EMPLOYMENT TRIBUNALS

Claimant: Mr K Duffy

Respondent: East Riding of Yorkshire Council

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 15, 16, 17, 18 and 19 May 2023

Before: Employment Judge Brewer

Representation

Claimant: In person
Respondent: Mr B Frew, Counsel

JUDGMENT

1. The claimant's claim for unfair dismissal fails and is dismissed.

2. The claimant is ordered to pay the respondent costs in the sum of £10,000.

REASONS

Introduction

1. This case was heard over 5 days. The evidence was concluded on day 4 after which I heard submissions from the parties. I delivered judgment on day 5.

2. At the hearing the claimant represented himself and he called his wife, Mrs A Duffy, and Mr P Hennessy, a former colleague. The respondent called Mr M Knapton, the investigating officer, who is an employee of the respondent, Ms S Ball, who is the deputy chair of governors of Parkside primary school, the school where the claimant worked, and she was the dismissing officer, Ms L Pollard, who is the chair of governors at a different school from the one at which

the claimant worked, and she was on the appeal panel. Neither Ms Ball nor Ms Pollard are employees of the respondent or otherwise involved with the school at which the claimant worked.

3. I had written witness statements from all the witnesses, a short chronology, a cast list and an agreed bundle of documents running to 759 pages.

4. I have taken into account all the evidence and the submissions of the parties in reaching my decision.

5. I gave an oral judgment in the afternoon of the last day of the hearing and below are the detailed reasons.

6. In the reasons below the following are referred to:

    a. SOB – Head Teacher
    b. MK – Mark Knapton, (Secondary Improvement Advisor) Investigating Officer
    c. SB – Sarah Ball, (Deputy Chair of Governors) Disciplinary Panel Chair
    d. LP – Liz Pollard, (Chair of Governors Appeal Panel Member
    e. SB – Teacher
    f. SC – Deputy Head Teacher
    g. KH – Teacher
    h. LP – School Business Manager and the claimant's line manager.

7. At the conclusion of the oral judgment Mr Frew made a costs application which is dealt with below.

Issues

8. The respondent accepted that the claimant was dismissed and therefore the issues to be determined in the case were as follows:

    a. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

    b. If the reason or principal reason for dismissal was a potentially fair reason under the Employment Rights Act 1996 (ERA) then did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

    c. Was the dismissal fair in all the circumstances taking into account the size and administrative resources of the respondent and equity and the merits of the case?

    d. If the claimant was unfairly dismissed, then he may be entitled to a compensatory award. If there is a compensatory award, how much should it be?

        i. What financial losses has the dismissal caused the claimant?

ii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

iii. If not, for what period of loss should the claimant be compensated?

iv. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

v. If so, should the claimant's compensation be reduced? By how much?

vi. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

vii. Did the respondent or the claimant unreasonably fail to comply with it by?

viii. If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

ix. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

x. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

e. What basic award is payable to the claimant, if any?

f. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Law

1. The relevant statute law is set out in sections 94, 98, 119, 120, 122, 123, 124 and 124A Employment Rights Act 1996 (ERA). I need not set out the text of those sections here.

2. The leading cases in an ordinary unfair dismissal claim are the well-known cases of **British Home Stores Limited v Burchell** [1978] IRLR 379; **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439; **Sainsburys Supermarkets Limited v Hitt** [2002] EWCA Civ 1588.

3. The principles derived from those cases may be summarised thus:

   a. the respondent must have a genuine belief in the employee's guilt,

   b. that genuine belief must be reasonably held,

   c. the respondent must have carried out as much investigation as was reasonable in all the circumstances,

   d. the procedure followed must be one which is within the band of reasonable responses,

e. dismissal must be a sanction which was within the band of reasonable responses.

4. I remind myself that I should not step into the shoes of the employer and the test of unfairness is an objective one.

5. In this case the claimant was dismissed for gross misconduct. Exactly what type of behaviour amounts to gross misconduct is difficult to pinpoint and will depend on the facts of the individual case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract) — **Wilson v Racher** 1974 ICR 428, CA. Moreover, the conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence — **Laws v London Chronicle (Indicator Newspapers) Ltd** 1959 1 WLR 698, CA, and **Sandwell and West Birmingham Hospitals NHS Trust v Westwood** EAT 0032/09.

6. Even if an employee has admitted to committing the acts of which he or she is accused, it may not always be the case that he or she acted wilfully or in a way that was grossly negligent. (see **Burdett v Aviva Employment Services Ltd** EAT 0439/13).

7. In determining the reasonableness of a summary dismissal, the Tribunal must have regard to whether the employer had reasonable grounds for its belief that the employee was guilty of gross misconduct. In **Eastland Homes Partnership Ltd v Cunningham** EAT 0272/13 the EAT held that the employment Tribunal had fallen into error when it failed to consider whether it was reasonable for the employer to characterise the employee's conduct as gross misconduct.

8. During the case questions arose as to the adequacy of the respondent's investigation. In **Polkey v AE Dayton Services Ltd** 1988 ICR 142, HL, Lord Bridge itemised the procedural steps as follows:

    a. a full investigation of the conduct, and

    b. a fair hearing to hear what the employee wants to say in explanation or mitigation.

9. In **ILEA v Gravett** 1988 IRLR 497, EAT, Mr Justice Wood (then President of the EAT) offered the following advice:

    > *'at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including questioning of the employee, is likely to increase.'*

10. Employers need to be clear about what it is they wish to prohibit (**Liberty Living plc v Reid** EATS 0039/10).

11. In the present case the claimant was accused of and found to be guilty of sexual harassment of four members of staff. The respondent's policy in

relation to bullying and harassment adopts the statutory definition of harassment in s.26, Equality Act 2010 (EqA). It may therefore be useful to consider how the law related to sexual harassment has defined the various elements of the definition.

12. The definition of sexual harassment states that a person (A) harasses another (B) if:

    a. A engages in unwanted conduct of a sexual nature and

    b. the conduct has the purpose or effect of:

        i. violating B's dignity; or

        ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

13. There are therefore two essential elements of a sexual harassment allegation under the respondent's policy:

    a. there must be unwanted conduct of a sexual nature,

    b. that conduct must have had the proscribed purpose or effect.

14. The Equality and Human Rights Commission's Code of Practice on Employment ('the EHRC Employment Code') notes that unwanted conduct can include 'a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour' — para 7.7.

15. The following have all been held to constitute unwanted conduct:

    a. office gossip — **Nixon v Ross Coates Solicitors and anor** EAT 0108/10,

    b. nicknaming a French employee 'Inspector Clouseau' — **Basile v Royal College of General Practitioners and ors** ET Case No.2204568/10, and

    c. a drip feed of comments relating to the claimant's Irish nationality, including being dubbed 'Irish', comments about terrorism and bomb making, and mimicry of his accent — **Sherlock v Barbon Insurance Group Ltd** ET Case No.2601755/11.

16. The conduct must of course be unwanted and the EAT in **Thomas Sanderson Blinds Ltd v English** EAT 0316/10 pointed out that unwanted conduct means conduct that is unwanted by the employee. The necessary implication is that whether conduct is 'unwanted' should largely be assessed subjectively, i.e. from the employee's point of view. This could possibly become an issue where employee B is alleging that he or she has suffered harassment by virtue of having witnessed harassment suffered by employee C. Depending upon the

circumstances, the employer might be able to argue that although the treatment was unwanted by C it did not affect B and therefore was not unwanted conduct so far as B was concerned.

17. That said, the conduct does not have to be directed specifically at the complainant in order for it to be unwanted by him or her. The EHRC Employment Code gives the following example: during a training session attended by both male and female workers, a male trainer directs a number of remarks of a sexual nature to the group as a whole. A female worker finds the comments offensive and humiliating to her as a woman. She would be able to make a claim for harassment, even though the remarks were not specifically directed at her (see para 7.10).

18. The employee does not even have to be present when the words/actions occur.

19. In **Reed and anor v Stedman** 1999 IRLR 299, EAT, the EAT noted that certain conduct, if not expressly invited, can properly be described as unwelcome. Normally, conduct that is by any standards offensive or obviously violates a claimant's dignity will automatically be regarded as unwanted. The EHRC Employment Code gives the following example of what it terms 'self-evidently' unwanted conduct: in front of her male colleagues, a female electrician is told by her supervisor that her work is below standard and that, as a woman, she will never be competent to carry it out. The supervisor goes on to suggest that she should instead stay at home to cook and clean for her husband. The electrician would not have to object to this conduct before it was deemed to be unlawful harassment (see para 7.8).

20. A failure to complain at the time is unlikely to undermine a claim based on inherently unwanted conduct. For example, as noted by the EAT in **Reed v Stedman**, a woman does not have to make it clear in advance that she does not want to be touched in a sexual manner.

21. If the claimant has made it clear, through words or conduct, that he or she personally has no objection to the conduct, that conduct will not be unwanted,

22. Conduct that is clearly not objected to will not be 'unwanted' even if most people would find the conduct in question unacceptable to the extent that it could be regarded as inherently unwanted.

23. However, the fact that the conduct has been going on for a long time with no apparent objection does not necessarily mean that the claimant accepts or condones it.

24. There are few cases examining precisely what is meant by violating a claimant's dignity. In **Richmond Pharmacology v Dhaliwal** 2009 ICR 724, EAT (a race claim) Mr Justice Underhill, then President of the EAT, said:

> *'Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by*

> *things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended'.*

25. Mr Justice Langstaff, then President of the EAT, affirmed this view in **Betsi Cadwaladr University Health Board v Hughes and ors** EAT 0179/13. In that case the EAT observed that:

> *'the word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence'.*

26. Some of the factors that a Tribunal might take into account in deciding whether an adverse environment had been created were noted in **Weeks v Newham College of Further Education** EAT 0630/11. Mr Justice Langstaff, then President of the EAT, held that a Tribunal did not err in finding no harassment, having taken into account the fact that the relevant conduct was not directed at the claimant, that the claimant made no immediate complaint and that the words objected to were used only occasionally. (However, he noted that Tribunals should be cautious of placing too much weight on the timing of an objection, given that it may not always be easy for an employee to make an immediate complaint.) Langstaff P also pointed out that the relevant word here is 'environment', which means a state of affairs. Such an environment may be created by a one-off incident, but its effects must be of longer duration to come within what is now S.26(1)(b)(ii) EqA.

27. A claim brought on the basis that the unwanted conduct had the purpose of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment obviously involves an examination of the perpetrator's intentions. As the perpetrator is unlikely to admit to having had the necessary purpose, the Tribunal hearing the claim is likely to need to draw inferences from the surrounding circumstances.

28. In deciding whether the conduct has the effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, each of the following must be taken into account:

    a. the perception of the complainant,

    b. the other circumstances of the case; and

    c. whether it is reasonable for the conduct to have that effect.

29. The test therefore has both subjective and objective elements to it. The subjective part involves looking at the effect that the conduct of the alleged harasser (A) has on the complainant (B). The objective part requires a response tom the question whether it was reasonable for B to claim that A's conduct had that effect.

30. In **Pemberton v Inwood** 2018 ICR 1291, CA, Lord Justice Underhill, gave the following guidance:

> *'In order to decide whether any conduct…has either of the proscribed effects…a Tribunal must consider both…whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and…whether it was reasonable for the conduct to be regarded as having that effect (the objective question).*
>
> *It must also, of course, take into account all the other circumstances…The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'*

31. In considering the subjective element, it must be borne in mind that different people have different tolerance levels. Conduct that might be shrugged off by one person might be found much more offensive or intimidating by another.

32. The objective aspect of the test is primarily intended to exclude liability where a person is hypersensitive and unreasonably takes offence. As noted by the EAT in **Richmond Pharmacology v Dhaliwal** 2009 ICR 724, EAT*:*

> *'while it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the… legislation…) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase'. It continued 'if, for example, the Tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the Tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question.'*

Findings of fact

33. I make the following findings of fact (references are to pages in the bundle).

34. The respondent in this case is a local authority. It is responsible for a number of schools. The claimant was the site coordinator at Parkside primary school.

35. The claimant was employed from 18 February 2008.

36. Between 13 and 28 April 2021, the respondent received complaints from four female members of staff, SC, SB, KH and LP which on the face of it were allegations of sexual harassment by the claimant.

37. These allegations were received by the head teacher, SOB, who decided to carry out an investigation. She met with each of the complainants along with YF, from HR on 20 April 2021 (SC), 22 April 2021 (SB), 27 April 2021 (KH) and 28 April 2021 (LP). She met with a witness, AH, on 27 April 2021 and she interviewed the claimant on 7 May 2021. Throughout the disciplinary process the claimant was represented by SC. Transcripts of these interviews can be seen respectively from [72], [84], [91], [101], [108] and [148].

38. The claimant was suspended on 29 April 2021.

39. Following representations made by the claimant, that because the investigating officer was the head teacher he believed that staff would be less forthcoming than might otherwise be the case, the respondent agreed to change the investigating officer and MK was appointed to investigate.

40. Having read the original transcripts of the interviews by SOB, MK decided that it was not necessary for him to re-interview the four complainants. MK focused on what the claimant called his mitigating circumstances given that he had admitted key parts of the allegations.

41. MK Interviewed the claimant on 23 June 2021 [282] and he interviewed SOB on 28 June 2021 [295].

42. The claimant's mitigating circumstances were as follows:

    a. that the respondent had an ulterior motive for dismissing him based on his trade union activities and/or the wish to replace him with the husband of LP, PP, who worked without being DBS checked,

    b. that the claimant's name was not on the rota to cover the summer holiday, suggesting that the respondent knew he would not be employed at that point,

    c. the wish to employ the School Business Manager's partner, PP, as site coordinator instead of the claimant's son,

    d. that his behaviour was in line with the culture of the school,

    e. that given who the complainants were, there was collusion between them,

    f. that the claimant was not a threat to staff, which included that he did not know that his behaviour was unacceptable because he had not been trained and did not have access to the relevant policies,

    g. that SOB knew and did nothing about the banter and thus condoned it.

43. MK investigated each of the claimant's purported mitigating circumstances. His conclusions were as follows:

    a. the claimant wanted to increase his trade union activities and the respondent knew that he had been elected to the trade union Convenor role before 10 March 2021. The school knew about his election on or before 17 March 2021 which is when the claimant told HR about the role. The claimant himself described the school as supportive of his trade union activities. The school governors were told of the change to the claimant's duties on 23 March 2021. The claimant was to start the new role on 1 April 2021 and, as a result, he would have less time for his substantive role which needed to be backfilled. An advertisement was placed for the role on 16 March 2021. It is accepted by the respondent that the initial advertisement incorrectly stated that the role was permanent. It was not because of course the claimant's elected Convenor role was not permanent. Once that was spotted, some three days later, the advertisement was changed, on 19 March 2021, from a permanent to a fixed term position. PP was appointed to the role and commenced work on 3 May 2021. He was given a fixed term contract until 31 March 2022. Therefore, the claimant's role at the school continued for two days a week and he undertook his trade union role for three days a week. In the circumstances the allegation that there was an ulterior motive for seeking to dismiss the claimant in order to employ LP's husband was unsubstantiated, As to the allegation that PP worked without being DBS checked, in fact a clear DBS check was received on 23 April 2021 and given that PP did not commence work until 3 May 2021 the claimant's concern about this was also unsubstantiated,

    b. as to the issue of the rota, It was found that this was drafted on the basis that the claimant's suspension may go into the summer break which MK found was a sensible precaution in the circumstances and which he described as forward planning,

    c. in relation to the concern about the wish to appoint the School Business Managers partner (PP), MK considered the appointment process. The position was properly advertised, there was a proper recruitment process which did not include the School Business Manager. There was no evidence that this was anything other than a simple recruitment exercise,

    d. in relation to the question of the school culture or what MK called institutionalised banter of a sexual nature, this was investigated in some detail by MK. The claimant had given MK over 20 names of people to speak to in relation to this matter, however given the size of the school and the number of staff, over 100, MK decided it would be reasonable to take a stratified sample of staff to interview. These staff were interviewed between 16 and 28 June 2021. In other words, the investigation spoke to a representative sample of staff from all levels of the school. The conclusion of this part of the investigation was that staff certainly discussed issues other than work although in the main these discussions

were not sexual in nature. To get staff to open up MK agreed that the evidence he took from staff would be anonymised and summarised for the purposes of the investigation and, if necessary, the disciplinary process going forward. MK found that some interactions between staff did involve sexual and personal language and that some of the terms used were degrading. However, the evidence also showed that the claimant was perceived as somebody who escalated comments to the point that some staff were shocked sometimes to such degree that they felt the need to discuss the comments with their families. In short, some staff participated in banter and some of that banter was as described by the claimant but there was no evidence that this was a whole school culture,

e. in relation to the allegation of collusion the claimant suggested that the complaints were from the management team which suggested collusion, but in fact the first allegation was from a teacher and not a senior leader. The witness to that incident was a teaching assistant and not part of the management. There was no evidence of collusion and this allegation itself is of course linked to the suggestion that the complaints were made in order to get rid of the claimant (either for union reasons or to enable PP to be employed) of which there was no evidence in any event. In short there was no evidence that there was any ulterior motive for the complaints having been made, and no evidence of collusion,

f. in relation to the issue around whether the claimant presented a threat, his lack of training and knowledge of policies, part of this mitigating circumstance was the claimant's continued insistence, which he repeated at the hearing before me was that he did not intend his comments to be sexual and he did not intend to violate anyone's dignity or create a hostile or degrading environment. The claimant was reminded on a number of occasions that for sexual harassment to occur there need not be intent and therefore whether or not he was 'predatory' was irrelevant. In fact, MK considered that the claimant's behaviour was or at least could be described as predatory because all of the complaints were about comments made to women, largely when they were either alone or where there was only one, junior, colleague present. In relation to training it is correct that the claimant did not undertake equality and diversity training prior to the complaints being made, but the approach taken by the school was that the training was available, and staff were expected to log on and undertake it. However, the school did not monitor who had taken the training and did not enforce the taking of it. That is undoubtedly problematic, but I am satisfied that the claimant was given both the disciplinary policy and more importantly the schools equality and diversity policy when he started, and it was incumbent on him to read them and understand the nature of sexual harassment. I shall return below in the discussion section to whether training was necessary for the claimant to reasonably understand what was and what was not acceptable behaviour. I find as a fact that the fact that the claimant did not deliberately set out to sexually harassed staff and the fact that he

had not undertaken the training does not mean that he did not sexually harass staff,

g. as to the position of the head teacher, SOB, she denied that she was aware of the banter including rude or sexual content around the school and furthermore, MK's stratified interviews showed that all of those interviewed indicated that the head teacher was not involved in jokes and banter as the claimant had asserted.

44. In relation to each of the allegations the conclusions of the investigation were as follows:

a. in relation to allegation 1, the claimant admitted using the phrase about having a quickie in the cupboard although denied that this was a sexual reference,

b. in relation to allegation 2 the claimant accepted that he asked the complainant about whether she had had "got" her "designer vagina",

c. in relation to allegation 3, the claimant denied using the exact phrase about what time the individual's legs would be open, but he did confirm that he commented on KH's clothing and how they showed off her figure although he did not consider this was inappropriate because of how well he got on with KH,

d. in relation to allegation 4 regarding the shower, the claimant agreed that he asked the staff member whether she knew how the shower worked and he agreed that he may have said that she should take advantage of using the shower herself, but he said that did not invite her to join him in the shower,

e. in relation to allegation 5 the claimant accepted that he used the word 'sexpot' but denied using the words sugar tits or sweet tits. The claimant said that the word sexpot was not sexual,

f. in relation to allegation 6 the claimant admitted using the words vinegar tits and happy crack to refer to two particular members of staff, but he denied that these were sexual references,

g. in relation to allegation 7 the claimant said that the allegation was entirely fabricated.

45. The claimant was invited to attend a disciplinary hearing on Tuesday 20 July 2021. The disciplinary hearing was heard by a panel of three governors. The purpose of the hearing was to consider seven allegations each of which were described as potentially acts of gross misconduct. The seven allegations were as follows:

a. on Friday 26 March 2021, sometime after 3:30 PM The claimant asked a colleague if she would go in the cupboard for a quickie or similar wording,

b. in early February 2021 the claimant said words to the effect “alright? Is it OK then? Your designer vagina. Wasn't that what you were having done?”,

c. on Friday 26 March 2021 the claimant made the following comment to a female colleague: “nice legs what time do they open, you should get them out more often” or similar wording,

d. on a day during the Easter holidays the claimant entered the classroom of a female teacher who was working alone and asked if she “knew how the shower worked and did [she] need a demonstration and helping hand in the shower” or similar wording,

e. referring to female colleagues as “sexpot”, “sugar tits” and “sweet tits” or similar wording,

f. using the words “vinegar tits” and “happy crack” to refer to two specific female members of the leadership team,

g. when speaking to the claimant’s line manager, a female, when she was alone and discussing her husband who was due to start work at the school, stating “when Paul comes, I'll show him the showers and then you can go for a quickie at lunchtime” or similar wording.

46. The letter made it clear that each allegation in and of itself if proved could amount to sexual harassment and if so, would amount to gross misconduct.

47. The disciplinary hearing took place on 20 July 2021 and lasted for around seven hours.

48. The outcome of the disciplinary hearing was communicated to the claimant by letter dated 30 July 2021 and the hearing panel determined that the first six allegations were proved, and the claimant was summarily dismissed without notice or payment in lieu of notice. The reason for dismissal within the meaning of the Employment Rights Act 1996 was ‘conduct’.

49. By letter dated 11 August 2021 the claimant appealed against his dismissal under four headings - first the perceived unfairness of the judgment, second the severity of the penalty, third that new evidence had come to light and finally procedural irregularities.

50. The appeal hearing took place on 7 October 2021. The appeal was undertaken as a complete re-hearing.

51. The claimant was informed that his appeal had been unsuccessful by letter dated 21 October 2021.

52. The claimant commenced early conciliation on 6 September 2021.

53. The early conciliation certificate was issued on 18 October 2021.

54. The claimant presented his claim for unfair dismissal on 27 November 2021.

Discussion and conclusion

55. Given that the reason for dismissal was 'conduct', I start by reminding myself of the key questions I must answer:

    a. did the respondent have a genuine belief in the claimant's guilt,

    b. was that belief reasonably held,

    c. did the respondent carry out as much investigation as was reasonable in all the circumstances,

    d. was the procedure followed one which is within the band of reasonable responses,

    e. was dismissal within the band of reasonable responses.

56. I shall start by focussing on the complaint made by SC because that is the matter which Mr Frew focused upon in his cross examination of the complainant and in his submissions. I will deal briefly with the other complaints below.

57. The claimant's allegation about collusion was in essence that the complaints were fabricated either in whole or in part, and/or that the complainants were not genuinely upset. In this context, and referring specifically to the complaint by SC, the claimant referred a number of times in his evidence and did so again in submissions to what he refers to as the vast differences in his and SC's accounts.

58. I accept that there are differences in the details between the two accounts, however given that the claimant admitted the central part of the allegation, what was said, it is difficult to see how he could begin to suggest there was fabrication, or as he put it, collusion such as to suggest that the disciplinary and appeal panels should not have accepted the evidence of SC over the claimant's evidence. The reality is that if the claimant's version was accepted then the key points are that he and SC were alone, the claimant asked her "did you get it – your designer vagina" and then he left the room. I cannot see how that could have made any difference to the panels' finding that in terms of what was said, the allegation was well-founded.

59. That only left the issue of whether the words spoken by the claimant violated SC's dignity or created the required environment (I shall use the term hostile or degrading environment for ease of reference).

60. I have no doubt that the question to the complainant about whether she had "got her designer vagina" is a sexual reference despite the claimant's vehement

assertion that it was not. The claimant had a very curious understanding of what is meant by sexual because there is a clear and unambiguous reference to the most intimate part of SC's body in this comment and yet he insisted that it was not a sexual comment. I find that what the claimant meant was that in this comment he was not talking about sexual activity, and thus the comment was not 'sexual', but that is a misunderstanding of the term 'sexual' which in the context of sexual harassment I take to mean any comment relating to the sexes or to gender, not only to, for example, sexual activity.

61. The evidence from SC is that she was upset. She described herself as speechless, she went home feeling very upset, she felt very uncomfortable and uneasy about reporting it. She was so upset that she told the head teacher, SOB, that if the matter was going to progress to a formal process, then she would prefer to remain anonymous. The matter played on her mind for some time it was a distraction for a few weeks and the complainant having discussed the matter with her husband decided to complain, although her concerns about progressing the complaint remained.

62. The claimant's evidence was that he did not believe that SC was upset, and this appears to be based on two matters. First that she and he had previously shared jokes and banter and second that she delayed making the complaint.

63. As to the first matter, I take the point raised by Mr Frew that the case law says that the fact that somebody may have put up with banter for a long time does not mean that the conduct about which they complained was not unwanted (see **Munchkins Restaurants Ltd v Karmazyn** UKEAT/0359/09).

64. As to the second point, again the case law suggests that the fact that there is no complaint for some time does not mean that there was no upset. It is a well-known if somewhat trite mantra that the absence of complaint does not mean the absence of a problem. People, perhaps particularly women in this context may be reluctant to complain for all sorts of reasons.

65. I am satisfied that it is of no material consequence that there were some differences between the accounts of the complainant and the claimant because those differences do not go to the central issue which is what was said and whether what was said amounted to sexual harassment.

66. I am satisfied that, given the independence of the investigation, the make-up of the panels and the evidence found, in particular claimant's own version of events, the respondent genuinely and reasonably believed that the incident as described took place; that is to say whilst alone with SC, the claimant asked her whether she had "got her designer vagina".

67. Having found that the respondent had a genuine and reasonable belief in what was said the next question is whether they had a reasonable belief that the claimant committed sexual harassment. In turn that in part goes to the question of whether there was a reasonable investigation.

68. The only matters raised by the claimant in relation to whether the comment was sexual harassment were first that the comment was not sexual, second, he did not intend to sexually harass the complainant and third, because he says SC had participated in banter previously, SC could not have been as upset as she claimed she was. In fact the claimant went a little further and suggested that case law meant the SC was unable to claim she was sexually harassed in these circumstances.

69. The respondent rejected those assertions.

70. The complaint was investigated as far as was possible by a combination of SOB and MK and then further investigated by the disciplinary and appeal panels during their hearings.

71. As to the claimant's first point, for the reasons set out above, it is clear that it was reasonable for the respondent to believe that the comment was made and was of a sexual nature.

72. Second, it is irrelevant whether the claimant intended to harass SC given that the definition of sexual harassment in the respondent's policy includes both activities which have the purpose or effect of sexual harassment.

73. Third, it is clear from SC's description of how she was made to feel that it was reasonable for the respondent to believe that her dignity was violated and given that how she felt extended over a significant period of time, I am also satisfied that the relevant hostile or degrading environment was created.

74. The claimant did raise the issue that having taken over the investigation MK should have re-interviewed the complainants including therefore SC.

75. I have considered this matter but on balance, certainly in relation to this particular complaint, I cannot see that re-interviewing SC could have made any difference. The fact is that the claimant admitted making the comment which was the subject of the complaint and the evidence that the claimant was, and the extent to which she was upset comes entirely from her. Had MK interviewed her there was no reason to suppose she would not have said exactly the same things to him that she had said to SOB.

76. MK did of course consider the other matters raised by the claimant, that is to say the collusion issue, the issue of the culture in the school and the other matters referred to as mitigating circumstances. There is simply no evidence that anything like the comment made on this occasion by the claimant to SC had ever happened before. The claimant's case, taken at its highest was that he and SC had previously shared jokes, sometimes rude jokes but that seems to me to be a world away from the comment made by the claimant on this occasion, in the context of a hospital procedure performed on the claimant. I do note that the claimant said he was unaware of the hospital procedure, but I do not find him credible on this point because by his own admission the words he used were "did you get your designer vagina" and I take the words "did you get" to be a reference to a procedure otherwise the words make no sense.

77. In all of those circumstances I find that the respondent's belief, that what the claimant said amounted to sexual harassment within the meaning of their policy, was reasonably held following a reasonable investigation.

78. As to the procedure in general, in fact the claimant does not really complain about the disciplinary and appeal procedures overall and in my judgment, by any standard this was overall a fair procedure. The investigating officer was independent, all six members of the panels, three at the disciplinary hearing and three at the appeal hearing were independent of the respondent, all matters were thoroughly investigated across the investigations by SOB, MK and the panel hearings, particularly given that the appeal was a complete rehearing. The claimant was invited to bring witnesses to both hearings, but he chose not to. The claimant was well represented by his trade union throughout.

79. I shall just touch on a number of matters raised by the claimant during the course of his evidence which go to the reasonableness of the procedure followed both at the disciplinary and appeal hearings.

80. When giving her statement to SOB, SC referred to an incident which she said happened about eight years prior to the matter she complained about. This concerned the claimant inappropriately touching her leg. The claimant said this was an entire fabrication and no such incident took place. SB was asked about this in cross-examination by the claimant and she was clear that no consideration was given to that incident, and it played no part in the disciplinary panel's decision. The claimant said that this should have been explored further through re-interviewing SC because if SC was lying about that incident, then she could have been lying about other matters. Theoretically, that may be the case and it would have made a difference if the panel's findings turned on points of detail such as when exactly the incident took place, where exactly it took place and what exact time it took place. However, the claimant has overlooked that the only points in issue in this allegation were what was said and whether what was said amounted to sexual harassment. It is perhaps worth stating again that the claimant admitted to the comment which is said to have amounted to sexual harassment and there was no basis, given the overlap, rather than the differences, between the version of events as told by the claimant and SC, to consider that SC was being anything other than honest about the core issue.

81. The claimant also criticised what he referred to as the reliance on anonymous evidence and in particular he says that the respondent's anonymous evidence was accepted but his evidence in witness statements from people who were not present at the hearing was ignored.

82. The first point to make about this is that the anonymous evidence he is referring to are the statements taken as part of the investigation into the issue of whether there was a culture of banter. MK knew who had given the statements, so they were not in that sense anonymous. Thus, in this context the reference to anonymity is that the identities of the witnesses were not disclosed to the panels or to the claimant. The reason for anonymity is a set out above. What

the disciplinary and appeal panels relied upon was not the anonymous witness statements but MK's analysis of the evidence that was found. In my judgement the panels acted reasonably in relying on that analysis. It should also be noted that the claimant could have brought live witnesses to both panel hearings but chose not to.

83. The second point is that the claimant's written witness statements that were put by him before the panels were not ignored, they were considered but they were not given much weight. In part the statements make specific assertions which could not be tested. However I would also add that even if what was in those statements was entirely accepted by the panels, the evidence still did not amount to anything from which the panel could reasonably conclude that sexual harassment did not take place nor that SC was not upset or was not as upset as she said she was because they essentially repeat the same argument put forward by the claimant which is that because SC participated in some aspects of the banter at the school, she was not entitled to complain when she was sexually harassed and in that context the claimant relies upon the case of **Evans v Xactly Corporation Ltd** UKEAT/0128/18. The claimant says that the **Evans** case supports the proposition that a person who has previously participated in a culture of banter cannot claim to be harassed themselves. That judgment is very fact sensitive and the principle from the case is perhaps better expressed thus: *a person who has previously participated in a culture of banter cannot claim to be harassed themselves by that banter*. But the reality is that if the culture of banter is to take an absurd example, so-called 'knock-knock' jokes, it makes no sense to assert that just because somebody takes part in that they cannot claim to be harassed by entirely different behaviour which by any standard amounts to behaviour of a sexual nature which either violates dignity or creates the necessary environment to meet the definition of sexual harassment. Each case will turn on its own facts and there cannot be an overarching principle that anyone who participates in a culture of banter cannot be harassed by something which goes on for too long or oversteps the mark which, in my judgment, is what happened in this case.

84. The claimant refers to one WhatsApp image which he says originated from SC. This was not sent to the claimant but he says was given to him by another employee who says she was sent it by SC, but there is no corroborative evidence of that and even if the image was sent by SC, it is not evidence that was not or would not have been affected by what the claimant said as she describes in her evidence to SOB. Furthermore, during the disciplinary hearing, the claimant, when discussing this complaint said as follows:

> *"[SC] thought that private and her very personal information had been talked about and was wondering how it had leaked out. A genuine reason for being upset…"*
>
> [422]"

85. So, on the one hand the claimant appears to be saying that SC would not have been and was not upset, but on the other he conceded that given the content of what was said she had a genuine reason for being upset. He developed this in

his evidence at the Tribunal by arguing that he thought that SC was upset because she thought the claimant was referring to a medical appointment, a hospital procedure and he says that he did not know about that. But looking at the comment he made at [422] the claimant seemed to accept that SC had a genuine reason to be upset which runs counter to a significant part of his own case which is that she was not in fact upset and his assertions about whether this was related to a discussion about the hospital appointment or the reference to a designer vagina is mere speculation on his part.

86. At the Tribunal hearing the claimant said in relation to this incident that the disciplinary panel took the allegation out of context and misinterpreted the evidence but on my analysis, they did no such thing. They thoroughly explored the context as asserted by the claimant and they interpreted the evidence in front of them reasonably and reached reasonable conclusions from that evidence.

87. In his submissions the claimant raised two other matters which I should deal with.

88. The first is that he was, as he put it, led astray by his line manager, LP. Essentially his case appears to have been that because she was a strong participant in the culture of banter, he was merely following her lead. To excuse or explain the claimant's behaviour on this basis would be to presume that a mature adult man cannot tell the difference between what is and is not acceptable behaviour within the workplace without being expressly told in detail which precise words he should not use, which precise jokes he should not tell, which precise epithets are unacceptable and so on. That is not possible in any meaningful way for obvious reasons, and it is why policies are drafted in general terms to essentially say you should not discriminate against people, you should not harass people and so. It is not possible for a policy or indeed a manager speaking directly to subordinates to say precisely what is and is not acceptable.

89. Furthermore, the general assertion by the claimant that he did nothing wrong is somewhat undermined by what was said at his appeal hearing by his representative and which the claimant confirmed to the Tribunal he accepted. In summing up the claimant's representative said as follows:

> *"Mr Duffy, in my professional opinion has done wrong. I think he knows that, I think he had plenty of time to think about that and plenty of time to think about where he can put that right, because he has to put that right… it is not acceptable for anyone who's employed within the school… to behave in the manner that we have seen during this case…"*
>
> [584]

90. It is difficult to see how the claimant maintained that he had done nothing wrong during the disciplinary hearing, the appeal hearing and indeed this Tribunal hearing when he had accepted that he had done wrong at the end of the appeal hearing. I would also add that in his submissions to me, the claimant said that

he did regret the use of some words he had used and he would apologise to the complainants given the opportunity to do so, which again runs somewhat counter to how he put his case.

91. Taking all things into account I am satisfied that the procedure followed by the respondent was within the band of reasonable responses.

92. That leaves the question of sanction.

93. Gross misconduct requires deliberate or wilful repudiation of the contract or gross negligence. If we accept that the claimant did not intend to cause offence but that what he did had the effect of violating dignity or creating the relevant environment for the purposes of the definition of sexual harassment, does that behaviour meet the requirement of the definition of gross misconduct? In my judgement it does because making the comment is the wilful act. The deliberate making of an offensive comment caused the violation of dignity or creation of the hostile or degrading environment, and it does not seem to matter to me that the claimant did not intend to violate dignity or cause the hostile degrading environment. The repudiatory act was the causative act, the deliberate, wilful making of the offensive comment.

94. In the circumstances I am satisfied with that dismissal for such a serious offence was within the band of reasonable responses and that therefore the claim's dismissal was not unfair.

95. I have centred my judgment on the allegation in relation to SC but for the avoidance of doubt the same analysis applies to the 1st and 4th allegations over which there was little factual dispute.

96. There was some dispute over the wording used in the 3rd allegation because although the claimant accepts that he had previously used the phrase “nice legs what time do they open”, he says that he did not use it to KH or at least not on this occasion. However, he does admit that he commented on her skin-tight leggings and tights and essentially the shape of her body which in my judgment in and of itself is capable of amounting to sexual harassment. Given all of these findings above it seems to me unnecessary to apply any further analysis to this particular allegation.

97. In relation to the 5th allegation, the claimant admitted calling people “sexpot” and again that is clearly capable of amounting to sexual harassment.

98. I accept Mr Frew’s submission in relation to the 6th allegation which is that there is no evidence that using the terms “vinegar tits” and “happy crack” violated anyone's dignity or created a hostile or degrading environment and the claimant would not and could not have been fairly dismissed for that allegation alone.

99. Finally, relation to the 7th allegation the disciplinary panel found that that was not proved although the appeal panel reversed that and found that it was. Without going into any significant detail, in my judgment the disciplinary panel conclusion was correct and it is unclear how the appeal panel came to the

opposite conclusion. Given that this makes no difference to my judgment it does not seem to me to be fruitful to pursue this any further.

100. For all the reasons set out above the claimant's claim of unfair dismissal fails and is dismissed.

Costs

101. At the conclusion of the oral judgement Mr Frew made an application for costs.

102. The application is based on the assertion by the respondent that the claim had no reasonable prospect of success a matter which they brought to the claimant's attention in a letter of 21 September 2022. The respondent's position is that the claim was misconceived, and the claimant was given an opportunity to withdraw without there being any application for costs against him. Mr Frew also said that towards the end of the claimant's evidence he and the claimant, with my permission had a discussion and the claimant was again given the opportunity to withdraw before judgement was made, again with there being no risk of a costs application. The claimant rejected that and continued with the case.

103. Counsel's fees are in excess of £15,000 but the respondent seeks costs limited to £10,000.

104. Having heard Mr Frew, I invited the claimant to respond to the application. The claimant said he was very surprised but having lost, he was absolutely convinced but he had been unfairly dismissed and he referred again to what he called the vast differences in the accounts between himself and SC, to the **Evans** case and the other matters he pursued during his evidence.

105. I asked the claimant about his means and in brief he mitigated his loss almost immediately and is currently working. He has a mortgage but did not know but his mortgage payments all, he said that he had no savings, and he did not know whether he had any equity in his house. He could not say what his monthly outgoings were. I did ask whether he would like more time to consider responding to the costs application, but he did not.

106. An application for costs on the basis that the claim had no reasonable prospect of success is made under rule 76(1)(b) of the 2013 Tribunal Rules.

107. Costs for these purposes means 'fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a tribunal hearing)'.

108. Rule 78(1) of the Tribunal Rules sets out how the amount of costs will be determined. There is provision for 'unassessed costs' which cannot exceed £20,000.

109. In relation to this application, I should apply a two-stage test as follows:

a. Was there 'no reasonable prospect of success,

b. Should the discretion to award costs be exercised?

110. In **Radia v Jefferies International Ltd** EAT 0007/18 the EAT dismissed an appeal against an employment tribunal's decision to award the respondent employer the whole of its costs, potentially amounting to over £500,000, on the basis that the claim had no reasonable prospects of success. In so holding, the EAT gave guidance on how tribunals should approach costs applications under rule 76(1)(b). It emphasised that the test is whether the claim *had* no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start. Thus, the tribunal must consider how, at that earlier point, the prospects of success in a trial that was yet to take place would have looked. In doing so, it should take account of any information it has gained, and evidence it has seen, by virtue of having heard the case, that may properly cast light back on that question, but it should not have regard to information or evidence which would not have been available at that earlier time. The EAT went on to clarify that the mere existence of factual disputes in the case, which could only be resolved by hearing evidence and finding facts, does not necessarily mean that the tribunal cannot properly conclude that the claim had no reasonable prospects from the outset, or that the claimant could or should have appreciated this from the outset. That still depends on what the claimant knew, or ought to have known, were the true facts, and what view the claimant could reasonably have taken of the prospects of the claim in light of those facts.

111. I consider the following factors relevant to the question whether to exercise the discretion to award costs:

a. As the Court of Appeal reiterated in **Yerrakalva v Barnsley Metropolitan Borough Council and anor** 2012 ICR 420, CA, costs in the employment tribunal are still the exception rather than the rule.

b. It remains a fundamental principle that the purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the paying party. Questions of punishment are irrelevant both to the exercise of a tribunals discretion as to whether to make an award and to the nature of the order that is made — **Lodwick v Southwark London Borough Council** 2004 ICR 884, CA.

c. Given that costs are compensatory, it is necessary to examine what loss has been caused to the receiving party. In this regard the Court of Appeal in **Yerrakalva v Barnsley Metropolitan Borough Council and anor** 2012 ICR 420, CA, held that costs should be limited to those 'reasonably and necessarily incurred'.

d. A tribunal is not obliged by rule 84 to have regard to ability to pay — it is merely permitted to do so. That said, in **Benjamin v Interlacing Ribbon Ltd** EAT 0363/05 the EAT held that where a tribunal has been asked to consider a party's means, it should state in its reasons whether it has in fact done so and, if it has, how this has been done.

e. The fact that a costs warning has been given is a factor that may be taken into account by a tribunal when considering whether to exercise its discretion to make a costs order — see, for example, **Oko-Jaja v London Borough of Lewisham** EAT 417/00, where the EAT confirmed that an employment tribunal was entitled to take into account the fact that in a previous, similar claim made by O against the same respondent the tribunal had given a costs warning. Note that the fact that a party to proceedings has issued a costs warning does not mean that costs will follow. As noted by the EAT in **Lake v Arco Grating (UK) Ltd** EAT 0511/04, parties frequently make threats of costs applications prior to hearings.

112. In relation to the first question, did the claim have no reasonable prospect of success, I consider the following facts to be material (whether judged at September 2022 or by the 4th day of the hearing):

a. the claimant was an experienced trade union representative,

b. the claimant was aware that serious allegations had been made each of which if proved, in the reasonable belief of the respondent, were being considered as gross misconduct and that therefore could result in his summary dismissal,

c. the claimant was aware that all of those involved in the disciplinary process at the material times were independent of the school in which he worked,

d. the claimant was aware that there was an extensive investigation, and his only criticism was that the complainants were not re-interviewed,

e. the claimant was aware that both the disciplinary and appeal hearings we're lengthy and on any reading of the notes covered all of the matters he raised in mitigation,

f. in particular in relation to the allegation by SC, the claimant was aware that he admitted making the comment which SC alleged amounted to sexual harassment,

g. the claimant was aware of what SC said was the effect of the comment on her, why she found it difficult to complain and therefore why she delayed in making the complaint,

h. the claimant was aware of the respondent's policy dealing with sexual harassment and therefore was or ought reasonably to have been aware

that the absence of an intent to sexually harass was not a shield of protection from a finding that what he said caused sexual harassment because intent is not necessary for the offence to be made out,

i. the claimant was aware that on his own evidence he understood that what took place caused SC, as he himself put it, “genuine” upset and he was aware that at the appeal hearing his representative confirmed that the claimant knew that he had done wrong and it was sorry for the wrong he had done, despite which he ran his case on the basis that SC was not upset which in my view was fundamentally misconceived,

j. at no point did the claimant lead any evidence or cross examine the respondent’s witnesses on the severity of the sanction. There were points at which with the claimant in his cross examination of MK asserted that because the investigation did not consider the claimant's previous record and his length of service for example the investigation was not balanced but that was not a matter he took up with SB who chaired the disciplinary panel undo in any event confirmed that all matters were taken into account irrespective of whether they formed part of MK’s presentation to the disciplinary panel,

k. the claimant was aware that he could have brought witnesses to both the disciplinary and appeal hearings, but he made a conscious decision not to do so in which case he could hardly be surprised at the fact that the witness statements which he did present in support of his case were given little or no weight yet this was a matter he again pursued at the Tribunal hearing,

l. the claimant was very selective in the case law he chose to take account of and was overly reliant on the **Evans** case which he misunderstood,

113. To summarise, on any reasonable assessment of what the claimant was aware of or ought reasonably to have been aware of when he had the opportunity of withdrawing this claim without incurring costs, he knew what all of the evidence was, he knew what procedure had been followed by the respondent in dismissing him, he knew the sexual harassment was a very serious matter, he admitted many or many aspects of the allegations he was facing and in particular he admitted the material parts of the allegation made by SC and essentially he relied upon the thinnest of cases being that on the basis that SC had apparently been complicit in aspects of school banter, described essentially as rude jokes, although I know that no point was any specific detail given by the claimant about this, she could not be upset by the reference he made to what has been referred to as her “designer vagina”.

114. Based on what the claimant knew or ought to have known I am satisfied that he should have been aware that his claim had no reasonable prospect of success as at September 2022 and if not then, undoubtedly by the middle of day four of the Tribunal hearing when he had another opportunity to withdraw without facing a costs application.

115. As to the second question, whether I should exercise my discretion, I accept that costs are the exception rather than the rule but of course in in an appropriate case I would have costs is available and I consider that this is just such a case.

116. The respondent is a publicly funded body which has been put to considerable expense by an unmeritorious claim. The costs being sought are reasonable in the circumstances particularly given that They do not even cover Counsel's entire fee.

117. I have taken into account what the claimant said about his means but on balance I consider that given all of the facts an award of costs against him is justified. This was not the case where the merits were balanced and it could have gone either way, it was plain and also have been clear to the claimant based on the tests I had to apply, essentially the band of reasonable responses, that this was the case doomed to fail from the start.

118. For those reasons I would cost against the claimant in the sum of £10,000.

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Employment Judge Brewer

Date: 19 May 2023