EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Sellers	**v**	**The British Council**

Heard at: London Central
On: 5 – 8 September 2022

Before: Employment Judge G Hodgson

Representation

For the Claimant: in person
For the Respondent: Mr S Keen, counsel.

ORDER

1. The respondent shall re-engage the claimant pursuant to section 115 Employment Rights Act 1996.

2. The terms of re-engagement are as follows:

    a. The employer is the British Council.

    b. The nature of the employment will be international assignment at senior country director level or equivalent.

    c. The respondent shall pay to the claimant any amount payable in respect of any benefit which the complainant might reasonably be expected to have but for the dismissal, including arrears of pay, for the period from the date of termination to the date of re-engagement. The parties shall seek to agree the figures by not later than **16:00, 30 September 2022**.

d. If the parties cannot agree the sums payable for any benefit, there is liberty to apply for further determination. If there is a dispute as to the sum owing, the following shall apply:

   i. the claimant must on or before **16:00, 3 October 2022** serve on the respondent a schedule of any sums he believes owing and should give full disclosure of, and account for, all sums which may reduce the employer's liability pursuant to section 115 (3) Employment Rights Act 1996. The claimant must serve any evidence relied on;
   ii. if that schedule is not accepted, the respondent must by **16:00, 10 October 2022** serve a counter schedule, together with all supporting evidence;
   iii. if agreement cannot be reached, the parties must request a further hearing by **16:00, 17 October 2022**; and
   iv. if there is dispute as to the sum payable, the remainder of the order must be complied with, and the disputed matters must be referred back to the tribunal for determination.

e. The remuneration shall be at band LMFGS, £70,000.28 per annum, and should include any benefits applicable to that grade.

f. The claimant's rights and privileges should be restored as if the dismissal had not taken effect. In particular, all pension rights should be restored, any deductions for his contribution to pension should be provided for by way of deduction from salary in accordance with any applicable rules and contractual terms.

3. The order for re-engagement must be complied with by **16:00, 26 September 2022**.

REASONS

Introduction

1. By a judgment sent to the parties on 22 December 2021, following a hearing in November 2021, I determined that the claimant had been unfairly dismissed. It was not possible to consider remedy at that hearing; the remedy hearing came before me on 5 September 2022. Any question of contributory fault, or any Polkey reduction, was specifically reserved to the remedy hearing. The respondent was invited to consider whether further evidence should be filed, and specifically whether it wished to call Ms ZZ.

The remedy hearing

2. At the remedy hearing, both parties supplied schedules of loss. It is common ground that the claimant's loss is significant and significantly exceeds the statutory cap. In principle, the respondent accepts that there should be a basic award of £14,175. In addition, the respondent's schedule puts the compensatory award at £282,603.40, before any addition for breach of the ACAS code of practice. Any award would be grossed up for tax.

3. It was agreed that if claimant was not reinstated or re-engaged, subject to any argument on Polkey (and any residual obligation I had to consider contributory fault) the claim may exceed the statutory cap. Given the potential complexity, and the agreed possibility settlement, it may not be necessary for the tribunal to consider the detail.

4. The claimant confirmed that he wished to pursue reinstatement/re-engagement. The respondent strongly objected. It was clear there was no time to consider reinstatement/re-engagement and the compensatory award. The parties agreed that we would consider all matters relevant to reinstatement/re-engagement.

5. The respondent asserts there should be a Polkey deduction. The Polkey argument is not developed in the schedule of loss. The respondent's opening note states

> **The Tribunal will consider making a *Polkey* deduction – the Respondent asks the Tribunal to make a deduction from compensation of 80% on the basis that it is very likely that the Claimant would have been dismissed in any event if the Respondent had initially adopted a proper procedure.**

6. Mr Keen confirmed the basis for a Polkey deduction was that if an investigation had occurred properly, it would have concluded there was sexual misconduct and the dismissal would have occurred.

7. During day one, Mr Keen stated that the respondent no longer alleged contributory fault. No attempt was made to explain either the reason for the withdrawal, or the effect on the respondent's pleaded case. This lack of explanation was explored several times during the course of the two-day hearing.

8. On day one, I drew to the respondent's attention the content of the ET3. I noted it contained two allegations of misconduct. The first was that the claimant had kissed ZZ on the mouth. The second was that he had "moved both his hands down her breasts in a deliberate and sexual manner." It is common ground that he was not dismissed for allegation one. It is clear that the allegation of sexual touching was the alleged misconduct relied on when dismissing. The ET3 states, "The respondent submits that the claimant contributed substantially to the dismissal by his

conduct and any damages he is awarded should be reduced accordingly." I noted that it may be necessary to amend the ET3 in order to clarify the respondent's position.

9. The respondent maintained its position that it had withdrawn any allegation of contributory fault. I noted that the original allegation of contributory fault had been founded on the allegation that the claimant, as a matter of fact, sexually touched ZZ on the breasts. I noted there appeared to be two possible reasons for the concession. First, the respondent accepted that the conduct had not occurred, and therefore no question of contributory fault arose. Second, the respondent alleged the conduct had occurred, but it did not amount to contributory fault. The respondent's position remained unclear, save that it was asserted that neither of the possibilities identified were correct. I ordered clarification in writing. I confirmed that if the pleaded position had changed, the ET3 should be amended.

10. The response, received on 7 September 2022, remained unsatisfactory; the respondent stated -

> **The Respondent has withdrawn any argument for a reduction of any financial award on the basis of contributory fault. We are not aware of any rule that requires a concession to be made by a formal amendment to the pleading but if we are wrong and this is required, the Respondent hereby applies for leave to amend the ET3 to withdraw the allegation of Contribution. We submit that the Claimant suffers no prejudice as a result of any amendment application at this stage as it has been clear since he received the list of issues that the Respondent was not running a contributory fault argument.**

11. This statement addressed the respondent's position on contributory fault under section 123(6), but not section 116. I sought further clarification, as set out below:

> **EJ Hodgson notes that by email of 7 September 2022, the respondent stated, 'The Respondent has withdrawn any argument for a reduction of any financial award on the basis of contributory fault.' At today's hearing the respondent clarified that this 'withdrawal' was for the purposes of section 123(6) Employment Rights Act 1996.**
>
> **The respondent is ordered to clarify its position on the application of contributory fault when considering section 116 Employment Rights Act 1996, which provides, in so far as it is applicable to this case -**
>
> > **(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account--**
> >
> > **…**
> >
> > **(*c*) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.**

> **(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.**
>
> **(3) In so doing the tribunal shall take into account--**
> **…**
> **(*c*) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.**
>
> **The respondent should state:**
>
> 1. **Is it is accepted the word 'shall' obliges the tribunal to specifically consider contribution, whether raised by the parties or not?**
> 2. **Is it the respondent's position that the claimant contributed to his dismissal?**
> 3. **If it is alleged he did contribute, what facts are relied on?**
> 4. **The respondent has withdrawn its allegation that the claimant contributed to the dismissal.**
>
> a. **Is it the respondent's position that as the respondent is not pursuing an active allegation of contribution before the tribunal for the purposes of section 123(6) that the tribunal must neither consider contribution, nor decide facts which may be relevant to contribution for the purpose of section 116.**
> b. **If it conceded that he did not contribute to the dismissal for the purposes of section 116 , is it the respondent's position that:**
> i. **the conduct relied on when dismissing namely the sexual touching of ZZ (the conduct), did not occur; or**
> ii. **the conduct did occur but did not contribute to the dismissal.**
>
> **The respondent must comply with this order on or before 10:00, 8 September 2022. If the claimant wishes to make representations he must do so by the same time."**

12. I received the following response:

> …**the Respondent's answers to the Tribunal's questions are:**
> **Question One: Is it accepted the word "shall" obliges the Tribunal to specifically consider contribution, whether raised by the parties or not?**
> **i) The Tribunal is obliged to consider whether the claimant did cause or contribute to some extent to the dismissal. This is not an inquisitorial duty.**
> **Question Two: Is it the Respondent's position that the Claimant contributed to his dismissal?**
>
> **ii) The Respondent has already made it clear that it does not rely on any of the evidence, in this case, to advance a positive case that the Claimant caused or contributed to his dismissal in any way.**

The Respondent relies upon the evidence to show that its concerns about the Claimant's conduct were genuine and rational and make it impracticable to re-employ him.

Question Three: If it is alleged, he did contribute, what facts are relied on?
iii) See the answer to Question Two.

Question Four: The Respondent has withdrawn its allegation that the Claimant contributed to the dismissal.
a. Is it the Respondent's position that as the Respondent is not pursuing an active allegation of contribution before the Tribunal for the purposes of section 123(6) that the Tribunal must neither consider contribution, nor decide facts which may be relevant to contribution for the purpose of section 116.
b. If it is conceded that he did not contribute to the dismissal for the purposes of section 116, is it the Respondent's position that:
i. the conduct relied on when dismissing namely the sexual touching of ZZ (the conduct), did not occur; or
ii. the conduct did occur but did not contribute to the dismissal.

(iv) Neither party argues that the Claimant caused or contributed to his dismissal;
(v) There is no proper reason for the Tribunal to embark upon an inquisitorial examination of whether the Claimant was innocent. This is not required by s.116(1)(c) or 116(3)(c);
(vi) The Respondent does not admit that the misconduct did not occur but does not advance a positive case either that the Claimant committed the misconduct or that he contributed to his dismissal. These issues are not relevant to the Respondent's case. The only relevant question to the Respondent's case is whether its genuine belief in the Claimant's misconduct was held on rational grounds and whether that belief makes his re-employment impracticable. The Tribunal should focus on the statutory questions under s.116(1)(b) and 116(3)(b).

Evidence

13. The claimant relied on a further statement.

14. The respondent relied on evidence from Mr Charles Walker and Mr Andrew Williams.

15. I received an agreed bundle of documents.

16. The respondent filed an opening note and a schedule of loss.

17. There was a renewed anonymity order. I confirmed I did not have time to deal with that application during this hearing.[1]

18. The claimant relied on an opening statement and an updated schedule of loss, and opening submissions.

[1] The order concerning MS ZZ remains to be decided and I have confirmed that it will continue pending ana further order.

19. During the hearing, further documents were disclosed.

20. From the claimant, I received an order (and a translation) dealing with the respondent's claim against them for repossession of a flat he occupied in Italy.

21. The respondent disclosed an unredacted version of the terms of reference, being the instructions from the respondent to Mr Jack Mitchell.

22. On day two, the respondent disclosed an email to Mr Walker concerning his role in a "reopened investigation". The respondent maintained that this document was irrelevant, and only disclosed because the claimant had requested it on observing, during cross-examination, that it had not been sent to him.

23. Both parties relied on written submissions.

Relevant facts

24. The liability decision was sent to the parties on 22 December 2021. I understand the respondent accepts the finding of unfair dismissal and the reasons for that finding.

25. For the respondent, I heard from Mr Andrew Williams who is "the chief operating officer of the British Council." He states he was not involved in any decision making in relation to the claim prior to judgment. He confirmed, during evidence, that he was not responsible for instigating, or designing, the respondent's investigation, which occurred post judgment.

26. I also heard from Mr Charles Walker who is currently the director of the British Council global network. He was not responsible for any part of the original dismissal. I will come to his role in due course.

27. It may be helpful to give an overview. Following receipt of the judgment, a decision was taken, it appears by Mr Sanjay Patel (the British Council's chief people officer) to "instruct an external and independent investigator to re-investigate the allegations raised."[2] I have not heard from Mr Patel. This led to a barrister, Mr Jack Mitchell, being instructed to undertake an investigation. He undertook an investigation and reached the opinion that Ms ZZ was telling the truth when she alleged there had been sexual touching of her by the claimant on 16 December 2018. That report, which I will refer to generally as the Mitchell report, was considered by Mr Walker, who reached a conclusion, as a fact, that the claimant had sexually touched Ms ZZ on 16 December 2018. The respondent now relies on the Mitchell report in support of its contention that, as it has found the sexual touching occurred, there is a loss of mutual trust and

[2] Mr Williams at paragraph 19 of his statement.

confidence in the claimant. The respondent does not rely on the original investigation.

28. Following termination of employment, a dispute arose as to whether the claimant should stay in his flat in Rome. I have received limited evidence and I cannot assess the merits of the respective positions. Proceedings were brought by the landlord,[3] which resulted in eviction. The respondent also brought proceedings against the claimant. I do not know the detail. The respondents' proceedings were withdrawn, having secured the claimant's consent to withdrawal (a requirement in Italy), and upon the respondent paying the claimant's costs.

29. It is necessary to consider some detail.

30. Mr Williams states at paragraph 18

> **On 21 December 2021, the British Council received Employment Judge Hodgson's judgment (pages 28-64 of the bundle). Members of the Executive Board involved in decision making around this case were very concerned by the conclusion that the original internal investigation into the allegations against Mr Sellers had been inadequate, characterised by serious oversights, unreasonable assumptions, procedural errors and a failure to consider all available and necessary evidence. Although two internal investigations had resulted in the finding that the alleged misconduct had occurred, and both decision makers had an honest belief that it had, due to the flaws in the investigation process the Judge had determined that that belief was unreasonable. This raised a great deal of concern for the organisation.**

31. Mr Williams was not involved in the decision, and I treat his evidence with some caution as he has no direct knowledge. I am not satisfied that he can give any relevant evidence on the reason for taking the decision to pursue a further investigation. The respondent has chosen not to call the apparent decision maker, Mr Patel.

32. At paragraph 19 of his statement Mr Williams states -

> **On 15 March 2022, having discussed matters with our external legal advisers, the decision was taken by Sanjay Patel, the British Council's Chief People Officer, to instruct an external and independent investigator to re-investigate the allegations raised. This decision was taken because Employment Judge Hodgson had found the decision to dismiss was procedurally unfair and there was concern that the Tribunal may order the British Council to reinstate Mr Sellers and award him damages in circumstances where he may have been guilty of sexually assaulting a member of the British Embassy. The uncertainty left following the judgment raised several concerns for the British Council should the organisation be ordered to re-employ Mr Sellers. Those concerns are set out in some detail below at paragraph 25, sections A to F. Considering those concerns, it was felt that the organisation had no choice but to re-**

[3] The respondent was not the landlord.

> **open the investigation with a view to remedying the flaws identified by the Judge to determine whether the correct decision had been made to dismiss Mr Sellers in any event. Had the investigator concluded categorically that there was no evidence of the misconduct, and the allegation of sexual assault could not be upheld, the British Council would have taken steps to consider reinstatement in a suitable role as we would have had evidence with which to address any internal or external concerns raised about Mr Sellers' potential future conduct. However, Mr Sellers would not have been placed back into the Country Director Italy posting as his term of service in that role had already been extended twice beyond the usual fixed term.**

33. I am satisfied, on the balance of probability, that had the Mitchell report concluded that the claimant had not sexually touched Ms ZZ, re-engagement was considered a possibility. There is no suggestion it would have been considered impracticable. There is no suggestion that there were any concerns about the litigation in Italy being a reason to refuse reinstatement.

34. On 4 May 2022, Mr Patel sent Ms Gemma Ralph an invitation to give evidence. In that email, he explained his rationale for commissioning the Mitchell report.

> **As an update we are awaiting a date for a remedies hearing during which the judge will decide the level of damages the British Council will need to pay the respondent and whether we will be asked to re-employ him. In advance of this hearing we have on advice of our lawyers decided to re-open the investigation to correct some of the perceived inadequacies of the initial investigation identified by the judge. We have appointed an independent external investigator to look into the case. The investigator will re-interview some of the witness and the complainant. We see this as our best chance to avoided damages or an order for re-instatement of the former employee. In this respect I would be grateful if you could consider whether you would be willing to be re-interviewed by the external investigator. I appreciate this involves further time and stress for you but we would really appreciate your help in trying to ensure a fair outcome. If you would like to discuss this further I would be happy to have a call.**

35. I find that this statement is in conflict with the evidence of Mr Williams. There is reference to reopening the investigation to correct "perceived inadequacies." Mr Patel states the rationale for the process is "We see this as our best chance to avoided[4] damages or an order for reinstatement." It follows that the main purpose of the commissioning the Mitchell report was to avoid paying damages and to resist an application for reinstatement. I find it was not requested as part of a genuine attempt to rectify previous errors.

36. I have been given limited disclosure of the documents relevant to the commissioning of the Mitchell report. It is apparent a process existed whereby various barristers' chambers were approach. It is almost inconceivable that the process did not generate correspondence, but that full correspondence has not been disclosed.

[4] Presumably this is a typo and should read 'avoid.'

37. The terms of reference sent to Mr Mitchell are dated 14 April 2022. The document was not sent to the claimant at the time. The terms of reference, as disclosed to the claimant shortly before this hearing were redacted. Mr Keen stated the redactions were of irrelevant information. The full terms (albeit with what appear to be names still redacted) were disclosed during this hearing. I have considered the latest less redacted version; I find that there is no justification for the assertion that the redacted information was irrelevant.

38. The respondent's position is that the Mitchell report was requested to rectify the alleged mistakes made in the initial dismissal. However, the terms of reference raise new matters (including an alleged assertion by an individual whose name has been redacted) that female staff "were told to keep themselves away from Mr Sellers at functions where alcohol was served because of this behaviour." It is said this was “well known.” It is asserted that individuals who remain working at the British Council alleged they "had suffered similar treatment" to ”that complained of by ZZ”, but the individual or individuals were unwilling to come forward. These unsupported assertions were not matters which were raised in the original disciplinary. These matters form no part in the original investigation. The claimant could have no idea that such matters would be raised. They are couched in terms which make it clear that the writer of the instructions asserted the unspecified misconduct was to be taken as having occurred. Their inclusion is highly prejudicial. Why new unparticularised assertions of actual misconduct were included in the instructions to Mr Mitchell is unexplained. I find, on the balance of probability, the assertions were included to suggest a pattern of behaviour. They were included in a deliberate attempt to prejudice the ultimate findings. They seriously undermine any suggestion there was a true attempt to address previous deficiencies. The redaction of the information is unjustified and significant. The inclusion of such unsupported new allegations is at odds with the respondent’s assertion that there was a genuine attempt to investigate further.

39. Mr Mitchell contacted various witnesses and undertook various reviews. He was given documentation to consider, albeit the documentation was incomplete. I have no reason to doubt that he produced his report in good faith. The information before him, as acknowledged by Mr Mitchell, was limited. Further, Mr Walker confirmed the timetable was constrained. I have no doubt that Mr Mitchell would have sought to put from his mind the irrelevant prejudicial information, but the inclusion of it before him undermines the reliance that the respondent should reasonably have placed on his opinion. If Mr Mitchell dealt with the new allegations expressly in his report, it has not been brought to my attention. I have no reason to doubt Mr Mitchell formed a view based on the information as disclosed to him, and the evidence he had obtained from witness interviews. However, the material before him was limited and distorted.

He did not interview he claimant. He did not seek any comments from the claimant. It does not appear he gave weight to the claimant's written statements or any of his wife. On the basis of the information before him, Mr Mitchell concluded that the claimant had committed the alleged sexual assault.

40. I find there can be no criticism of the claimant for not participating in the Mitchell investigation. Whether he sexually assaulted Ms ZZ was a live issue before this tribunal and was to be determined as part of the remedy hearing. He had engaged with the original investigation and all stages of the appeal. To the extent that the respondent purported to reopen the investigation post dismissal and post judgment, it was outside any procedure. The claimant was no longer an employee. The new investigation was not underpinned by any reinstatement. He had no obligation to cooperate with the further internal investigation, particularly given that the proceedings were ongoing. No reasonable employer would have expected the claimant to participate in a further internal procedure, which formed no part of the respondent's normal policies, in circumstances where the central issue under consideration was before the tribunal. I find the respondent knew at all times that there was no prospect of Mr Mitchell interviewing the claimant or his wife and knew that the information on which Mr Mitchell could base his opinion would inevitably be incomplete.

41. I noted, in the liability decision at paragraph 7.102 the importance of the statements of Ms Monica Marziota's and Mr Michele Gerace. I said –

> **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.**

42. Ms Monica Marziota's statement was countersigned by Mr Michele Gerace, who is her husband. That statement was not sent to Mr Mitchell. The omission is significant and not explained, particularly given my judgment emphasised the importance of that evidence.

43. I accept that attempts were made by Mr Mitchell to contact both individuals. I reject Mr Walker's evidence that all reasonable attempts were made to contact those witnesses. It appears that emails were sent to Ms Marziota's and Mr Gerace on 5 May 2022, and a further email to Ms Marziota on 6 July 2022. On 12 May 2022, Mr Mitchell did speak with Mr Gerace, briefly. His wife, Ms Marziota, was, literally, giving birth and

understandably he could not proceed with the interview. Apart from, possibly, an email on 6 July 2022, there is no evidence that any further attempt was made at contact. Ms Marziota and Mr Gerace potentially provided the only independent evidence which would demonstrate that the alleged conduct of Ms ZZ did not take place. The attempts to contact them were wholly inadequate and seriously limit the reliance that the respondent could reasonably place on any report.

44. If the Mitchell report is relevant at all, it is in deciding to what extent it was rational for the respondent to rely on it when deciding, as a fact, that the claimant had sexually touched Ms ZZ. I will consider this further in due course.

45. The draft report was sent to Mr Walker. Mr Walker raised a number of questions, which I have reviewed. No question raised a substantive issue. It should have been obvious that there were material failures in the report, particularly with regard to contacting the most important witnesses. Further, at no time did Mr Walker question the appropriateness of the respondent's approach, or the rationale for the investigation. In his evidence, he accepted that he was tasked with deciding whether the claimant had committed the alleged sexual assault. He was unable to say why it was considered appropriate for the matter to be considered by an independent barrister, who had limited access to information, when the issues was before tribunal. It is clear that he gave no consideration to the overall appropriateness of the procedure in the context of continuing litigation or the cogency of the report's finding when the claimant could not be expected to participate in the process.

46. Mr Walker describes his role as follows

> **5. I was not involved in the original investigation into the allegation of misconduct against Mr Sellers, the decision to dismiss him or his subsequent appeal against his dismissal. I was asked to review Jack Mitchell's report as an independent internal decision maker and decide whether, based on Jack's findings , I agreed that the allegation raised against Mr Sellers had, on the balance of probabilities, occurred as alleged and whether, in my view, it constituted an act of gross misconduct.**

47. Mr Walker did consider whether to offer Mr Sellers the opportunity to comment on the findings. He chose not to. He said he relied on advice.[5] He offers an explanation at paragraph 7 of his statement

> 7. I reached this decision because the report was commissioned because the judgment in Mr Sellers' unfair dismissal claim (pages 28-64 of the bundle) had ruled that the decision to dismiss was procedurally unfair and as a result there was concern in the leadership team that the Council might be ordered to re-employ Mr

[5] Any legal privilege has not been waived.

> Sellers in circumstances where it was unclear following the judgment whether he was guilty of sexually assaulting a member of the British Embassy. I also understood from my review of the report (paragraph 18, page 225 of the bundle) that Mr Sellers and his wife had declined to be interviewed by Jack Mitchell as part of his investigation, seeking to rely on their previous interviews and I took this to mean that Mr Sellers had nothing further to add on the matter.

48. As to his own findings, he states -

> **8. Having reviewed and considered Jack Mitchell's revised investigation report and supporting documents in detail I concluded that his findings were supported by the evidence and that the allegation in question amounted to an act of gross misconduct, one that I believed to be a serious example of "unwanted conduct which is intended to, or has the effect of, violating an individual's dignity" under the British Council's Bullying and Harassment Policy (pages 298-300 of the bundle). I recorded the detailed rationale for my decision in a record of decision document dated 20 August 2022 which can be found at pages 785-786 of the bundle.**

49. I have considered the "rationale." Mr Walker states he was satisfied the investigation had been undertaken in a wholly independent manner. He states, "all reasonable efforts have been made to engage witnesses." He states, "I see no evidence that ZZ had anything to gain." He relies on certain aspects of the evidence, including the fact that ZZ appeared to be agitated when leaving the party. He states, "None of the witnesses interviewed by JM are able to provide compelling evidence that the alleged assault did not take place or could not have taken place." He does not explain why he considered it necessary for there to be compelling evidence that the assault did not take place, particularly when Mr Mitchell's findings were based on the balance of probability. It appears he may have had in mind a higher burden of proof required to believe the claimant. As to his rationale he states –

> **Given this, I have focused my considerations on whether I believe that the alleged assault took place in the manner that it has been articulated by the complainant, ZZ. In doing so, I note the investigator has sought to identify evidence that supports and opposes the allegation raised. He identifies ZZ's accuracy of recollection of events noting a comment made by PS at the party to a 13-year-old girl; he identifies that ZZ allegation is fortified by her contemporaneously raising the matter with her close friend, the manner in which she raised it by the timing of the communications… and her line manager's view that a few days later ZZ was genuinely shaken and at a loss to know what to do.**

50. Finally, he reaches a view "on the balance of probabilities" that the alleged assault did take place. No part of his rationale questions any deficiencies in the report or the failure to obtain evidence. It also appears to proceed on the assumption that the claimant should be expected to participate in the process.

51. Mr Walker gives no evidence as to what happened thereafter. It is apparent there was a senior leadership team, consisting of approximately 10 people including the chief executive, of which both he and Mr Williams were part. There is no evidence that the matter was considered by that team. It is unclear what happened to the report, who considered it, what further decision was made, or on what basis. No decision maker has been called and the evidence does not establish who else believed the claimant guilty of alleged misconduct or why.

52. I am satisfied that Mr Walker, simply accepted the finding of Mr Mitchell. During the course of his evidence, he conceded that there were difficulties with the report and the potential key evidence had not been considered. He did not consider those obvious deficiencies at the time, despite being tasked to reach his own decision. I am satisfied that had Mr Mitchell said the conduct had not occurred, Mr Walker would have accepted that finding. I am satisfied that he placed reliance wholly on the Mitchell report. It follows that Mr Walker did not hold an independent view that the claimant had committed misconduct. He was prepared to accept an appropriate and proper finding of a proper investigation. There is no suggestion before me that any member of the senior leadership team of the respondent has, independently, formed the view that the claimant committed a sexual assault. The only direct evidence I have is from Mr Walker, and he relied wholly on the report. As I am satisfied that he would have accepted a finding that the claimant did not commit the sexual assault, I am not satisfied that he has formed an intractable view that the claimant committed the misconduct. I have no reason to believe that the respondent's managers, should it now accept that there are deficiencies in the process, will maintain the view the claimant committed the alleged sexual assault; however, the evidence I have is limited, but I have no doubt that Mr Walker has an open mind.

53. Moreover, having regard to the evidence, particularly of Mr Williams, I note that there are concerns about reinstating the claimant because of the effect that may have an stakeholders and others. However, that reservation is in the context that there is no specific finding that he did not commit the misconduct which could be communicated to the world at large. That was the position before this hearing.

54. Following his dismissal, the claimant continued to occupy the flat in Rome. There was a dispute about the continuing provision of accommodation. I have been given limited details of the dispute. The respondent's action against the claimant was ultimately withdrawn, with his consent. The respondent paid the claimant's costs. This suggests that the respondent's action against claimant was not well-founded. However, the respondent has given no detail. It appears the flat was repossessed because of the landlord, who is not the respondent, took action. This tells me nothing about the relationship between the claimant and respondent. There is some suggestion that the claimant delayed returning artwork. However,

there is no suggestion at all that he intended to keep it permanently and it was returned to the respondent. The claimant summarises the position in his submissions.

> **The Respondent mentions the apartment in Rome (AW Witness Statement para 29). They are correct in saying that I stayed in the apartment after my dismissal. I stayed because I understood that housing would continue to be provided until the matter went to the Employment Tribunal. The Respondent themselves, in their Counter Schedule of Loss (P 126) confirms this. I received no communication about alternative arrangements or about repatriation and was surprised to be taken to court over this matter. The artworks mentioned in AW Witness Statement are incidental, part of the fixtures and fittings of the apartment. I submit that my behaviour was in good faith in terms of my expectations of my rights. The litigation went through the courts and was settled. The BC requested me to allow them to withdraw and agreed to pay my costs (Apartment Rome document shared during the Remedy Hearing). As far as I was concerned, the situation was resolved amicably. Indeed, the Respondent confirms there are situations where current or serving employees are involved in litigation with the BC (AW Testimony). I submit that this is part of a normal process and does not have to result in any loss of trust or confidence on either side.**

I accept that this is fair and accurate.

55. The evidence before me demonstrate that reinstatement would be considered based upon the findings of the Mitchell report. There is no suggestion that such consideration would be contingent upon any matter relating to the Italy litigation. There is no evidence to suggest that the Italy litigation was a significant consideration. There is no evidence in support of the contention that the Italy litigation fundamentally damaged mutual trust and confidence, such as to be relevant to any claim of reinstatement of engagement. To the extent Mr Williams asserts that the Italy litigation is important, his evidence is unconvincing, and I do not accept it.

56. The British Council is an international organisation for cultural relations and educational opportunities. It operates internationally. It works in the fields of arts, culture and education. It has a physical presence in over a hundred countries. It has offices in this country, including Manchester and London. The eight regions are each led by regional directors and there are country directors, of which the claimant was one.

57. Many appointments are subject to rotation. The claimant expected to remain in post for three years. Appointments are sometimes extended by between one and two years. I do not need to go into the detail. Despite appointments being of limited duration, many, and possibly most, employees at a senior level stay in the organisation for a considerable period. It is common to reapply for further appointments. Where appointments are not immediately secured, individuals may undertake projects within Britain. Sometimes those projects may last for a considerable period. Ultimately, if appointment to a post is not secured, there may be a process of entering a redundancy pool which may last

many months. It follows that the process of displacement and reapplication is normal. This organisation is peculiarly well equipped, to deal with displaced employees and to identify, and supply, alternative, and suitable roles. The process of periodic displacement is the model used. Given the size of the organisation, individuals may be placed in different countries, different departments, and different offices. They may work with individuals, including managers, with whom they have not worked previously.

58. Mr Williams gave evidence of an ongoing restructuring process. The process includes a reduction in funds and a reorganisation. I accept the claimant's evidence that the fact that direct funding is being reduced does not necessarily mean that all sources of funding are reduced, there may be funding available for specific processes supplied by stakeholders. I do not need to consider the detail. I do accept that the ongoing process has led to consideration of redundancy. Some have volunteered for redundancy. I am not satisfied that all redundancy programmes have closed, albeit I do not need to consider the detail of this at this stage. The reality is that the picture is developing. It is unclear how many individuals will seek to remain. It is unclear how many will secure employment. The respondent suggested that there are more individuals chasing positions than there are positions which exist. The reality is that this is speculation, and such a simple assessment may not be reliable.

59. The claimant occupied the position of country director Italy. That position will become vacant. It is anticipated it will be advertised in or around or January 2023. It is unclear when it will be filled, the best evidence I have suggests that it may be filled sometime next year.

60. The last assessment the claimant received was that he "exceeded expectations." It is unclear whether he would have been reappointed as a country director Italy. His tenure had expired, and it may not have been extended. There is at least a possibility that he would have applied for and accepted another role. I do not need to consider in detail what jobs are currently available. It is common ground that there are positions available which would be suitable for the claimant and to which he could be appointed. There is no suggestion that they will not remain available in the foreseeable future during the period any re-engagement will take effect. Mr Williams speculates about whether the claimant would succeed in a competitive appointment. However, I do not consider that to be relevant to my decision at this stage.

61. As regards general changes, Mr Williams says the following -

> **48. In summary, significant changes have been made to the Global Network operating model as part of the ongoing transformation process and these include:**
>
> - **an increase in Locally Appointed Country Directors rather than International Assignees from UK;**

- **an increase in Country Director roles with remote delivery responsibilities for other countries;**
- **a removal of shared *Country Director / Teaching Centre Manager* roles; and**
- **more Country Directors with the need for a specialised sector skill in Arts and/or Education.**

62. I do not need to consider all the roles Mr Williams has identified. It is clear that there are numerous roles for which the claimant may be suitable. For some of those roles he may need to be trained, but that is not itself necessarily a barrier and it reflects the reality of rotation. In any event, that there are roles to which he would be suitable. At paragraph 52 Mr William states –

> **52. Noting Mr Sellers' background with the British Council in Exams Management and as a Country Director, I would anticipate that of the 11 advertised roles, Mr Sellers' skills and experience mean he might be a suitable candidate for four of these roles, namely, Country Director Sri Lanka (the profile for which is found at pages 796-799 of the bundle), Country Director Brazil (the profile for which is found at pages 777-780 of the bundle), Country Director Jordan & Cluster Lead Levant (the profile for which is found at pages 770-773 of the bundle) and Regional Head South Asia and East Asia (the profile for which is found at pages 774-776 of the bundle), had he not been dismissed for gross misconduct.**

63. It is respondent's position that if the claimant is re-engaged, or reinstated, this will add one further person to a process of reorganisation, ultimately, that may mean that another person is unable to find employment. That may be a theoretical possibility. It is not a certainty, and I am not satisfied that it is decisive.

Law

64. Section 116 Employment Rights Act 1996 provides.

> **(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—**
>
> **(a) whether the complainant wishes to be reinstated,**
> **(b) whether it is practicable for the employer to comply with an order for reinstatement, and**
> **(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.**
>
> **(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.**
> **(3) In so doing the tribunal shall take into account—**
>
> **(a) any wish expressed by the complainant as to the nature of the order to be made,**
> **(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and**

> **(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.**
>
> **(4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.**
>
> **(5) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of subsection (1)(b) or (3)(b), whether it is practicable to comply with an order for reinstatement or re-engagement.**
>
> **(6) Subsection (5) does not apply where the employer shows—**
>
> **(a) that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement, or**
> **(b) that—**
> **(i) he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and**
> **(ii) when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.**

65. An order for reinstatement or re-engagement cannot be refused merely because it is inexpedient (see **Qualcast (Wolverhampton) Ltd v Ross** [1979] IRLR 98, [1979] ICR 386, EAT. The fact that the employer considers another person preferable for an available alternative post does not mean that re-engagement is not practicable (see **Davies v D L Insurance Services Ltd** [2020] IRLR 490, EAT).

66. The availability of possible jobs is to be assessed as at the date that any order would take effect: **Great Ormond Street Hospital v Patel** UKEAT/0085/07.

67. The Court of Appeal in **Port of London Authority v Payne** [1994] IRLR 9 held that the tribunal must make a determination on the evidence in relation to practicability at the first stage. This is provisional. It is at the second stage that the final determination has to be made, with the burden of proof then clearly on the employer. The 'provisional' nature of practicability in the initial order was accepted and emphasised by the Supreme Court in **McBride v Scottish Police Authority** [2016] UKSC 27.

68. An order may not be practicable if there remains a continuing breakdown of trust and confidence between the parties: **Wood Group Heavy Industrial Turbines Ltd v Crossan** [1998] IRLR 680, EAT. In in this case the employers remained convinced of the substantive allegations of misconduct. In such a case, what the tribunal must do is to determine whether this employer has genuinely and reasonably lost confidence. The tribunal should not substitute its own view as to that misconduct **United**

Lincolnshire Hospitals NHS Foundation Trust v Farren UKEAT/0198/16. In that case the employment tribunal had accepted that the employee had administered drugs in breach of the trust's policy but considered that the employee had long service, and in the view of the tribunal, the employee could be trusted to act properly in an environment other than an accident and emergency unit, given her experience, record and professional commitment. The tribunal was not permitted to substitute its own view about the trust to be placed in the employee. The correct approach was to ask whether this employer genuinely believed that the claimant had been dishonest, and whether that belief had a rational basis.

69. In **Kelly v PGA European Tour** [2021] EWCA Civ 559 the Court of Appeal confirmed the **Farren** approach.

70. The mere fact that the initial dismissal was for misconduct does not make reinstatement impracticable even if some managers still believe in guilt (especially in a large organisation) see **London Borough of Hammersmith & Fulham v Keable** [2022] IRLR 4, EAT.

71. In Boots Co plc v Lees-Collier [1986] IRLR 485, the EAT held that the test for contributory fault under subsections (1)(c), (3)(c) is the same as the test for contributory fault under ERA 1996 s 123(6) in that case, the tribunal had accepted that on the facts there was no argument for a reduction under s 123(6) and so it followed that it would not be unjust under sub-s (1)(c) above to order reinstatement.

72. A tribunal should make clear if contributory fault will be considered in the liability or the remedy hearing (see Iggesund Converters Ltd v Lewis [1984] IRLR 431.

73. If a tribunal considers on the facts before it that the employee's acts caused or contributed to the dismissal it must make the reduction even if the parties have not expressly raised the question of contributory fault (see, e.g., **Swallow Security Services Ltd v Millicent** [2009] All ER (D) 299 (Mar)).

74. It is important to consider whether the claimant's actions caused or contributed to the dismissal itself, not to the unfairness of that dismissal (see **British Gas Trading Ltd v Price** UKEAT/0326/15 (22 March 2016, unreported).

75. It is necessary to determine, as a fact, whether conduct, which may be capable of contributing, did, in fact, occur. The employee's conduct must be to some degree blameworthy for a reduction in compensation to be made and by analogy to be relevant to the question of reinstatement or engagement.

76. Langstaff P in **Steen v ASP Packaging Ltd** [2014] ICR 56, EAT advised tribunals to address four questions—(1) what was the conduct in question? (2) was it blameworthy? (3) (in relation to the compensatory award) did it cause or contribute to the dismissal? (4) to what extent should the award be reduced?

77. Langstaff P further clarified in **Rawson v Robert Norman Associates Ltd** UKEAT/0199/13 (28 January 2014, unreported) that, in relation to the employee's alleged contributory conduct, the test here is whether it actually occurred, not the more general unfair dismissal test of whether the employer reasonably believed it happened.

Conclusions

78. For both reinstatement and re-engagement, I am required to consider whether the claimant contributed to his dismissal and if so, whether it would be just to order either reinstatement or re-engagement.

79. The tribunal should adopt the same approach as required by section 123(6). I have set out the main principles above. The fact a party does not rely on contributory fault does not absolve the tribunal of its obligation to consider it.

80. There have been unusual developments in this case. The respondent initially pleaded that the claimant was dismissed because of the alleged sexual assault. It alleged his conduct contributed to the dismissal. I have no doubt the conduct referred to is the alleged sexual assault. The respondent has 'withdrawn' its reliance on the allegation of contributory fault for the purposes of section 123(6). The respondent failed to confirm its position in relation to section 116, and hence the order for further submissions.

81. After the hearing, the respondent sought to amend by deleting paragraph 15 of the grounds of resistance. I have allowed that amendment. This simply removes the positive assertion there was contributory fault, but it does not change the factual basis of the defence or concede that the conduct did not occur. The final submission states, "The Respondent does not admit that the misconduct did not occur." The original pleaded case stated it did occur, and that has not been withdrawn.

82. The respondent failed to give any explanation for the withdrawal of its positive case that the claimant contributed to the dismissal. Despite specific enquiry that was not clarified in the hearing. I sought clarification in the order for further submissions.

83. Withdrawing a positive case of contributory fault does not relieve the tribunal of its duty to consider contributory fault. In circumstances where a

respondent accepts that conduct initially relied on did not occur, the tribunal may, in appropriate circumstances, be able to rely upon that concession. The result would be there would be no finding of contributory fault.

84. In circumstances where the respondent asserts that the conduct did occur, it may still be necessary for the tribunal to consider whether it finds the conduct did occur, and if so, whether it contributed to dismissal. A withdrawal of a positive case may be persuasive, but it is not decisive, particularly if the reason for the withdrawal is unclear.

85. In this case the respondent does not concede the conduct did not occur, and fails to explain why it now chooses to advance no positive case of contribution, whilst simultaneously asserting that the respondent maintained a rational belief that it did occur.

86. The approach to contributory fault is the same for section 123 and section 116. It follows that the respondent's withdrawal of reliance on contributory fault for the purpose of section 123 could be relevant to consideration of contributory fault pursuant to section 116.

87. It remains the respondent's evidential position that the alleged sexual assault occurred. That is the effect of Mr Walker's evidence. His consideration was not in the context of whether he believed the matter for the purposes of dismissal, but whether he believed the conduct occurred for the purposes of deciding whether there was a loss of mutual trust and confidence. He decided, as a fact, that the sexual assault had occurred. The fact that the conduct is alleged to have occurred is consistent with the respondent's pleaded case.

88. It is necessary to go back to first principles. In particular, I have regard to Langstaff P in **Steen**. First, what was the conduct in question? There can be no doubt about this. It is the alleged sexual touching at the party on 16 December 2018, which I refer to generally as the alleged sexual assault or the alleged sexual touching. In order to consider whether any conduct contributed to dismissal, it is first necessary to consider whether it happened at all.

89. Contributory fault was not decided at the liability hearing. At the liability hearing the parties were told the question of contributory fault would be reserved to the remedy hearing. They had an opportunity to, and should have, filed all relevant evidence concerning contributory fault at the liability hearing. When contribution was reserved for the remedy hearing, the respondent was invited to consider what further evidence, if any should be produced. This was a second opportunity for the respondent to produce that evidence.

90. The respondent contacted Ms ZZ for the purposes of the Mitchell report. It was suggested to me that it would be inappropriate to call her to give evidence, as she may not wish to give evidence, and she may still be in Italy. If there has been relevant correspondence, it has not been brought to my attention. I do not find that submission compelling. It was open to the respondent, at all times, to call Ms ZZ, and any other evidence it considered appropriate, in order to establish the conduct which it relied on in its pleaded case.

91. I reject the respondent's submission that the claimant has not given relevant evidence. His evidence has been consistent and to the effect he did not commit the sexual assault.

92. I have seen evidence in the form of various reports and statements. In particular I have regard to the letter from Ms Monica Marziota and Mr Michele Gerace, albeit I am conscious that they have not been called to give evidence.

93. During the hearing, Mr Keen indicated that the respondent did not pursue an allegation that the claimant had committed the sexual assault because it did not have sufficient evidence to establish the fact, albeit the respondent maintained that it had sufficient evidence to sustain a belief that the conduct occurred. I do not accept that the respondent could not produce evidence in support of its pleaded case. At the very least it could have sought a statement from Ms ZZ, even if she were not called.

94. Throughout the remedy hearing, I made it plain that the issue of contributory fault remained live and may need to be decided by the tribunal, regardless of the position adopted by the parties. The respondent had an opportunity to cross examine the claimant further, if it had chosen to do so. Instead, the respondent adopted the position the contributory fault was irrelevant, and that the tribunal must not make findings, and to make findings would be an error of law. That position was expressly not accepted by the tribunal. It follows that I am satisfied that the respondent had an opportunity to produce evidence in support of its pleaded position. It had an opportunity to cross examine the claimant. It had not opportunity to advance arguments on whether there was contributory fault. Instead, it chose to abandon reliance on contributory fault for the purpose of section 123, and as the approach to contributory fault under section 116 is the same, by implication for that purpose also. The reason advance was that the respondent could produce insufficient evidence to establish the alleged conduct. The respondent is entitled to make that litigation choice.

95. None of that removes my obligation to consider contributory fault. The first question is whether Mr Sellers committed the sexual assault on which the respondent relied for dismissal.

96. I have considered all of the evidence carefully. I have regard to my liability decision and in particular to the discrepancies I found in Ms ZZ's accounts.

97. The claimant's evidence has been consistent throughout. Ms ZZ's position has been inconsistent. I considered those inconsistences in the liability judgment. She is inconsistent as to whether she said goodbye to the claimant or his wife first. I accepted the claimant's evidence. Ms ZZ said goodbye to his wife first. To the extent Ms ZZ showed distress, I accept on the balance of probabilities, that she was distressed before saying goodbye to the claimant. Therefore, there is no rational basis for me to attribute her distress to any action of the claimant.

98. Ms ZZ's statements developed as to the exact nature of the sexual touching. It appears a further account has now been given to Mr Mitchell. This would suggest that the sexual touching occurred over a period of up to ten seconds. This alleged assault occurred in a relatively small flat in a crowded party. Ten seconds is a significant amount of time. It is inconceivable that such inappropriate touching would not be observed by anybody present, provided they were paying a reasonable amount of attention. It appears to be Ms ZZ's position, both in the statements she gave to the respondent and the statement she gave to Mr Mitchell, that she believed the claimant's actions would not be observed. That in my view is inconsistent with any description she gave of the touching. It would appear that her account became more graphic and developed before Mr Mitchell. I can see no rational explanation given by Ms ZZ as to why she believed the alleged sexual touching would not have been observed. Ms ZZ's accounts fall short of suggesting that she was so isolated with the claimant that there were no observers. She appears to accept people were present. It appears that her evidence as to who was present is poor. I note that during the course of the respondent's initial investigation, her account was described as hazy.

99. In the circumstances, I prefer claimant's evidence, which is the effect that many people were present who would have been in a position to see the alleged sexual assault.

100. I have no doubt that the statements of Ms Monica Marziota and Mr Michele Gerace are important. If believed, their statements are compelling, and possibly conclusive, evidence in favour of the claimant's account. I have a clear and cogent letter. The respondent failed to interview either witness during the disciplinary process. Mr Mitchell failed to interview either witness. I am conscious that neither have been called. I am also satisfied that in no sense whatsoever have they sought to avoid answering questions. Mr Mitchell was able to speak to Mr Gerace. The fact that his wife was, at that time, giving birth, explains completely why the interview did not proceed. I reject the evidence that every effort was made to contact them. I find their statements are consistent with, and

corroborate, the claimant's account. There is no good reason to give their statements less weight than the written statements of Ms ZZ.

101. I found the claimant to be consistent in his evidence.

102. To the extent that I have any account from Ms ZZ, there are obvious inconsistencies, her recollection appears to be hazy, her account developed and varied, her assertion that she believes no one would have seen the assault is, absent any further explanation, unexplained and unlikely.

103. During the disciplinary proceedings, Ms ZZ indicated that her initial text to a friend had been deleted. It appears that her position may have changed when the Mitchell report was commissioned. I have received limited evidence on the point. I accept the claimant submissions on this point. It appears that, when Mr Mitchell was considering his report he corresponded with Ms ZZ. In her email to Mr Mitchell of 14 July 2022 she stated, "I found a screenshot of the conversation which I will send separately from my mobile." The next sentence is redacted completely; I do not know why. Her email states she had changed her mobile phone and had no texts before 2020. Why she now had screenshots of texts that she claimed to have deleted before the initial interviews is not explained. The email is difficult to follow, as large parts are redacted. The redactions appear to go well beyond simple redaction of names. The email refers to the recipient of the alleged contemporaneous texts and states, "I asked him for screenshots some time ago and he said he didn't have any." It follows that the screenshots do not appear to have come from the estranged friend. It would follow that the screenshots may have been of the claimant's own phone, but this is inconsistent with her original position that the text messages were not available, as she deleted them when she fell out with her friend. It may be that she had the screenshots all along, but if she did, it appears she withheld them, and misled the original investigation.

104. It is not clear to me if the screenshots were sent to either the respondent or Mr Mitchell. If they were sent it is not clear if they were considered. They may have been relevant. At the very least, it may have been possible to examine their properties and ascertain when the screenshots were captured. This may have resolved whether Ms ZZ had misled the original investigation.

105. It follows that how Ms ZZ came to have screenshots of a conversation she claimed to have deleted is unclear. It is possible there is an innocent explanation. However, it is possible that this is clear evidence that she has deliberately misled. Further, the content may have been relevant, but it has not been produced to the tribunal.

106. I have to considered all of the evidence. It is regrettable that I have not heard from Ms ZZ. Had I heard from her, she may have been able to give satisfactory evidence explaining the apparent difficulties, discrepancies, haziness, and possible withholding of documentation. I must decide the matter on the evidence before me. I accept, on the balance of probability, the claimant's evidence. I find the alleged sexual assault did not occur.

107. As I found the conduct did not occur, I find the claimant did not contribute to his dismissal.

108. As to reinstatement, the respondent relies, first, on the fact that the Italy post is currently filled and second, the claimant had reached the end of his tenure and would have been removed in any event. It is clear that the post will be advertised around January 2023 and will be filled sometime next year. It will become available but is not currently vacant.

109. The respondent's submissions do not, specifically, address the operation of section 116 (5) and (6). The claimant accepts that it was necessary for the Italy role to be filled. In this context, a permanent replacement refers to a fixed term appointment. The post will become vacant again as noted. It is also unclear to me if the replacement was engaged "after a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged." It is clear that there was an appointment to his role, albeit the term of that replacement appointment is coming to an end.

110. I am persuaded that the post of country director in Italy will become available, albeit it is not immediately available.

111. I am persuaded that it is not appropriate to order reinstatement to the specific role. In exercising my discretion, I note that the claimant had reached the end of his tenure and was due to reapply, competitively, for a new role. In those circumstances, it makes little sense for me to order reinstatement into role which he would inevitably have left.

112. The respondent alleges it is not practicable to re-engage. Its submissions on this point are limited. I must consider whether the order is capable of being carried into effect with success. Practicability must be considered at the date the order would take effect. The parties have not advanced the case on the basis that there will be a material change to the current position in the near future. If the order is made now, it will take effect between now and before the end of October, at the very latest.

113. The respondent alleges there has been a loss of trust and confidence, which is based on a rational belief that the claimant committed the sexual assault. It also relies on his failure to cooperate in leaving the Italy flat. I will deal with this below. The remainder of the submission states this:

> 7 (b) Secondly, it would result in the Respondent being further overstaffed, other people being made redundant and a disruption of the redundancy processes that were already underway.

114. There are further points relied on as set out in paragraphs 21 – 24 of the respondent's submissions; they can be summarised as follows: there has been a reduction in the number of roles, which has led to potential redundancies and employees seeking new role; it is alleged there will be more people seeking roles than there are roles available; engaging the claimant would add to "over staffing problems;" re-engaging the claimant would require alteration of the redundancy programme, as others may be bumped, and that burden is too high; an employer is not required to find a place for an employee irrespective of whether there are vacancies; it would be artificial to re-engage the claimant and place him in the pool for redundancy; and the redundancy process should not be trumped.

115. I should deal with those matters.

116. An order shall not be refused because it is inexpedient. The fact that the employer considers another person preferable for an available post is not relevant. I accept there may be an ongoing programme of restructuring and redundancy. However, the position is far from clear. I do not accept there is clear evidence that there will be more people seeking appointments than there are jobs available. There is an ongoing programme of voluntary redundancy, and the outcome is unpredictable. The respondent's assertion appears to be that other individuals, who may face redundancy in any event, may face more competition should the claimant be re-engaged. This argument is one of expediency.

117. There are jobs, as confirmed by Mr Williams, which are suitable for claimant, and to which he could be appointed immediately. The fact that the respondent may prefer to appoint someone else, is not itself conclusive. Moreover, this respondent is in a peculiarly strong position to accommodate the movement and repositioning of displaced employees to include giving specific assignments. I am not satisfied that the respondent has explored the possibility of the claimant being re-engaged into a specific position working on a project, as he may have envisaged would be a possibility when his tenure as a country director concluded. I am not satisfied that undue burden is placed on the respondent by re-engaging the claimant. It is clear that there are roles to which he could now be assigned.

118. The second point relied on is loss of mutual trust and confidence. I accept it is not for me to substitute my views to whether there should be a loss of mutual trust and confidence. My finding the claimant did not commit the sexual assault does not displace any belief held by the respondent's relevant employees that the claimant committed misconduct. Equally, it is for the respondent to show evidence demonstrating who held what belief and why. I should not assume a belief is held.

119. If there is a belief that the claimant sexually assaulted Ms ZZ, I must consider whether the employer holds that belief on genuine and rational grounds. Much of the case law focuses on the rationality of grounds. However, the first question is whether the belief is held at all, and if so, by whom.

120. The case law recognises that the size of the employer may be relevant (see **Keable**). In a large organisation, there may be multiple worksites. There may be significant insulation between the re-engaged employee, and any individual who was previously involved in the dismissal or any subsequent litigation.

121. I have heard from two employees. Mr Williams was not involved in the process. He was part of the senior leadership team, which was the body which would have considered reinstatement, had Mr Mitchell come to a different conclusion. I am far from satisfied that he holds any firm or strong view that the claimant committed misconduct. To the extent that he has formed any view, he has relied on the conclusions of Mr Mitchell, and on the assumption that they were proper findings based upon a fair investigation which rectified, in some manner the previous faults. I have no doubt that he was willing at all times, and remains willing, to accept the claimant is not guilty of misconduct, should there be appropriate grounds for finding that.

122. Mr Walker, prior to receiving Mr Mitchell's report, had not formed any view that the claimant was guilty of misconduct. He was prepared to accept the findings of the Mitchell report. He assumed that the report was a fair and proper process which adequately addressed the evidence; he had no specific independent view himself. For the reasons I have given, his review of the documentation was flawed. I accept that he believed that the process was appropriate, and the report itself fair and unbiased. However, I am not satisfied that he reached that conclusion by applying his own mind to the matter. Instead, he relied on the assumed fairness and appropriateness of the process. His reliance on the assumed fairness of the process limited his critical analysis. I have no doubt that before me, during cross-examination, he perceived serious flaws in the process. Whilst I have noted that Mr Walker did not, at the time, adequately apply his mind to considering whether it was rational to rely on Mr Mitchell's report, I have no doubt that Mr Walker is a fair-minded and thoughtful individual who is undoubtedly capable of reassessment at any time.

123. There are numerous senior managers. Save for Mr Williams and Mr Walker, I have no proper evidence as to the views of the numerous senior managers. It is clear that had the Mitchell report found in favour of the claimant, the senior managers would have considered reinstatement. There is no rational basis for believing that they would not have reinstated

the claimant. If anything is to be inferred from this, it is that they had open minds, and I have no reason to believe that their minds are now closed. That said, I have noted the difficulty in Mr Patel's position and his seeming wish to avoid reinstatement. I have noted that his stated objectives undermine the value of the report. However, it cannot be assumed that the respondent does not wish to reinstate the claimant because there is a belief that he committed the misconduct. That reluctance may be simply a matter of expediency. I am not satisfied that I have heard from the relevant decision-makers, and Mr Walker has been unable to assist me with this. It follows that I am not satisfied that all or the majority of the relevant senior managers have formed the view that the claimant committed the misconduct.

124. If I were wrong, and obdurate views have been formed, I would need to consider whether the views are genuinely held based on rational grounds. Those two matters may be connected.

125. As to rationality, the respondent's position is simple. It accepts that the original investigation was flawed and inadequate and it could not be relied on to found the belief that the claimant committed the sexual assault. [6] The respondent alleges that the inadequacies of the original investigation could be rectified by a further internal investigation, having rectified those errors, a decision could be made, in some manner, independently and on which the respondent could legitimately rely. It alleges the Mitchell report achieved this.

126. In submissions, the respondent confirmed that the Mitchell report was not a disciplinary process. The claimant was no longer an employee. He was not obliged to take part in the Mitchell investigation.

127. As the Mitchell report was no part of the disciplinary process, the respondent says it was not subject to the ACAS code, and it was not part of the respondent's own HR procedure. In no sense whatsoever could it be seen as a rehearing of the dismissal case. That process had been exhausted.

128. The commissioning of the Mitchell does not demonstrate that the respondent did not believe he had committed the misconduct, but it does demonstrate the respondent accepted that it was not rational or reasonable or appropriate to maintain a belief based on a fundamentally flawed investigation.

129. The Mitchell report may be understood as the respondent's attempt to undertake an investigation which did not have flaws. In principle, it is

[6] Albeit Mr Williams appears to place reliance on the first investigation when he states "two internal investigations had resulted in the finding that the alleged misconduct had occurred, and both decision makers had an honest belief…"

laudable that the respondent was prepared to reconsider the matter. I cannot wholly discount the possibility that an internal investigation, even at the stage when this was undertaken, could not found grounds for a rational belief in the misconduct. However, in his case, the exercise was fraught with difficulty.

130. It is appropriate to stand back and consider what is necessary to have a fair investigation which could lead to a reliable finding of fact. Relevant considerations may include the following: the investigator should be competent and independent; the person accused must be able to participate fully; the investigator should have access to all relevant evidence; there should be a reasonable expectation that all relevant witnesses should participate; all relevant evidence should be identified; and a rational decision should be reached.

131. I have no doubt that Mr Mitchell is a competent barrister and his is transparently independent, albeit I do have concerns that the respondent sought to prejudice him by supplying irrelevant prejudicial information.

132. Any fair process must allow full and proper participation from the person who is accused. That did not happen. The claimant was not given full details of the process. He was not told of the prejudicial information included in the terms of reference. He was not interviewed. No specific written questions were asked of him. He was not asked to review the report. It is no answer for the respondent to say that the claimant could have participated if he had chosen to. That ignores reality of the situation. He was involved in these proceedings. There had been a liability judgment. The question of contributory fault was a live matter before the tribunal. It would have been extraordinary if he had cooperated with some form of ad hoc internal procedure in those circumstances. No reasonable employer could have expected him to participate. No reasonable independent assessor could have believed that there was any possibility of hearing from the claimant. There can be no criticism of the claimant for failing to participate in the Mitchell investigation.

133. It follows there could be no rational reasonable belief that the claimant would participate in the process. Inevitably, the exclusion of the claimant would lead to a distorted process whereby the claimant's position was not taken into account.

134. Mr Mitchell did not have access to all the relevant evidence. There was a serious failure to identify and obtain the relevant evidence. The attempts to interview Ms Marziota and Mr Michele Gerace were inadequate. This was compounded by the failure to put before Mr Mitchell their statement. No proper explanation has been given for this failure. I should note that this is not a criticism of the report itself. I have not heard from Mr Mitchell

and it may be that there are reasons why those individuals were not interviewed, which have not been brought to my attention. The appropriate question is whether the respondent's reliance no the report was rational.

135. It is also clear that other evidence was not obtained or was ignored, particularly the contemporaneous evidence of Ms ZZ. I have indicated the difficulties with her evidence, not least with the email which demonstrates that she may have actively misled the original investigation.

136. There are proper grounds to doubt Mr Mitchell's ultimate conclusion. Viewed one way, it may be arguable that he came to an appropriate conclusion based on the material before him. However, this ignores the fact that the material on which he based his conclusion was seriously limited and inadequate. It was rational for the respondent to ask whether it was appropriate to base a belief on an opinion expressed in a report which was based on a limited investigation. As well as the other difficulties I have described, it was clear the Mitchell report suffered from a systemic bias, as the claimant's evidence could never be properly considered. In that sense it was inevitable that the second investigation would be even more problematic and flawed than the first. When Mr Walker, essentially uncritically, relied on the report, he failed to observe that it was more flawed than the first, and his reliance on it was even more irrational than reliance on the first investigation.

137. Relying on the report shows serious irrationality. The rationale, as advanced, is that it was inappropriate to rely upon a flawed initial investigation, but it was appropriate to rely on the Mitchell report because it was underpinned by a proper investigation. Even on a cursory consideration, that argument is unsustainable. It relies on an assertion that the further investigation avoided the pitfalls of the first investigation. It did not. Further, the claimant was wholly excluded from the process, which sought to introduce new and unsubstantiated allegations. He could not be expected to participate. Relevant evidence was not obtained. There were obviously inconsistencies in Ms ZZ's account. Her apparent failure to disclose information to the original investigation was not addressed. The Mitchell report did not remedy the failures of the original investigation. Instead, it created an artificial situation which wholly excluded the claimant. It is irrational to rely on such investigation. It follows that I do not accept the respondent had a genuine belief based on rational grounds.

138. I do not accept the respondent has genuinely and reasonably lost confidence in the claimant.

139. In summary, I find it is practicable to re-engage the claimant. It is practicable for the respondent to comply with the order. The claimant did

not cause or contribute to the dismissal. I find that he must be re-engaged.

Further developments

140. On 8 September 2022, whilst I was in chambers, I received an email from the respondent indicating that it had not had an opportunity to address benefits which may be due under an order for reinstatement or re-engagement. During the hearing, I indicated I would not consider the basic award or the compensatory award. However, the matter before the tribunal was the question of reinstatement/re-engagement. That inevitably includes consideration of the order. At no time did I indicate that the parties should not consider the contents of the order. I specifically raised with the parties on the first day that the content of the order needed to be addressed. I noted it was a matter that should have been considered previously. If the respondent has not addressed the relevant questions, that is the respondent's failure. I am not convinced that it prevents an order for re-engagement being made, albeit the order may need to be refined to consider what benefits are properly owed. It would be unfortunate if the possibility of re-engagement would be limited because of the respondent's failure.

141. The parties may apply for further directions to resolve any point of detail; however, this should not prevent claimant being re-engaged at this stage.

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Employment Judge Hodgson

Dated: 26 September 2022

Sent to the parties on:

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For the Tribunal Office