



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr P Sellers

v

The British Council

Heard at: London Central
On: 17 – 23 November 2021

Before: Employment Judge G Hodgson

Representation

For the Claimant: in person
For the Respondent: Mr I Scott, counsel.

JUDGMENT

The claim of unfair dismissal is well founded and succeeds.

REASONS

Introduction

1.1 By a claim form presented to the London Central employment tribunal on 8 September 2009, the claimant alleged he had been unfairly dismissed by the respondent.

The Issues

- 2.1 The only claim is unfair dismissal.
- 2.2 The respondent alleges that it had a potentially fair reason for dismissal which related to conduct. The respondent alleges the claimant was dismissed because it was believed he had, during a private party, sexually harassed a woman who was an employee of the British embassy. The

individual who made the complaint was anonymised by EJ Nicolle at a hearing on 5 February 2020. In this judgment I refer to the complainant as ZZ.

- 2.3 It is the claimant's case that the dismissal was unfair. In particular, he alleges that there were serious flaws in the way the respondent approached the investigation, the decision to dismiss, and the appeal. Throughout the process he denied the alleged sexual harassment.

Evidence

- 3.1 The claimant gave oral evidence, and I received a statement from him.
- 3.2 The respondent called Mr Sanjay Patel, who was at the time the global HR director employee relations and reward; he was not a decision-maker, but stated he had a supporting role throughout the process. The respondent also called Ms Kate Ewart-Biggs, who was the deputy chief executive; she dismissed the claimant.
- 3.3 I do not have any statement or oral evidence from the following: the person primarily responsible for the initial investigation; the person primarily responsible for investigating at appeal stage; or the person who considered the appeal hearing.
- 3.4 I received a bundle of documents.
- 3.5 The respondent filed a chronology and cast list.
- 3.6 Both parties filed written submissions and supplemented them with oral submissions.

Concessions/Applications

- 4.1 The claimant renewed his application for anonymity.
- 4.2 The respondent renewed its application to maintain ZZ's anonymity.

The Facts

- 5.1 In this section I will deal with the main events. To avoid unnecessary repetition, I will deal with further facts in my discussion section, as necessary, when considering my conclusions.
- 5.2 The respondent is the UK's international organisation for cultural relations and educational opportunities. It is an executive non-departmental public body and is a charity incorporated by Royal Charter. It operates in over one hundred countries. It is not part of any embassy, but liaises closely with the British embassy. The British embassy was, at the time, part of

the Foreign and Commonwealth Office (FCO)¹ and is the sponsoring government department of the British Council.

- 5.3 The claimant was employed by the British Council from 1 September 1990. He was appointed country director for Italy from 1 September 2014 until his dismissal on 7 May 2019. The country director role is the respondent's most senior role in each country in which it operates. The claimant was the respondent's senior representative in Italy. He was responsible for all aspects of the respondent's operation in the country and for developing and maintaining strong relationships with key stakeholders.
- 5.4 On Sunday, 16 December 2018, the claimant and his wife, in their Rome flat, hosted a social gathering which has been referred to as a "family Christmas brunch." I will refer to it generally as "the party."
- 5.5 ZZ attended that party. She was an employee of the British embassy in Italy. Following the party, she made a complaint to the embassy alleging inappropriate behaviour by the claimant, which she alleged was sexual harassment. Following an investigation and a disciplinary hearing, the claimant was dismissed on 7 May 2019. He subsequently appealed. The appeal was rejected.
- 5.6 It is agreed ZZ was at the party. The claimant accepts that when she left the party, he kissed her on both cheeks, being the common Italian practice. It is less clear whether he gave her a hug. In her initial complaint, ZZ appears to allege that she was kissed on the lips, being side of the mouth,² and thereafter there was inappropriate touching. Broadly, it is ZZ's position that the claimant placed both of his hands on both of ZZ's breasts and rubbed down in a sexual manner.
- 5.7 On leaving the party, ZZ sent a text to a man, which allegedly concerned the party. The man has not been identified at any stage. At a later date, which has not been ascertained, she deleted the relevant text messages. She later described the content of the alleged text messages in an interview at the appeal stage, and I will come to that in due course.
- 5.8 At approximately 02:00 on 17 December 2018, ZZ sent a WhatsApp message to her friend Gemma Ralph seeking her advice. She did not set out any details. She refers to sending an email to "HMA" who she says was "quite supportive." It is unclear who HMA was. The email has not been obtained or disclosed.
- 5.9 On 17 December 2018, at 14:25, ZZ wrote an email to Ms Jill Morris, the British ambassador to Rome. ZZ described the alleged incident in the following terms:

¹ I will continue to refer to it as the FCO.

² If at any time there was a distinction made between the side of the mouth and the lips, that has never been made clear.

At about 4:30 pm as the party was winding down I decided to leave and I went to thank Paul. As I went to kiss him goodbye he kissed me twice on the side of my mouth (rather than the cheek) and then he stroked my breasts with both his hands. I was very shocked so I didn't respond immediately and left the party. There were other people in the room but I do not know if they witnessed it.

- 5.10 ZZ stated that she wished to flag the issue and sought Ms Morris's views. Ultimately, there was a formal complaint made on ZZ's behalf by Mr O'Flaherty on 14 January 2019.
- 5.11 It is unclear what happened between 17 December 2018 14 January 2019. However, it is clear there was some form of ongoing investigation, and at some level it involved interaction between the FCO and the British Council.
- 5.12 On 3 January 2019, Ms Rebecca Walton, regional director EU, an employee of the British Council, wrote to Mr O'Flaherty stating

I am picking up the investigation into the complaint against Paul Sellars (PS). Thank you for relaying this to us. We are taking it seriously, and will put in place our formal processes.

I am aware that Sanjay Patel (BC Director Employee Relations, here in headquarters) was in touch with you before Christmas. He confirmed that I will head the investigation. Christmas leave is rather delaying us.

We plan to start the formal interviews towards the end of next week. Meanwhile I would find it helpful if you and I could have a short, informal, call this week, or early next, before I start the process. Do you have any time available?

Once we begin the formal process, I shall interview the complainant by telephone with a notetaker with me at this end. She will have the right to be accompanied, formally with a union or legal representative if she chooses. In the same manner I shall then interview PS. He can also choose to be accompanied. And if there emerge further material witnesses, I'll also speak to them.

- 5.13 It follows that there was some form of process. However, the nature of the process is unclear; it was not communicated to the claimant at any time. In Ms Watson's subsequent report, there is a timeline. The timeline starts at 3 January 2019. There is no account of the progress of ZZ's complaint between 17 December 2018 and 3 January 2019. It is not clear that all relevant documents from that period were obtained by the British Council.
- 5.14 The timeline records a case assessment panel (CAP) met on 8 January 2019 and states it was "to agree initial scope of investigation, approach and questions for complainant." There are no minutes of that meeting. It is the respondent's position that there are no minutes of any CAP meetings.

- 5.15 Some emails were generated and have been disclosed. The CAP was chaired by Mr Sanjay Patel, from whom I heard. He states the incident was first reported to the British Council by Mr O'Flaherty (Minister and deputy head of mission at the British Embassy in Rome) he does not state how the allegation was reported, but says he spoke with Mr O'Flaherty later that day and "agreed that the allegation would be handled by the British Council." He then states that he initiated the "internal process for an investigation." He does not describe the nature of this or confirm the procedure.
- 5.16 The disciplinary procedure provides that in the "case of gross misconduct if the issues are complex and/or sensitive it may be necessary to convene a case assessment panel." There is a procedure for agreeing the panel and its members with HR. The disciplinary procedure does not set out the CAP's purpose. Mr Patel explained it is to ensure an overview and to identify and suggest appropriate lines of enquiry. It should ensure a fair investigation and a fair procedure. Mr Patel says nothing about the process of convening the CAP, or the meeting on 8 January 2019.
- 5.17 Following agreement between the embassy and the British Council, Mr O'Flaherty, on 14 January 2019, sent a "summary of the complaint." In addition, his email said:

Separately from this complaint (but perhaps relevant), Paul Sellers has shown erratic and uncharacteristically emotional behaviour in his interactions with embassy staff in recent months.

This has made HMA and I wonder whether there might be other issues in play, and whether it would be worthwhile speaking to British Council colleagues in Italy (e.g. Jane Costello) to build a broader picture of Paul's interactions. I would be very happy to brief in more detail as useful.

- 5.18 The alleged incident is described as follows:

ZZ reported to HMA and myself that on Sunday 16 December she attended a party at the home of Paul Sellers, Director British Council in Italy. Paul's wife Isadora worked at the embassy until the end of December, and several other embassy colleagues attended the party.

ZZ arrived around 1400 and people were starting to drift off around 1530-1600. Embassy colleagues present included Helen Marais (and husband), Julia Barbieri (and husband) and an intern called Giulia. Another colleague Chris Brealey also left shortly before ZZ.

ZZ decided to leave around 1630 and said goodbye to Isadora. When saying goodbye to Paul, he leaned in and kissed ZZ on the edge of her lips. He placed his hands on her chest and rubbed them down over her breasts in a way that was clearly deliberate.

- 5.19 It went on to say

ZZ judges that Paul was "quite drunk". He had previously been salsa dancing with a female intern and said proudly that he "didn't drink coffee" when it was offered. [Comment: Paul regularly drinks at professional/

social events. I have not seen him incapacitated, but he does show the effect of alcohol and consumes more of it than many colleagues.]³

- 5.20 It follows that the report was a mixture of a report of ZZ's complaint, and a generalised allegation of erratic behaviour, but it unclear where this additional allegation came from or why it was included.
- 5.21 The email was not shown to the claimant at the disciplinary stage. The summary was kept from the claimant until the appeal stage.
- 5.22 On 14 January 2019, ZZ was interviewed by Ms Rebecca Walton. ZZ's companion was Mr O'Flaherty. The notes of the meeting are not verbatim. It was a video conference. It was not recorded. ZZ's account refers to her first saying goodbye to Ms Isadora Papadrakakis, the claimant's wife. Thereafter she went to say goodbye to the claimant. She said, "He was quite drunk." She referred to his dancing in the living room and seeming merry. She referred to being kissed "on the side of my mouth, near my lips." She is reported as saying "At the same time, he put both hands on my breasts and moved his hands downwards." She stated, "He started rubbing down." She then "picked up" her belongings and left there is no suggestion that she spoke to anyone else.
- 5.23 Later she is reported as saying "Also, during the course of the goodbye hug, if you can call it that, I do not think other people saw the incident, but they were in the room. His wife was behind me." Later she was asked if there was "anyone you feel was aware?" She is reported as responding "I don't think so, there were others in the room and they were close to us. But if they looked, it was just like we were saying goodbye. Maybe people picked it up, but I didn't see anyone realise it. I wasn't focusing on that at the time." She was then asked if she wished Ms Walton to interview anyone else. It is reported she gave the following response. "I cannot think of anyone that definitely saw what happened to me. On that basis, and for my own privacy, I would prefer for others not to be interviewed. There were six or seven embassy people there but in terms of managing it for myself, I would prefer no one else is interviewed.
- 5.24 Later, she made reference to a conversation between the claimant and a 13-year-old girl which occurred when ZZ was also talking to the claimant. She alleged he referred to the girl as pretty and attractive and stated "I felt that was an inappropriate comment." She then went on to say that having thought about matters she would be "comfortable" with Ms Walton interviewing Paul's wife. She was said to be the closest person to the incident.
- 5.25 On 15 January 2018, the claimant was interviewed. He was not told, prior to the interview, the nature of the allegations which were to be put to him at the interview.

³ It is unclear to whom this comment is attributed.

- 5.26 He clarified the nature of the party and the timing. The party had finished at 19:00 and most guests left between 16:00 and 17:00. ZZ had been invited by Ms Papadrakakis, the claimant's wife. At that time, he was unable to recall saying goodbye to ZZ. He confirmed it was a cordial party and when leaving, "People would get a kiss on both cheeks." He did remember ZZ arriving and being in the kitchen. He denied kissing ZZ on her lips when saying goodbye and referred to probably giving her a two cheek Italian kiss. He said there was no physical contact.
- 5.27 The allegation, that he put both hands on ZZ's breast, is then put. The respondent did not tell the claimant the allegation prior to this investigation meeting.
- 5.28 The claimant denied the allegation absolutely. Rubbing his hands down her front in a sexual manner is put as a further allegation. The claimant denied it.
- 5.29 He confirmed that there were many people around and he spent most of his time in the kitchen. He stated the farewells were happening in quick succession and that he would have been distracted by catering arrangements. He said he had no specific recollection of saying goodbye to ZZ.
- 5.30 He was asked whether he could think of any reason why the allegation may have been raised and stated he had no idea. He noted that Ms Walton had got the wrong date for the party and the wrong time. Ms Walton acknowledged that.
- 5.31 The claimant was unhappy with the nature of the interview he stated the following at the meeting –

Rebecca, this is a serious allegation. I appreciate your position and the time you have taken to speak to me. But the absence of detail has been severely distressing for me and my wife. It is not an excuse but it has been difficult. I feel like you have approached me without any detail and in fact, when you first wrote to me, you said that there was a party in the evening. It was not an evening party. So I have received mixed information.

I have felt extremely unprepared. I have told the truth to the questions. But given the seriousness of the allegations, this cannot be the end of my testimony. I do not want this to end based on the last 30 minutes. I have been informed of very serious sexual misconduct allegations and I do not accept that this amount of time is sufficient. However, you have told me that this is a fact finding exercise and that it is in the investigation stage. I would like to know the next steps, what your role is within the process, and I would like to make sure that if there is a danger of me being found guilty, that I have the chance to clear my name.

- 5.32 On 1 February 2019, the claimant sent a written statement, after he'd had time to consider the allegations. He noted that he had let ZZ out. He offered to provide a full guest list. He stated that there were people in close proximity who would have been able to see. He indicated that he believed his wife had seen him say goodbye to ZZ.

- 5.33 There was a further interview with the claimant on 5 February 2019. During this interview, the claimant's statement was considered. He was asked to explain why he remembered more. He stated that on reflection he remembered ZZ had asked about a taxi and that caused him to remember. He remembered seeing ZZ out of the front door and enquiring whether she needed taxi. He had a recollection of her pressing the button to the lift before he closed the door to the flat. He said there was nothing distinctive about her departure, apart from the taxi issue.
- 5.34 Ms Walton asked for more detail and the claimant indicated it would be necessary for her to see the layout of the apartment. Ms Walton never followed that up and did not obtain either a sketch plan or photographs. The claimant noted that the kitchen was no more than two metres from the front door. He sought to describe the layout carefully and noted that ZZ should be asked for her version of events. Ms Walton spent significant time with the claimant questioning in detail where he said goodbye and what could be seen.
- 5.35 Ms Walton referred to "a few further discrepancies." She asked whether there was dancing at the party and the claimant said there was around 6:30 but not before. He stated he was certain it was after ZZ had departed. He denied being drunk but confirmed he drank some alcohol.
- 5.36 On 15 February 2019, Ms Walton interviewed ZZ again. In that interview she is clear that she said goodbye to Ms Papadrakakis first. There was an attempt to explore with ZZ the exact sequence of events. She stated that Ms Papadrakakis had walked her to the door but then said that her memory about the matter was "quite hazy." However, she went on to say, "She definitely let me out of the flat." There is no indication at all that the claimant was at the door. She was adamant that Ms Papadrakakis let her out.
- 5.37 When asked about being agitated. She stated that she could only imagine it was because of what had just happened. This appears to be the reference to the alleged sexual touching, which, on that account, did not appear to have happened near the door, and it happened before saying goodbye to Ms Papadrakakis.
- 5.38 When asked where the claimant was when she said goodbye, she stated he was in the area between the kitchen and the living room. She described it as "the open area where the kitchen opened out into the living room. The music was on and he was dancing." She said, "Yes, I remember that he was dancing, or he may have just finished dancing. But it was definitely at the time when there was dancing, and I then went over to him to say goodbye."
- 5.39 On 20 February 2019, Ms Walton interviewed Ms Isadora Papadrakakis, the claimant's wife. She stated, "We are trying to keep this process confidential."

- 5.40 Ms Papadrakakis confirmed she had invited ZZ, whom she did not know well, but she'd had some interaction with ZZ. She believed that ZZ was new and not really integrated into the embassy. Ms Papadrakakis thought it would be nice to invite her. She was unclear as to the timing of the dancing but believed it was around 16:00 and then it stopped, and everything quietened down. She said it was brief, a couple of tracks. She recalled the claimant dancing. She confirmed both she and the claimant drank two or three glasses during the party. She confirmed the claimant was not drunk. She described the claimant had been actively involved in facilitating the party and said neither of them socialised significantly.
- 5.41 She confirmed that she had a snapshot recollection of ZZ leaving and stated the claimant was in the kitchen then moved out of the kitchen to escort ZZ to the door. She saw him as far as the hallway. She recalled there were quite a few people around, but did not recall who. She had the impression ZZ was not in high spirits, and put it down to a "Brexit grilling" given by a friend.
- 5.42 Ms Walton specifically asked, "Can you think of any reason why these allegations have been raised against Paul?" Ms Papadrakakis stated it would be speculation and then gave some possibilities in response to the specific question. First, she thought ZZ may have been disgruntled about embassy work. Second, she may be conservative about the Italian style of greeting. Third, there was a possibility of a psychological issue, and she suggested this because she was absolutely certain the claimant would not "lay a hand on her."
- 5.43 Throughout this process, there were reviews by the CAP. However, no detail has been given of any suggestion or input: no minutes or other documentation exists.
- 5.44 Ms Walton completed her report on 21 March 2019, having had some input from the CAP. There were five people on the case panel and in addition Ms Rebecca Walton acted as investigator. The report states "The case panel checked evidence as it emerged, agreed next steps and recommended standards and, when necessary, sought legal advice to ensure proper process." No further detail is given.
- 5.45 The report exhibited a number of appendices, which included relevant statements. The report identified kissing on edge of her mouth and moving hands down over her breasts in a sexual manner as the allegations.
- 5.46 No other witnesses were interviewed. The explanation given is "There were no other witnesses named by either [ZZ] or PS." Mr Patel's evidence contradicts the report's stated reason for not interviewing witnesses. He told the tribunal that no further witnesses were identified and called because the panel "felt the witnesses would not have seen anything."

- 5.47 Ms Walton stated the purpose of the CAP was "to establish as much detail as possible and to prevent any bias entering into the interviews."
- 5.48 The report goes beyond presenting the evidence and contains a lengthy analysis of Ms Walton's reflections on the strength of the evidence of the claimant. She is critical of his "tone." She states He "made this response in an unexpectedly throw away manner, as if getting details, even estimations, quite wrong, seemed not to matter. This cast a shadow over earlier recollections carefully established through questioning."
- 5.49 There is no comparable analysis of, or commentary on, ZZ's inconsistencies, even though it is acknowledged that her recollection was hazy and there was a clear discrepancy in her account about who saw ZZ to the door. The differing way the report treats their respective evidence is stark.
- 5.50 By letter of 3 April 2019, the claimant was invited to a disciplinary interview. The allegation was as follows:
- During a party held at your home on the afternoon of Sunday 16th December 2018, you deliberately put your hands on [ZZ]'s breasts, rubbing down in a sexual manner.**
- 5.51 The allegation about kissing on the lips was included in the investigation report, but was not put forward as an allegation of misconduct.
- 5.52 The claimant was sent the investigation report, but the original allegation, as set out by Mr O'Flaherty on 14 January was withheld, as was his email.
- 5.53 The letter does not say the claimant can bring witnesses. There had been previous reference to confidentiality. I accept the claimant's evidence that he was not clear about what would constitute a breach of confidentiality, or his rights or obligations in relation to calling witnesses.
- 5.54 The disciplinary hearing took place on 15 April 2019. The claimant was critical of the investigation report. He questioned the approach to gathering evidence, the approach to interview, and the interpretation of evidence. He stated there was a lack of clarity in the process. He had been informed that the grievance framework has been applied initially to the fact-finding investigation before it moved to a disciplinary process. He was critical of the failure to have an initial fact-finding call. He was critical of the lack of transparency in the CAP meetings. He asked for the complete summary from Mr O'Flaherty. He stated there was a lack of concrete evidence. He disputed ZZ's testimony and her consistency. He was critical of the investigator's conclusions and the approach to the investigation report and the basis for deciding matters on the balance of probability. He produced a plan of the flat and photographs, which were considered by Ms Ewart-Biggs, but were never shown to ZZ. He reiterated that he could provide a full list of all guests.

- 5.55 The claimant raised discrepancies in ZZ's account particularly with regard to where the alleged incident occurred. He raised the general confusion in ZZ's account about what happened when and where. He was critical of the methodology of the interviews and the failure to seek any contrary evidence, or make any effort to find it, and in particular, the failure to identify any witnesses to the alleged incident. He was critical of the failure to inform him of the allegation prior to the initial interview giving no opportunity to prepare adequately or at all.
- 5.56 The notes of the interview were provided to the claimant, who provided comments.
- 5.57 Ms Ewart-Biggs records that the investigation dropped the allegation of kissing on the mouth, as the investigating officer found "it might have arisen as an accident, in the normal way of Italian social kissing, on greeting and departing."
- 5.58 Ms Ewart-Biggs decided to interview ZZ; she says this at paragraph 29 of her statement:

29. I decided that it would be appropriate for me to speak to the complainant. My thinking at the time was that it would essentially come down to a question of who I believed, given the Claimant denied the allegation. I wanted to meet her, rather than read about her interview with Rebecca and rely on my conversation with Rebecca. This was a very important decision, and I didn't feel comfortable making it without speaking to the complainant and hearing her account directly from her, in the same way that I had from the Claimant at the disciplinary hearing. I wished to understand the sequence of events from the complainant directly and also understand her expectations of the process being undertaken by the British Council. I also wanted to understand the impact that the alleged behaviour had had on her.

- 5.59 On 24 April 2019, Ms Ewart-Biggs spoke with ZZ. Her statement gives no detail. The record of the interview is brief and is not commented on in Ms Ewart-Biggs's statement.
- 5.60 It is apparent that Ms Ewart-Biggs spoke to various individuals. In her statement she says the following:

31. I sought advice from HR and raised my decision with the CEO, Sir Ciarán Devane. My email chain with Nita Bewley on this dated 24-25 April 2019 is at pages 621 to 622. I did not ask Ciarán to ratify the decision and he did not know the details, but I had to ensure that he, as my line manager and CEO of the organisation, was aware of my decision. I was very clear that the decision was mine and aware from Nita that Ciarán would be dealing with the appeal, if the Claimant chose to appeal the decision. As CEO, Ciarán needed to be aware that the process was ongoing and told of the decision that I was making before it became official. This was also necessary from a governance perspective, in case he received any queries from the Council's Trustee Board about the decision.

32. In accordance with British Council policy, I consulted Catherine Ward, then Global People Director about the Claimant's dismissal . I also discussed my decision with Rebecca Walton, as the Claimant's line

manager she needed to be aware, so that she could manage the situation and would be ready to step in and pick things up as required, following the Claimant's dismissal.

...

34. I took advice from Sanjay Patel, HR Director Global Employee Relations and Reward on the next stage of the process, given that the Claimant remained in Italy [page 623]. It was felt that conveying the decision over phone/video would be better as the Claimant would remain at home and have the support of his family rather than flying to the UK to receive the decision, spend time in the British Council office and then have to fly back again. It would also avoid any further delay.

5.61 Whilst it is clear that Ms Ewart-Biggs consulted a number of people, the purpose and effect of the consultation is not clear.

5.62 The disciplinary hearing was reconvened on 7 May 2019. In the meeting Ms Ewart-Biggs stated she had no reason to doubt the events as described by ZZ. As for the points raised by the claimant, she asserted "I find the points you raise in your response as to not to be material to the substance of the allegation." In her evidence, she explained she was focusing narrowly on the incident itself, being the moment of the alleged touching of ZZ's breasts in a sexual manner, and not the surrounding circumstances, or any discrepancies in ZZ's general account.

5.63 The rationale for Ms Ewart-Biggs decision is set out at paragraph 38 and 39 of her statement as follows

38. I found the allegation to be true. I was satisfied that an appropriate investigation had been conducted and I agreed with Rebecca's view that the complainant's evidence was credible and consistent. I had no reason to believe that the complainant was lying or had motive to do so. I listened to the significant impact that it had had on her, her wellbeing and her anxiety levels. I had spoken to both her and the Claimant and having considered both their accounts, was satisfied that the inconsistencies that the Claimant presented in his defence were not material to the allegations.

39. In essence, I asked myself whether I believed the complainant or the Claimant. I found that on the balance of probabilities, I did believe the complainant and I did not believe the Claimant. I accepted that I was never going to be 100% sure about what had happened. One thing that I recall playing a part in my decision making is the way that the Claimant approached his response to the allegation. He denied the allegation, but also made arguments as to why and how it could not have happened. The Claimant did not accept that there was a possibility that it could have happened, despite his lack of recollection. The Claimant did not offer an apology, even on the basis that it could have happened. He pointed to inconsistencies in the complainant's account and was adamant that this proved that her account could not be relied upon. I disagreed. The Claimant's memory of the incident itself was clear and she was open about the fact that she had a hazy memory of some of the detail the Claimant was referring to in relation to the events before and after the incident. For example, she was hazy on where she had left her coat and I found it credible that her memory was entirely focussed on the moment of the inappropriate touching which she said had caused her to feel violated. The

fact that she had reported the matter promptly the next day influenced my thinking. I was satisfied with her explanation and believed her when she told me that she felt violated, humiliated and disrespected. This was consistent also with her telling Rebecca Walton in the investigation that she had felt violated.

- 5.64 She concluded that given the nature of the misconduct dismissal was the appropriate sanction. She considered other sanctions including demotion, but concluded they were not appropriate.
- 5.65 The dismissal letter was dated 7 May 2019 and the material part reads as follows:
- **I have no reason to believe [ZZ] was lying or had motive to do so. Having spoken to [ZZ] in order to follow up on the some of the inconsistencies you believe were present in the earlier interviews, I am satisfied that these are not material to the allegations.**
 - **I am satisfied that an appropriate investigation has been conducted and I concur with the view that [ZZ] is a credible witness. I found her to be thoughtful, clear, factual and consistent in her description of the sequence of events.**
 - **Considering all of the facts and on the balance of probabilities I find the allegation to be true.**
- 5.66 The claimant appealed by letter of 14 May 2019.
- 5.67 The claimant identified a number of grounds of appeal. He questioned whether the witnesses had been properly examined and highlighted the importance of corroboration. He offered new evidence which had been identified after the context had been clarified further. He noted ZZ should be able to recall who was in the vicinity and her refusal to name them should be taken into account. He complained that he was required to produce witnesses of an event that did not happen in an undisclosed and disputed location. He complained that the need for confidentiality had limited his ability to canvas evidence. He nominated three individuals who may be able to assist.
- 5.68 The claimant noted that evidence had been withheld which included appendix 2, notes of any CAP meeting and the third interview with the ZZ.
- 5.69 He maintained the disciplinary penalty was too severe in a case where there was no concrete or corroborated evidence.
- 5.70 He complained that there were procedural faults including an early assumption of his guilt.
- 5.71 He complained that the interviews were inappropriate and that the interviews of ZZ had not been with the intention of finding the facts. He did not consider the nature and tone to be impartial. He considered that the second interview with ZZ was an exercise in leading ZZ to rebut his account.

- 5.72 He questioned the external influence of the FCO.
- 5.73 The facts I can find in relation to the appeal are limited. Mr Patel gave some advice, but his evidence predominantly refers to the documents and his opinion as to the thought processes of Mr Mark Stevens who conducted the further investigations and Sir Ciarán Devane who had responsibility for the final decision. I received no direct evidence from Mr Mark Stevens or from Sir Ciarán Devane.
- 5.74 The appeal investigation process was complicated and involved.
- 5.75 Mr Stevens did produce a report. It is clear that a total of six further witnesses were interviewed. None of them suggested that there had been any inappropriate contact between the claimant and ZZ.
- 5.76 In the absence of relevant witness testimony, I will record the key events as they appear from the documents.
- 5.77 Three witnesses were interviewed on 15 May 2019 being Ms Marina Engel, Ms Giulia Nabieri, and Mr Tom Sneddon.
- 5.78 On 10 July 2019, Mr Stevens interviewed ZZ. There were limited questions put to her. She was required to confirm whether there had been a misunderstanding and whether the touching was deliberate and sexual. ZZ asserted that she was not surprised that no one had seen anything untoward and stated it happened in the context of the goodbye and stated "nobody would have looked at me as it was happening."
- 5.79 ZZ gave the following explanation for why no one would have seen anything.
- I am not surprised people do not remember. They would not have seen anything untoward happening. The incident did not take a long time to happen, it was quite quick, just a few seconds.**
- 5.80 Her reason was not explored. There was no exploration of the alleged relative positions of the claimant and ZZ when the alleged incident occurred, or why it was alleged that a deliberate holding of the breast with two hands and rubbing down in a sexual manner would not have been obvious to anybody who had been looking in the relevant direction.
- 5.81 There was no attempt to identify whether she could remember who was in the vicinity. There appeared to be little attempt to clarify exactly where the incident took place.
- 5.82 The three possible theories put forward by Ms Papadrakakis were put to her. She rejected those explanations, but it was not explored further.
- 5.83 Mr Stevens did explore with ZZ what had happened immediately after the incident. In that context, ZZ confirmed that she had texted a friend around

5:30 and then another friend early the next morning at around 02:00. She stated that she should have kept the first texts but had deleted them because she had fallen out with her friend. She offered to send a screenshot of the exchange with her friend Gemma.

5.84 She was asked if she could recall what was in the first texts to the male friend and stated the following:

Yes, I was still in denial, but I said something along the lines of 'oh this guy at the party I was just at was sleazy and tried to kiss me'. I had indicated that something happened that I was not comfortable with.

5.85 Mr Stevens did not ask why the alleged assault was not referred to.

5.86 ZZ confirmed she would send a screenshot of the text to Ms Gemma Ralph, and the email to the ambassador. None of these documents had been acquired by the original investigation or considered by Ms Ewart-Biggs.

5.87 No attempt was made to recover, or obtain, the chain of texts reported as sent from 5:30. It may have been possible to identify the male friend and ask for the texts.

5.88 On 15 July 2019, Mr Stevens interviewed Ms Walton; the purpose of this interview is unclear.

5.89 Three further witnesses were interviewed. None corroborated ZZ's account. None reported any inappropriate behavior at the party.

5.90 On 19 September 2019 Mr Stevens produced his report. The report addresses Mr Stevens conclusions in relation to each of the matters raised by the claimant.

5.91 He interviewed Gemma Ralph, the person whom the claimant sent a text to later in the evening on the day of the alleged assault and sought advice from the morning after the alleged incident.

5.92 In his report, Mr Stevens appears to limit his consideration to the specific points raised by the claimant. In relation to procedural faults, he recommended that the appeal would not be upheld. He rejected the allegation of inconsistent approach and recommend it not be upheld. He did accept that some documents had not been given to the claimant including appendix 2, but stated he concluded it made no difference and recommended it not be upheld. He did not consider that Ms Walton had behaved prejudicially, and recommended it not be upheld.

5.93 He considered whether there was an absence of concrete evidence. The report is confusing, but it appears he found that there was no evidence to corroborate the incident reported by ZZ. He reached the conclusion there was no corroborating evidence in support of the claimant's account. He placed significance on ZZ's reporting of events immediately after the

incident and stated, "I can find no motive at all for why ZZ would make such a claim if it were not true."

- 5.94 He did not consider the six statements to be relevant.
- 5.95 Overall, he recommended that no ground of appeal should be upheld.
- 5.96 He considered dismissal was the appropriate sanction. Overall, he recommended the appeal be dismissed. As I have noted, the findings I can make in relation to this appeal investigation are limited because Mr Stevens did not give evidence.
- 5.97 Sir Ciarán Devane made the final decision to refuse the appeal. He was not called to give evidence to the tribunal and the claimant had no opportunity to challenge his evidence. I have not found the evidence of Mr Patel to be of assistance in seeking to understand the thought processes of Sir Ciarán Devane. I have reviewed the appeal outcome letter, which is dated 25 September 2019. In this letter, he says he agrees with the recommendations made by Mr Stevens. The relevant part of this letter reads as follows:

Procedural faults

In relation to the original investigation and disciplinary process; interview approach; external influence from the FCO; appointment of original investigator; non-disclosure of evidence, Mark has reviewed all of the documents and interviews related to this case he can see no evidence that would have led to a different outcome.

Mark recommends that this part of the claim is not upheld and I agree that this is correct.

New evidence:

Mark has reviewed the new evidence you submitted and interviewed the witnesses you nominated.

In summary he found:

- The witnesses you put forward as a part of the appeal have not provided any materially significant information that would, in his view have changed the outcome of the original investigation.**
- Statements provided by witnesses about your overall character or disposition at the party do not, in Mark's view, provide any additional information that would have changed the outcome of the original investigation.**

Mark recommends that this part of the claim is not upheld and I agree that this is correct.

Disciplinary penalty

Mark has reviewed the disciplinary penalty applied to you in the original disciplinary hearing and concludes that the penalty was appropriate and consistent with a finding of gross misconduct. I agree that this is correct.

Conclusion

Mark concludes that having taken into account all of the new evidence submitted to him, reviewed the process of the original investigation and disciplinary hearings and considered the severity of the disciplinary penalty he recommends that the decision of the original investigation be upheld. I agree with Mark's recommendations. I therefore confirm that your summary dismissal stands meaning your employment terminated on 7 May 2019...

- 5.98 After the appeal, further evidence was submitted. On 17 October 2019, the claimant wrote to Sir Ciarán Devane having obtained a statement from two individuals, Ms Monica Marziota and Mr Michele Gerace. He explained that the evidence had not come to light earlier because he had been cooperating with the request for discretion and the need to respect the reputation of both institutions. The evidence in fact come to light by chance following a meeting with an acquaintance.
- 5.99 Ms Marziotta wrote to the British Council and confirmed she and Mr Michele Gerace had witnessed ZZ leaving, and the goodbye given by the claimant. The letter was countersigned by Mr Gerace. It corroborated the claimant's account. The most relevant part reads:

Michele and I were standing in the entrance to the open area at the time. My attention was caught by the guest in question as she brushed past me into the room. She made her presence known by announcing to a group standing close by that she was leaving. She then went forward towards Paul, who at the time was busy coming in and out of the kitchen serving coffee between seeing off other guests. I was at a distance of two metres or less from them, behind and slightly to the side of the lady, and able to see them clearly. They exchanged a few words, smiling, and then said goodbye with a kiss on each cheek followed by a hug. The limited physical contact was brief, friendly and straightforward. The interaction took place in direct proximity and clear view of a number of other guests including two of Paul's children, Fabian and Roman, not a single one of whom appeared to register anything remotely unusual.

- 5.100 She confirmed she had not offered testimony earlier because she had been unaware of the situation.
- 5.101 Mr Patel discussed the evidence with Sir Ciarán Devane and advised that it was possible to reopen the appeal under the respondent's procedures. Mr Patel's evidence is that he offered no opinion as to the appropriateness of reopening, and to the extent he gave any advice simply said reopening was not automatic.
- 5.102 Sir Ciarán Devane refused to reopen the matter. He wrote to the potential witnesses and to the claimant. To the extent he gave reasons, they are in the letter to the claimant and are as follows.

Re-opening an internal process may be appropriate in certain circumstances, for example, if key relevant evidence is over-looked in the internal process (deliberately or carelessly) or evidence that could not have been obtained at the time comes to light subsequently. However, having given the matter a lot of thought, I do not feel that this is the case here. You were given a number of opportunities in a lengthy internal process to identify relevant witnesses but did not identify Ms Marziota and Mr Gerace as having relevant evidence, even though they say in their letter that they were in the area of the flat most relevant to the allegation. Also, despite your reference to confidentiality being dictated, it was made clear to you that confidentiality was not absolute. You were invited to name further witnesses and all 6 witnesses you named were interviewed at the appeal stage.

As the new evidence could have been reviewed during the appeal process if you had put forward Ms Marziota and Mr Gerace as witnesses, it would only be appropriate to re-open the investigation if the evidence on its face is compelling that the conclusion of the investigation was a mistake. I do not believe that such weight can be given to the recollections in this letter, particularly so many months after the event occurred.

5.103 I have no further evidence for why he concluded that the new evidence was neither compelling nor indicated a mistake.

The law

- 6.1 Under section 98(1)(a) of the Employment Rights Act 1996 it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.
- 6.2 In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in **British Home Stores v Burchell** [1980] ICR 303, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the EAT in **Sheffield Health and Social Care NHS Foundation Trust v Crabtree** EAT/0331/09.
- 6.3 In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones** [1982] IRLR 439 and have in mind the approach summarised in that case. The starting point should

be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal consider the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

- 6.4 The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (see **Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23.)
- 6.5 The claimant relies on **Salford Royal NHS Foundation Trust v Roldan** [2010] EWCA Civ 522, and in particular paragraph 73.

The second point raised by this appeal concerns the approach of employers to allegations of misconduct where, as in this case, the evidence consists of diametrically conflicting accounts of an alleged incident with no, or very little, other evidence to provide corroboration one way or the other. Employers should remember that they must form a genuine belief on reasonable grounds that the misconduct has occurred. But they are not obliged to believe one employee and to disbelieve another. Sometimes the apparent conflict may not be as fundamental as it seems; it may be that each party is genuinely seeking to tell the truth but is perceiving events from his or her own vantage point. Even where that does not appear to be so, there will be cases where it is perfectly proper for the employers to say that they are not satisfied that they can resolve the conflict of evidence and accordingly do not find the case proved. That is not the same as saying that they disbelieve the complainant. For example, they may tend to believe that a complainant is giving an accurate account of an incident but at the same time it may be wholly out of character for an employee who has given years of good service to have acted in the way alleged. In my view, it would be perfectly proper in such a case for the employer to give the alleged wrongdoer the benefit of the doubt without feeling compelled to have to come down in favour of on one side or the other.

- 6.6 The tribunal should consider the ACAS code of Practice on Disciplinary and Grievance Procedures 2015. The provisions are admissible in evidence and "any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining" fairness. Section 207 Trade Union and Labour Relations Consolidation Act 1992 provides:

- (1) A failure on the part of any person to observe any provision of a Code of Practice issued under this Chapter shall not of itself render him liable to any proceedings.
- (2) In any proceedings before an employment tribunal or the Central Arbitration Committee any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

6.7 The most relevant parts of the 2015 code are set out below.

4. That said, whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:

- Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- Employers and employees should act consistently.
- Employers should carry out any necessary investigations, to establish the facts of the case.
- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
- Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
- Employers should allow an employee to appeal against any formal decision made.

...

5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

...

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct 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.

...

11. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

12. Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out 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. Where an employer or employee intends to call

relevant witnesses, they should give advance notice that they intend to do this.

...

23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct.

...

26. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.

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

...

Conclusions

- 7.1 The disciplinary process involved numerous people. It generated significant documentation.
- 7.2 The core facts are clear. The claimant occupied a senior position. The relevant events occurred at a private afternoon brunch party. There were at least fifty guests some were family, some friends, and some acquaintances associated with the British Council or the embassy. There were children present. It was a relatively small flat.
- 7.3 ZZ was an acquaintance of Ms Papadrakakis and someone whom the claimant may have come across professionally.
- 7.4 Following the party, ZZ made a serious allegation against the claimant. She alleged that he, without any provocation, first kissed her on the side of her mouth,⁴ and then place both hands on her breasts and rubbed down in a sexual manner. Objectively this could be a sexual assault. In the UK such conduct may constitute the crime of sexual touching. The respondent has referred to it as sexual harassment. I do not know whether it could be a crime in Italy. This assault took place in the flat in full view of numerous guests. ZZ alleged no one would have seen anything, other than a normal goodbye.
- 7.5 It is necessary to stand back from much of the detail and focus on what this tribunal must consider. The respondent must establish the reason for dismissal. Thereafter, the burden is neutral when considering reasonableness.

⁴ As noted above, there is no clear distinction between the side of the mouth and the lips identified at any time, and the two appear to have been used interchangeably.

- 7.6 This is a misconduct case where the conduct in question is disputed. The ACAS code of practice is relevant. Paragraphs 4 and 5 stress the importance of carrying out necessary investigations. The purpose is to establish the facts of the case, so the evidence can be presented at the disciplinary hearing. Paragraph 9 provides that notification of the alleged misconduct must be sufficient to enable the employee to prepare to answer the case. Copies of relevant evidence including witness statements should be provided.
- 7.7 There must be a disciplinary meeting. Paragraphs 11 and 12 provide the employee must be permitted to set out the defence. Paragraph 26 to 29 provide for an impartial appeal.
- 7.8 These principles are broadly reflected in the respondent's own policy. The relevant section on conducting the investigation provides that the investigation should include interviewing the employee, those directly involved, and possibly witnesses. It must gather relevant documentation both written and other evidence, as appropriate.
- 7.9 This respondent appointed a panel, the CAP, whose sole function was to consider lines of enquiry and to ensure fairness.
- 7.10 In cases of disputed misconduct, it is necessary to consider whether the person dismissing believed the allegations. The relevant belief normally establishes the reason. If the reason is established, it is necessary to consider whether there were grounds to sustain the belief, and at the time the belief was formed based on those grounds whether there had been sufficient investigation.
- 7.11 The claimant was dismissed by Ms Ewart-Biggs. It is her actions that I must focus on. In her role as the decision-maker, there is no reason why she should not seek advice. However, the responsibility for ensuring that there were supporting grounds based on a reasonable investigation is hers.
- 7.12 The first question is whether she believed that the conduct occurred. In **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 the Court of Appeal held:

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

- 7.13 Paragraph 12 of Ms Ewart-Biggs statement says the following

12 It was alleged that the Claimant had kissed the complainant on the edge of her mouth and moved both his hands down over her breasts in a deliberate and sexual manner on 16 December 2018 in the Claimant's flat in Rome at a Christmas brunch...

- 7.14 Paragraph 37 states "I found the claimant had committed gross misconduct." At paragraph 38 she states, "I found the allegation to be true."
- 7.15 The letter of dismissal gives no further clarification.
- 7.16 Her evidence was that she took a narrow view of the incident. It was unclear whether she concluded that the claimant had kissed ZZ on the side of her mouth, and if so whether that was different to kissing on the lips. It was not part of the formal allegation, but it was a relevant circumstance, and had been presented by ZZ as part of the relevant alleged assault.
- 7.17 It is clear that she decided the claimant had placed both hands on ZZ's breasts and rubbed down in a sexual manner. She did not decide where in the flat the assault had taken place. She did not decide the sequence of events leading up to the alleged assault. She did not decide if anyone had seen the incident, or where they were in relation to the alleged incident.
- 7.18 As to the events leading up to the alleged incident, she decided ZZ's evidence was hazy. It is less clear whether she found the claimant's account hazy. However, she did believe there was a "discrepancy" in his account. In her evidence before the tribunal the only alleged discrepancy she could identify was whether there been dancing, and if so at what time. She identified no other discrepancy in the claimant's evidence.
- 7.19 At paragraph 39 of her statement, she explains that she considered her role was to decide whether she "believed the complainant or the claimant." She states she decided on the balance of probability that she believed the complainant. Her evidence goes on to say that she "was never going to be 100% sure about what had happened." She clarified that she was 100% sure that the sexual assault occurred, but she was not 100% sure about any of the surrounding circumstances, which would include where it happened, who witnessed it, and the sequence of events.
- 7.20 I find Ms Ewart-Biggs concluded the claimant's recollection was hazy, but came to no clear conclusions about the general circumstances, other than the timing of dancing at the party, and the potential discrepancy in the claimant's account about this single matter.
- 7.21 I am satisfied that Ms Ewart-Biggs dismissed the claimant because she believed that the claimant had placed both hands on both of ZZ's breasts and rubbed down. It is that single action which she found to be gross misconduct. I am satisfied that her belief that the claimant touched ZZ's breast in a sexual manner is the sole or principal reason why she dismissed.
- 7.22 The next questions I must consider are first whether, at the time she reached her belief she had reasonable grounds on which to sustain that

belief, and second, whether at the stage when she formed that belief on those grounds she had carried out as much investigation into the matter as was reasonable in all the circumstances.

- 7.23 Viewed narrowly, there were grounds to sustain the belief. ZZ had made an allegation. That allegation provided grounds. However, it may not have been reasonable for her to rely on those narrow grounds, as there must be a reasonable investigation, and if that reasonable investigation either does or could undermine the narrow grounds, it may be unreasonable to fail to take that into account. In considering whether it was reasonable, it is necessary to look at the surrounding circumstances, and in particular to consider whether, at the time the belief was formed based on those grounds, an adequate investigation had been undertaken.
- 7.24 The investigation will be adequate if it was one which was open to a reasonable employer acting reasonably.
- 7.25 It was for Ms Ewart-Biggs to decide. It is for her to review the available evidence, and to consider whether the investigation was adequate.
- 7.26 During her evidence before the tribunal, Ms Ewart-Biggs agreed that in cases where there is disputed conduct, it is important to consider whether there is any evidence corroborating one account or the other
- 7.27 As to what such corroborating evidence may be, she identified the following matters as important: consistency of account; any contemporaneous documents; detail of the impact on the complainant; and any witness evidence. She also confirmed that making an assumption about what a witness may have seen would be inappropriate.
- 7.28 It follows that Ms Ewart-Biggs understood the importance of seeking relevant evidence in situations where the circumstances of alleged misconduct are disputed.
- 7.29 The material before Ms Ewart-Biggs was limited. The fact that material should have been available, which had not been obtained, was obvious from a simple reading of the relevant documents disclosed to her, including the report of Ms Walton.
- 7.30 Ms Ewart-Biggs sought no further documentation, but she did interview ZZ.
- 7.31 I do not need to record my analysis of all of the evidence before me. I have had regard to all of the evidence. I will consider the key points relevant to my decision. I will consider the following important general areas: the clarity of the allegation; the contemporaneous documentation; potential witnesses; and the adequacy of the investigation. In each case, I will consider what should have reasonably been understood by Ms Ewart-Biggs at the time she made her decision.

- 7.32 Ms Ewart-Biggs took a narrow view of the allegation. She concentrated solely on the moment of physical contact. In doing so, she put from her mind the more general circumstances, and failed to consider whether they impinged on the clarity and reliability of ZZ's evidence.
- 7.33 Ms Ewart-Biggs accepted that ZZ's memory of, and account of, the circumstances leading up to the alleged assault was hazy. Whilst she describes the recollection as "hazy." This does not capture adequately the difficulties in ZZ's account. It was clear that there was a serious lack of clarity in ZZ's account about the circumstances leading up to the alleged assault. ZZ's account materially changed. In Mr O'Flaherty's original note, it was ZZ's position that she said goodbye to Ms Papadrakakis first, and only then approached the claimant. She alleged she left immediately after. That remains the position on 14 January. Thereafter, her account began to change. By 15 February, she stated that it was Ms Papadrakakis who had walked her to the door. When asked about this, she stated her memory was hazy.
- 7.34 The problems with ZZ's account were recognised. By 14 March, Ms Walton stated she could conclude little from the sequence.
- 7.35 Against this, the claimant's evidence was always consistent, albeit when the initial allegation was put to him he had no immediate recall.
- 7.36 Ms Walton did, note an obvious reason for why the claimant's first account may have been incomplete. In her report she said "It was clear, and it was to be expected, that PS was on edge and unprepared. He was clearly shocked and strongly denied the allegation." Yet it was the content of that interview which was later said to constitute a careful exploration of his account.
- 7.37 ZZ did give various accounts as to when she said goodbye to the claimant. One of those accounts was that she approached him when he was dancing, or possibly when he had just finished dancing. Thereafter, he said goodbye, and this would put the incident somewhere other than the door to the flat. However, she ultimately said her recollection was hazy and she was not sure where it happened.
- 7.38 It follows, from ZZ's evidence, that it was not possible to identify where the alleged incident took place.
- 7.39 ZZ maintained that there were individuals present, but that no one would have seen anything, and anyone who was looking, would have seen a normal goodbye. Neither the investigation nor Ms Ewart-Biggs sought any explanation for why ZZ would hold that view.
- 7.40 Ms Ewart-Biggs focused on the moment of the inappropriate touching. Her evidence to the tribunal was that the contact constituting the assault was "fleeting." This was not consistent with the evidence given by ZZ who referred to the incident as spanning several seconds.

- 7.41 No attempt was made by Ms Ewart-Biggs to understand the relative positions of the claimant and ZZ. It may have been possible that his hands were obscured because the contact was close. It may have been he reached forward, there being space between them. Ms Ewart-Biggs did not ask the question and failed to clarify the detail of the allegation. This was a serious omission. Such detail would, at the very least, have been relevant to considering whether it was likely observes would have seen the alleged assault. It may have supported or undermined ZZ's account. It may have cast light on why she suggested that all that would have been seen was a normal goodbye.
- 7.42 At no stage did Ms Ewart-Biggs adequately consider why no one would have seen the assault, or why ZZ suggested that all that could be seen was a normal goodbye.
- 7.43 It follows that Ms Ewart-Biggs's understanding of the actual assault was also hazy. It was clear from the evidence before the tribunal that she gave no consideration to the exact circumstances, or whether those circumstances would have been consistent with an allegation that no one could have seen the alleged assault.
- 7.44 It should have been apparent from a simple reading of the available documentation that there were, potentially, contemporaneous documents which had not been disclosed. It is apparent that ZZ made contact with the embassy. It was possible that documents would have been generated. However, the investigation and the disciplinary failed to identify whether any contemporaneous documents existed. Such an enquiry was a requirement of the respondent's own policy, and a matter of common sense.
- 7.45 It subsequently became clear that ZZ had, on her own evidence, an hour after leaving the party sent a text to an undisclosed male friend. A simple enquiry of her during the investigation or the disciplinary process should have revealed that there was contemporaneous documentation. The question was not asked.
- 7.46 During the appeal process, ZZ confirmed that she deleted the text messages. It is possible that the texts would have existed at the time of the disciplinary.
- 7.47 Moreover, it should have been clear that ZZ reported the matter to the embassy the day after the alleged incident. There was then a process where the British Council liaised, in some manner, with the embassy which ultimately led to the British Council inviting Mr O'Flaherty to file a formal complaint. That complaint was not given until 14 January 2019. In the meantime, CAP had been appointed and there had been numerous discussions. It was unclear to what extent, if any, ZZ had been involved and what information had been obtained from her. There is a significant gap in the timeline from 17 December 2018 to 3 January 2019.

- 7.48 The claimant is entitled to see the relevant documentation. Ms Ewart-Biggs' role encompasses ensuring that relevant documentation is not only before her, but before the claimant. However, it is clear there had been no attempt in the investigation to identify whether there was any contemporaneous documentation or to obtain it. That should have been obvious to Ms Ewart-Biggs. She gives no adequate explanation for why she failed to identify and obtain the relevant documentation.
- 7.49 It follows that at the time she made her decision, she had no idea whether there was contemporaneous documentation. She knew, from the policy, that she should have obtained it. She had in mind that it would have been relevant evidence which could have corroborated either the claimant's or ZZ's account. She gives no adequate explanation for why she failed to observe the deficiency, or seek to rectify it.
- 7.50 Ms Ewart-Biggs did have in mind the alleged impact on ZZ. As for the relevant evidence, she relied entirely on the statements of ZZ. It is unclear what role this played in her decision. It is cited as a factor at paragraph 38. Ms Ewart-Biggs believed that the impact had been significant. It had affected ZZ's well-being and had caused anxiety. It is unclear whether she formed the view that a finding as to the impact was relevant to deciding on the balance of probability whether the incident occurred at all. All that can be said is it was a factor she took into account.
- 7.51 The only independent witness interviewed at the disciplinary stage was Ms Papadrakakis. Ms Papadrakakis gave clear evidence that she did not walk ZZ to the door, and thus contradicted ZZ's initial account. However, Ms Ewart-Biggs placed little or no reliance on Ms Papadrakakis's evidence, as she was assumed not to be independent. She did not explore the clear discrepancy in ZZ's account.
- 7.52 It was apparent that no other witness had been approached. It was clear ZZ had failed to give any adequate account of where the alleged incident took place. The claimant had offered to give a full guest list. It was apparent that ZZ had not been asked to identify who could have potentially seen the incident, despite stating that a number of people were in the vicinity. But she was not asked to identify them.
- 7.53 The documents demonstrates that there was concern about confidentiality. It should have been obvious that the claimant's ability to identify witnesses was inhibited both by the lack of clarity of the allegation and also the discussions concerning the need to maintain confidentiality. Moreover, there had been a lack of clarity from the respondent as to who it would approach as a witness. There was an obligation in the respondent's own procedure to identify relevant witnesses. The policy did not say that it was for the accused to select witnesses.

- 7.54 Mr Patel gave specific evidence as to why witnesses were not interviewed. He said the panel's reason was it "felt the witnesses would not have seen anything."
- 7.55 His approach is particularly surprising when considered in the context of the alleged function of the CAP. The role of the CAP was to identify lines of potential enquiry and to ensure they were followed. Instead of applying logical thought and objective consideration, the CAP relied on a collective feeling that witnesses would not have seen the incident, and relying on that feeling, failed to identify the relevant evidence. The fact that approach was taken, was confirmed by Ms Ewart-Biggs during her evidence. She shared the feeling that no witness would have seen the incident. This despite her evidence to the tribunal that such an assumption would be inappropriate. Had Ms Ewart-Biggs reflected on the rationality of this, she would have been bound to conclude that, in the context of this alleged sexual assault, there was a real possibility that a witness would have observed the claimant placing both his hands on ZZ's breasts and rubbing downwards in a sexual manner during a goodbye which lasted several seconds. At the very least, it would have been necessary to explore why ZZ maintained that nothing would have been seen.
- 7.56 It was this inappropriate, and unjustified, assumption which prevented the investigation seeking to identify appropriate witnesses who could be interviewed.
- 7.57 I should consider the adequacy of the investigation. The investigation failed to identify the existence of contemporaneous documents. It failed to retrieve relevant documents either from ZZ, or as generated by her complaint to the embassy. The investigation failed to adequately explore ZZ's account, and failed to identify the relevant circumstances of the alleged assault. This extended to the general circumstances as to where it occurred and in what manner. It also failed to identify the details of the alleged assault. The detail of the circumstances was directly relevant to establishing what potential evidence existed. Failure to establish what potential evidence existed prevented the respondent from pursuing it.
- 7.58 Employers are not required to explore every potential avenue of investigation. The band or reasonableness applies to the investigation. It must be one which is open to a reasonable employer. In this case, the investigation is characterised by serious oversights and unreasonable assumptions. No reasonable employer would have failed to seek the relevant contemporaneous documentation, or to explore the circumstances of the alleged assault, or to seek relevant evidence from witnesses to the alleged incident.
- 7.59 Ms Ewart -Biggs found the claimant's account had discrepancies, albeit the only discrepancy relates to the timing of the dancing. This one matter appears to have been considered as relevant by Ms Ewart-Biggs and although her evidence on this is poor, taken as a whole it appears to be

cited as a reason for doubting the claimant's account. Save for this one negative inference drawn against the claimant, no other relevant surrounding circumstance appears to have been taken into account.

- 7.60 Making an assumption, based on feelings, that no witness could have observed the incident, is unreasonable. No reasonable employer would have taken that approach.
- 7.61 It follows that when considering whether there were grounds to support the belief, I conclude that Ms Ewart-Biggs took a narrow view and failed to consider the relevant surrounding circumstances. Whilst she had in mind the potential importance of corroboration, including witnesses, contemporaneous documents, and contemporaneous accounts. Her narrow view contributed to her failing to ask whether the investigation was adequate. I find the investigation was not one that was open to a reasonable employer and at the time Ms Ewart-Biggs formed her belief the grounds she relied on were not supported by a reasonable instigation.
- 7.62 During the submissions, the parties were asked to confirm whether there were any authorities on the relevance of independent evidence when considering the reasonableness of investigations. The parties were given permission to identify, and file, any relevant cases.
- 7.63 The respondent filed a further submission which stated that no relevant cases have been found. Nevertheless, the respondent referred to 2 documents, which had not been raised at the hearing being: the ACAS Guidance on Handling a Sexual Harassment Complaint and the Crown Prosecution Service document: Rape and Sexual Offences - Overview and index of 2021 updated guidance. Neither document was referred to during the course of the hearing either in evidence, or in submissions.
- 7.64 There is no attempt made in the supplementary submission to identify the specific relevance of the documents, or to establish the relationship with the submissions previously made.
- 7.65 I have not found either document to be of assistance, and I should explain why, briefly.
- 7.66 Section 207 Trade Union and Labour Relations Consolidation Act 1992 does not refer to the ACAS guidance on Handling a Sexual Harassment Complaint. The guidance itself under the section "What you must do as an employer" says the following: "You must follow a full and fair procedure in line with the Acas Code of Practice on disciplinary and grievance procedures." These supplementary submissions appear to cite the guidance in support of the proposition that the complainant should not be doubted "simply because [the incident] happened away from other people or nobody else witnessed in." It relies on an example which states "after hearing the evidence from both sides and a fair process, you can still decide the case is valid if you believe the person who made the complaint." I observe that the application of the guidance is premised on

there having been a fair process. The assessment of that fair process must incorporate the principles under the 2015 code, as envisaged by the guidance.

- 7.67 The Crown Prosecution Service document appears to be cited as authority for the proposition that prosecutors must not introduce a requirement for corroboration in a review process as one person's word can be enough. The quote is selective and it is clear there is a more general qualification that the evidence in its entirety must be assessed having regard to the guidance.
- 7.68 I need to be very cautious in deriving any principles from these documents, or applying them as guidance. Section 207 identifies what codes are admissible in evidence, and neither of the guidance notes referred to are admissible pursuant to section 207.
- 7.69 Taking the ACAS guidance in the round, it does nothing to undermine the importance of ensuring a fair process. That is underlined by reference the 2015 code. The guidance itself stresses the importance of keeping an open mind, and treating the complainant and accused equally. Further, it stresses the importance of needing to support both the person making the complaint, and the person accused. It specifically says of the person accused but he or she should be offered the same kind of support as the person who made the complaint which would include talking to them privately and allowing plenty of time, offering mental health support, and ensuring the person investigating the complaint is impartial and trained for the role. These principles cannot be applied directly in the current case, as there is no statutory basis for it. However, they are not inconsistent with the approach I have adopted above.
- 7.70 Even more care must be exercised before applying the CPS guidance directly. As far as I am aware, there is no rule in law of England and Wales that accusations of criminal sexual assaults cannot succeed without corroboration. As a matter of law, they can. However, I view this guidance with extreme caution. This is not a case where the alleged assault happened away from other people, or where nobody could witness it. The opposite is true. Just because a case could be decided, in the context of criminal law, on the basis of one person's word against another, that does not mean that other relevant evidence should be ignored. I find this guidance of no assistance.
- 7.71 I accept that there may be occasions when it would be fair for an employer to prefer the uncorroborated evidence of the complainant. However, where there are clear lines of enquiry, I doubt that an employer would ever act fairly by ignoring those lines of enquiry and limiting the decision to a simple question of whether the manager taxed with making the decision believed one person rather than another. If that were the case, employees would be vulnerable to any accusation made outside the context of work by any individual should a manager, without any adequate investigation, choose to believe the complainant rather than the employee,

with all the obvious risk of applying, even subconsciously, stereotyped views.

- 7.72 At the very least, employers should bear in mind the guidance given in **Salford Royal NHS Foundation Trust v Roldan** above, and the potential for finding that the allegation has not been proven.
- 7.73 I have very limited evidence concerning the appeal. Mr Patel's evidence is of little relevance. There is nothing in his evidence to suggest that the CAP modified its view on the appropriateness of acquiring witness evidence, and it appears his approach remained tainted by his unreasonable reliance on what Ms Ewart-Biggs and the CAP felt witnesses may have been seen rather than addressing whether there had been an appropriate investigation leading to a reasonable exploration of the evidence and identification of the facts.
- 7.74 Appeals are important. A flawed appeal may lead to an otherwise fair dismissal being unfair. An appeal may lead to matters of unfairness being rectified.
- 7.75 Appeals are sometimes categorised as re-hearings and reviews. Such categorisations must be treated with healthy caution, and labels may be misleading.
- 7.76 Did the appeal rectify any deficiencies in the disciplinary process, such that any unfairness was addressed? It is possible that the answer can be reliably found from a consideration of the documents. But it cannot be assumed that producing the documents is sufficient.
- 7.77 I should consider whether the appeal appears to have addressed those deficiencies I have identified. Thereafter, if appropriate, I should consider more generally matters of reasonableness.
- 7.78 It does not appear that the appeal set out to rehear the disciplinary. Instead, it sought to identify the grounds of appeal as advanced by the claimant, and to deal with each. I will consider each of the elements identified by the appeal.
- 7.79 The claimant identified several procedural faults. His allegation that there was inconsistency in the approach taken in interviews was rejected. It is unclear why. The investigation report clearly shows he was examined carefully on any matter of potential discrepancy, whereas ZZ was not. A cursory reading of the investigation report demonstrates that Ms Walton expressed strong and negative opinions about the claimant's evidence, but not about ZZ's. There was clear evidence of a serious disparity in treatment. It is unclear why his contention was rejected.
- 7.80 The claimant complained about the external influence of the FCO. There is clear evidence of the involvement of the FCO at an early stage. The FCO was not requested to provide any relevant documents. Mr

O'Flaherty's email of 14 January indicates a more general discussion about the claimant and demonstrates he was viewed negatively, yet this was not explored. There was clear evidence in support of the involvement FCO, and at least a potential for finding that there had been undisclosed negative conversations. There was direct evidence of the FCO raising concerns unrelated to the context of ZZ's complaint. It is unclear why his concerns about the FCO were rejected.

- 7.81 The claimant complained about non-disclosure of evidence. It is clear that documents were not disclosed to him, including two of the most important being Mr O'Flaherty's complaint and his email which contained unexplained negative comments about the claimant. It is unclear why this was not considered important.
- 7.82 The claimant complained that the onus had been put on him to prove the impossible by providing concrete evidence in circumstances where he had not been given adequate details. It is unclear why this was rejected. The appeal failed to identify that the CAP had actively advised that evidence should not be sought because it was felt the witnesses would not have seen anything relevant. This was a serious deficiency, and it is unclear why the appeal did not identify it.
- 7.83 Mr Mark Stevens, who conducted the appeal investigation states that he was unable to find any corroborating evidence. However, the appeal does nothing to go on to identify that ZZ had not been asked to identify who observed the incident, or to explain why the respondent continued to take no active steps to seek the relevant evidence.
- 7.84 Mr Stevens does place reliance on the fact that there were reports made by ZZ shortly after the party. He did identify that there were contemporaneous texts that she had deleted. It is unclear why he did not place emphasis on her destruction of texts, or the failure to gather all of the relevant contemporaneous evidence during the investigation.
- 7.85 Mr Stevens also stated, "I can find no motive at all for why ZZ would make such a claim if it were not true." It is unclear the extent to which this influenced his decision, or whether he is suggesting, in some manner, that it is necessary for the claimant to demonstrate some ulterior motive before his account will be accepted. His reasoning is unclear.
- 7.86 Six witnesses were interviewed. Only those individuals identified as possibly relevant by the claimant were interviewed. It appears the evidence of those witnesses was rejected because the incident was not seen. However, each gave clear evidence as to the nature of the party. They confirmed it would have been likely that the alleged sexual assault would have been observed. Their evidence supported the claimant's position, and undermined ZZ's assertion that no one would have seen the incident. However, that evidence was wholly rejected, and it is unclear why.

- 7.87 Some of Mr Stevens conclusions are questionable. He asserts the claimant was offered the opportunity to put forward witnesses, but he does not identify what he is referring to. Moreover, he fails to engage with the question of the respondent's responsibility to actively investigate. If there is an explanation for this, it is not before me. The relevant evidence has not been produced.
- 7.88 I cannot find, from the documentation supplied, that Mr Stevens appreciated the lack of the clarity of the allegation and the surrounding circumstances, the absence of contemporaneous documentation, or the he respondent's obligation to investigate reasonably.
- 7.89 I have even less evidence for why Sir Ciarán Devane rejected the appeal. I do not know what he considered to be the parameters of his role. I do not have evidence of his rationale, other than that contained in his letter rejecting the appeal. It appears that he accepted that Mr Stevens had identified the points of appeal properly and had investigated them adequately. He simply agreed with Mr Stevens. He failed to observe any of the difficulties which I have outlined.
- 7.90 Whilst it is clear that six further witnesses were interviewed, their evidence was rejected, and there was no recognition that the respondent may be required to take a more active approach to identifying the relevant circumstances.
- 7.91 It is unclear why the evidence of the six witnesses was rejected. There had been exploration at the investigation stage about the general circumstances, including the atmosphere of the party. It was explored by Ms Walton. Exactly why the atmosphere was relevant remains unclear. At various times there was reference to drinking and dancing. But this was a social gathering. It is unclear whether there was some suggestion that the conduct of the party generally was inappropriate. If that was the case, it was never said expressly. It may be there was some form of assumption that the tone of a party may make the allegation of sexual assault more likely. If that was contemplated, it was never made explicit. Given the apparent importance placed by the respondent on the nature of the party, it is not surprising the claimant put forward witnesses who could deal with it. The evidence of the witnesses undermined ZZ's assertion that no one would have seen the alleged incident, and it confirmed the nature of this family party. Yet this evidence was, essentially, dismissed.
- 7.92 Ms Ewart-Biggs did place reliance on her belief that ZZ had no reason to lie. This does not appear to have been explored at the appeal stage. The appeal did not recognise the potential danger that a decision may be based in part on the failure of an employee to prove an ulterior motive. It is not an important point in the context of this case, given the other serious flaws I have identified, and I do not need to consider it further. However, I would doubt that it would be fair to find against an employee because he could not establish evidence of an ulterior motive.

- 7.93 Ms Ewart-Biggs' made her decision based on her opinion of who was telling the truth. She says, "In essence, I asked myself whether I believed the complainant or the claimant." It was clear that she based that decision on a very narrow view of the evidence.
- 7.94 There is no evidence establishing whether Sir Ciarán Devane considered the specific approach taken by Ms Ewart-Biggs, or what view he reached in relation to it, or whether he considered there were deficiencies.
- 7.95 The reality is that there were deficiencies in the disciplinary process, and they were clear on a simple reading of the documents. The appeal did nothing to rectify those deficiencies. This appeal was not one which would make an otherwise unfair dismissal fair.
- 7.96 Sir Ciarán Devane was involved further when fresh evidence was presented. Again, I have very limited evidence.
- 7.97 The new evidence came from someone who specifically witnessed the claimant saying goodbye to ZZ. Ms Marziota stated she saw a completely normal Italian farewell greeting or "saluto."
- 7.98 She confirmed there were others close by. She explained she had been late arriving, her attention was focused on the claimant, and that is why she had a vivid recollection. She confirmed that the reason for dismissal had only recently come to her attention and explained that she had not been aware of the situation previously.
- 7.99 The claimant explained that he had maintained confidentiality and had not discussed the matter generally with the guests at his party. He explained he felt constrained to maintain that confidentiality.
- 7.100 The only evidence I have of the reason for Sir Ciarán Devane rejecting the evidence is contained in his letter to the claimant. In this letter he acknowledges that the appeal can be reopened and gives certain examples, albeit it is not clear where those examples come from. One example is if evidence has been overlooked in the internal process. A second example is if evidence could not have been obtained at the time.
- 7.101 He acknowledges that the claimant was required to maintain some form of confidentiality but says it "was not absolute." It is unclear what is meant by that. He clearly puts the onus on the claimant to name the witness. He goes on to say "It would only be appropriate to reopen the investigation if the evidence on its face is compelling that the conclusion of the investigation was a mistake. I do not believe that such weight can be given to the recollections in this letter, particularly so many months after the event occurred." This suggests that his only objection is the evidence may be unreliable given the passage of time. What element he considers to be unreliable is not identified.

- 7.102 Ms Marziota's statement is the only direct independent evidence from a witness who states that she saw the goodbye between ZZ and the claimant. She has given a clear and rational explanation for why she remembered it. She describes why ZZ came to her attention. There is nothing in the statement which would suggest that her memory was unclear. The evidence, on its face, is relevant, clear, and compelling. If that evidence had been accepted by the respondent, I can see no rational basis on which the respondent could continue to find there had been a sexual assault, as described by ZZ. Sir Ciarán Devane's suggestion that the evidence was not "on its face is compelling that the conclusion of the investigation was a mistake" is unsustainable.
- 7.103 It was possible to reopen the appeal. Instead of reopening the appeal and assessing the strength of the witness evidence, Sir Ciarán Devane rejects the evidence citing only that many months had passed since the event occurred. This is an assumption that the evidence is unreliable. Given that this is the only direct independent evidence, and that reopening the appeal was a possibility, making an assumption, based on the passage of time, that the evidence would not be reliable, is outside the band of reasonable responses of a reasonable employer.
- 7.104 I have set out above, in relation to each relevant matter, my conclusions. I should summarise them here.
- 7.105 Ms Ewart-Biggs believed the claimant placed both hands on ZZ's breasts and rubbed down in a sexual manner. She reached limited conclusions on the remainder of the circumstances about which she considered ZZ's account to be hazy.
- 7.106 She placed reliance on what she saw as a discrepancy in the claimant's account of the timing and fact of dancing but identified nothing else that she considered to be a discrepancy, either in ZZ's account or the claimant's account.
- 7.107 I accept that her belief was honest. I accept that the reason for dismissal has been made out and related conduct, as found.
- 7.108 In a limited sense there were grounds to sustain the belief. However, Ms Ewart-Biggs's view of the relevant grounds was unreasonably limited.
- 7.109 There were fundamental difficulties with the investigation. The failings were serious. For the reasons given, this investigation was not one within the band of reasonableness. It was not a reasonable investigation open to reasonable employer. The effect was that relevant evidence was not identified. Even on the evidence available it was apparent that Ms Ewart - Biggs ignored relevant evidence. The failure to conduct a proper investigation, and the reliance on what it was "felt" a witness would see, resulted in the respondent failing to identify evidence that should have been identified by a reasonable investigation. At the time that Ms Ewart-Biggs formed her belief, a reasonable investigation, being one open to a

reasonable employer, had not taken place. In particular, she was aware of the importance of corroboration, but did nothing to secure the relevant evidence in circumstances when she was aware that such evidence could be crucial.

7.110 It follows that the dismissal was unfair.

7.111 I have considered the appeal process. The appeal process did not adequately identify deficiencies in the investigation or the approach of Ms Ewart-Biggs. It did not rectify those difficulties. The appeal process did not render an otherwise unfair dismissal fair.

7.112 When an appeal process is completed, it may not be unfair to ignore a request to reopen. However, the circumstances of this case are unusual. Reopening of the appeal was envisaged by the respondent's own policy. It was recognised that where there was fresh compelling evidence, it may be appropriate to reopen. If Ms Marziota's evidence had been accepted, there is no rational basis for believing that the dismissal would not have been set aside.

7.113 The approach taken by Sir Ciarán Devane in refusing to reopen the appeal was unfair. It was clear the claimant had felt constrained by confidentiality. Sir Ciarán Devane did not explore adequately the perceived and actual constraints imposed. There was no proper basis for believing that the witness's recollection should be doubted. He failed to take into account the respondent's own failure to actively seek to identify witnesses. The assertion in his letter that the evidence was not on its face compelling is unsustainable.

7.114 Moreover, given the nature of the penalty, and the potential effect on the claimant's future employment, rejecting compelling relevant evidence summarily when the respondent own procedure would have allowed the matter to be reopened is not fair. No reasonable employer would have behaved in that way.

7.115 Had the dismissal been fair at the dismissal and appeal stages, in the circumstances of this case, refusing to reopen the appeal would have made the appeal process unfair.

7.116 For all the reasons I have given, I find that this dismissal is unfair.

7.117 There are a number of further points I need to deal with. The claimant has made an application for anonymisation. That has already been considered by EJ Nicolle on 5 February 2020. I have been presented with no new grounds which would cause me to vary his decision. I decline to consider it further.

7.118 EJ Nicolle's decision made it clear that the complainant should remain anonymised during the course of these proceedings.

- 7.119 I am conscious that it is necessary to have a remedy hearing. The question of a Polkey deduction and any deduction for contributory fault has been left to the remedy hearing. When considering contributory fault, I will need to decide whether any action of the claimant contributed to his dismissal. I anticipate that will involve deciding whether the claimant committed the alleged sexual assault. As this is a question of fact, it may be appropriate to hear further evidence. It may be necessary to hear from witnesses. The respondent may choose to call ZZ.
- 7.120 Having regard to the fact that there will be a further hearing, I see no reason to interfere with EJ Nicolle's decision at this stage, and I will order that it is continued until the next hearing. It may be considered further following any remedy hearing.
- 7.121 It will be necessary to have a further case management hearing to consider the directions for the remedy hearing. I would invite both parties to write to me with their proposals.

Employment Judge Hodgson

Dated: 22 December 2021

Sent to the parties on:

22/12/2021.

For the Tribunal Office