he sent a photo of his bottom half in swimming trunks to L with a

caption referencing her knickers; he invited E to the pub in the context of a promotion panel; he was flirtatious; he had commented on the physical appearance of female colleagues.

(3) In relation to the conduct which the claimant did not admit, I find that it is likely that he also: reached into P's thighs to retrieve his phone whilst driving; invited L to come back to his hotel room during the residential course; returned L's knickers to her ostentatiously. The claimant agreed in oral evidence that P and L were not dishonest; he was unable to recall the first two of these allegations nor deny them and his explanation was that he lacked sexual intent; in relation to the third allegation, the claimant conceded, at worst, that he may have shown L the content of the envelope in which he says he returned the knickers and I find it more likely that L was able to recall this event more clearly then the claimant; I also find that this conduct is consistent with the other behaviour which the claimant agreed he did or which he denied but which the respondent upheld and which I find were likely to have taken place.

(4) In relation to the impact that this conduct had on the complainants, as I have found, the claimant's focus was on his intent and not the effect of his actions. Notably in his oral evidence:

- The claimant agreed that the "Basic Instinct" comment was demeaning and unacceptable behaviour which violated P's dignity, showed a lack of discretion, and did not meet the requirement for him to set an example. He conceded that this would amount to serious but not gross misconduct. Nor did he accept that this demonstrated a lack of integrity or was an abuse of power.
- In relation to L's allegation that he propositioned her during the residential course, the claimant agreed that if L had understood that he was asking her to come back to his hotel room to have sex this would be demeaning, a lack of discretion (but not integrity) and capable of amounting to gross misconduct.
- The claimant agreed that had he returned L's knickers in the manner alleged this would have embarrassed L and conceded that this would amount to serious misconduct.
- He also admitted that he had sent E a lot of texts which included inappropriate and sexual content with the aim of sparking a romantic interest in him.
- In relation to E more generally, although the claimant said that she had been motivated by malice, he agreed that she had expressed her own truth.

(5) As I have found above, had the respondent conducted a fair process, it would have concluded that the claimant's conduct was unwanted, unacceptable and demeaning and that it demonstrated a lack of discretion and integrity and an abuse of power. It is relevant that the claimant was in a senior leadership role and a position of trust as well as authority.

(6) There was therefore a demonstrable pattern of harassing conduct by the claimant which was directed at junior female colleagues.

(7) The lack of any express prohibition or guidance on relationships between colleagues (or the failure to provide the claimant with the guidance promised as a result of the first disciplinary process) did

not exculpate the claimant. Here again, the claimant's seniority and position of trust is relevant. The claimant also said that he understood what constituted sexual harassment and that he was able to write guidance on this subject although it appeared to me that he was under the misapprehension that harassment could only take place where there was intent rather than an unintended effect.

(8) The claimant showed no insight or remorse into the impact that his actions had on his colleagues although he acknowledged, at his appeal, that some of his colleagues could no longer work with him and suggested that the respondent changed the reason of his dismissal from gross misconduct to SOSR. As I have already highlighted, the claimant also felt that the MeToo movement had made it easier to substantiate sexual harassment complaints.

(9) The claimant's long service and his operational expertise neither mitigated this conduct nor militated against the sanction of dismissal.

(10) I find that as a result of the claimant's culpable conduct the respondent's trust and confidence in him was gone.

93. Finally, I would like to apologise to the parties for the delay in promulgating this judgment.

Employment Judge Khan

04.12.21

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

05/12/2021

FOR EMPLOYMENT TRIBUNALS