



# EMPLOYMENT TRIBUNALS

**Claimant:** N A Fitzsimmons

**Respondent:** Marriot Hotels Ltd

**Heard at:** Leeds (CVP) **On:** 14 November 2023

**Before:** Employment Judge Rakhim (sitting alone)

## Appearances

**For the claimant:** Attended, unrepresented

**For the respondent:** Represented by Mr T Westwell (Counsel)

## JUDGMENT

The claimant's complaint for unfair dismissal is not well founded and is dismissed.

## REASONS

### Background

1. The Claimant was employed by the Respondent from 15 September 2000 to 6 April 2023 and at the time of his dismissal he was a Kitchen Porter. It is not in dispute that he was dismissed by the Respondent.
2. The Claimant started the ACAS early conciliation process on 19 June 2023 and the ACAS certificate was issued on 21 June 2023. The claim was presented, in time, on 4 July 2023.

### The Claim

3. The Claimant has claimed unfair dismissal pursuant to the Employment Right Act 1996, Section 98 ("ERA"). The Claimant was the subject of disciplinary proceedings for an inappropriate comment to a female colleague. The Respondent deemed this to be gross misconduct for the offence of sexual harassment and decided to summarily dismiss him.

4. The Claimant disputes the evidence supported the allegation made, takes issue with the evidence given by the witnesses, and submits the decision was based on false witness testimonies without any documents or other evidence. He also submits his account was dismissed by the interviewers who were prejudiced and biased against him, and that he was coerced to admit guilt.

### **The issues**

5. At the hearing before me, the parties agreed that the following issues fall to be determined in this case:

In relation to the misconduct being the reason for the dismissal, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will particularly decide:

- a. whether there were reasonable grounds for that belief;
- b. whether at the time the belief was formed the Respondent had carried out a reasonable investigation;
- c. whether the Respondent otherwise acted in a procedurally fair manner;
- d. whether the dismissal was within the range of reasonable responses.

### **The hearing**

6. The hearing took place by way of a CVP remote hearing with both parties joining remotely. The Claimant was not represented and the Respondent was represented by Mr Westwell.
7. I was assisted by a 226 page bundle (paginated to 216 pages, which is what I refer to below when referencing pages). I was provided with witness statements from the Claimant and both witnesses for the Respondent. The parties confirmed there were no additional documents. The parties agreed that they would refer me to the relevant documents that they wanted me to consider within the bundle.
8. The Claimant provided a DBS certificate but this was not relevant to the issues to be decided. The Claimant also provided an unsigned and undated letter from his line manager (attesting to his hard work, punctuality and attendance) and a screenshot of an email from another individual whose position/relationship is unknown (attesting to the Claimant's hard work and reliability). However, the issues to which they spoke to were not relevant for the purpose of considering whether the Respondent's conduct was reasonable at the material time that the Claimant was dismissed.
9. All witnesses affirmed, adopted their statements and had no requirements for any adjustments. I heard oral evidence from the Claimant. For the Respondent, I heard evidence from:
  - a. A Malloy ('AM'), Multi Property General Manager;
  - b. T Nesbitt ('TN'), Cluster General Manager.
10. The Claimant cross examined both Respondent witnesses. The Claimant then provided oral evidence and was cross examined by Mr Westwell. I then heard submissions from Mr Westwell followed by the Claimant. At the end of the hearing, I reserved my determination as the submissions finished close to the end of the day and the matter was listed for a single day hearing.

11. In reaching my decision, I have carefully considered the oral and documentary evidence, the closing submissions, and my record of proceedings. The fact that I have not referred to every document in the evidence bundle should not be taken to mean that I have not considered it.
12. Where it has been necessary to make a finding of fact in respect of contested matters, I have done so by deciding which version of events is more likely, taking the evidence in the round.

## **The Facts**

### *Background*

13. The Claimant was employed by the Respondent from 15 September 2000 (albeit the Claimant states this was from 20 November 2000) to 6 April 2023 as a Kitchen Porter. The Respondent gave gross misconduct as the reason for the Claimant's dismissal.
14. The Respondent operates a chain of international hotels and has 3,500 employees in Great Britain. The Claimant worked at the Leeds branch, where the Respondent employed 103 employees. AM is the Multi Property General Manager and had overall responsibility for running the Leeds and York branches. He also conducted the Disciplinary Hearing on 6 April 2023. TN is the Cluster General Manager responsible for 11 hotels including Leeds and conducted the Appeal Hearing on 1 June 2023.
15. In his evidence, AM stated the employee handbook was issued every year. The Respondent's employee handbook [pp.73-160], titled '23<sup>rd</sup> UK Associate Handbook' 2023, was provided within the bundle. The relevant sections include section 8.5, 'Harassment and Professional Conduct in the Workplace Policy'. It also included section 8.5.2, titled 'Sexual Harassment'. The relevant parts of the policy in section 8.5 were as follows:

- *Harassment generally is unwanted and unwelcome behaviour which an individual may find offensive, which causes him/her to feel threatened, humiliated, patronised or harassed and creates an intimidating, hostile or humiliating work environment for the individual. Harassment may be open or covert, direct or indirect, an isolated incident or a series of repeated actions. It may also include, in certain circumstances, off-duty conduct....*

*Each associate must exercise his or her own good judgement to avoid engaging in conduct that may be perceived by others as harassment.*

- *Sexual harassment is harassment (as defined previously) of a sexual nature, which includes unwelcome sexual advances, requests for sexual favours, or any other visual, verbal, or physical conduct of a sexual nature when....*

*The harassment has the purpose or effect of unreasonably interfering with the associate's work performance or creating an environment, which is intimidating, hostile, offensive or humiliating to the associate.*

*The following is a partial list of conduct that will usually be considered sexual harassment:*

1. *Verbal – Repeated sexual innuendoes, sexual epithets, derogatory gender related slurs, sexually explicit jokes, obscene or sexually suggestive comments*

*about a person's body, offensive or unwelcome flirtations, unwanted sexual advances or propositions, threats, or suggestive or insulting sounds...*

16. The Claimant signed for the 2023 Associate Handbook on 26 January 2023 and this declaration was worded; *"I acknowledge that I have received, read and understood the contents of the handbook and that I agree to abide by the Company standards described therein"* [p.161].
17. The Claimant's record of training [pp.161 and 162E], confirmed that he had undertaken training for:
  - 'Harassment Prevention in the Global Workplace for Non-Managers' on 2 January 2020
  - 'Global Workplace Harassment Prevention for Employees' on 1 December 2022 [p.162]. Extracts from the latter online course has been provided within the bundle [pp.162A-162D].
18. Prior to the index incident, there was an incident on 1 January 2023. A member of staff who remained anonymous, alleged that the Claimant had said to her; *"You know, you shouldn't bend over like that in front of me."* On 9 January 2023, Jane Uhren ['JU'], the Human Resources manager at the Leeds branch, wrote to the Claimant [p.163]. This followed a discussion with the Claimant earlier that day. It details a complaint made by a colleague on 1 January 2023 and goes on to state:

*As per our meeting, we explained that any derogative comments and inappropriate behaviour will not be tolerated in this hotel, which you admitted this could be a dismissible offence.*

*We recommend that you reflect on your conduct at work and how you speak and interact with your colleagues, as you mentioned in the meeting it could be mistakenly taken out of context of [sic] misconstrued and cause offense.*

*We also suggest that you complete all the necessary online training in regards to business conduct and harassment ...*

*If we are presented with any further information relating to matters of a similar nature we will have no option other than to investigate this matter through our disciplinary process.*

19. The letter suggested that the Claimant should ensure that he completes all the necessary online training with regard to conduct and harassment. The records do not indicate this was done, but the Claimant had completed the training titled 'Global Workplace Harassment Prevention for Employees' on 1 December 2022, which was a month prior to this January incident.

### *The Incident*

20. On 29 March 2023, a further incident occurred. A complaint was received that the Claimant had made inappropriate comments and displayed inappropriate behaviour towards a colleague who was a food and beverage worker, namely A1 (note; A1, A2 and A3 are those that were interviewed by the Respondent, actual initials are not used to protect identities).

### *The investigation*

21. JU and a colleague (CF) interviewed the complainant, A1, that same morning at 10:05 [pp.166-169]. A1 recounted that she walked into a room, the Claimant was talking to a colleague (VS) about how everyone is getting pregnant this year. She then stated that the Claimant was backing into the hallway with a trolley, she was near the entrance and the Claimant whispered to her *"in a joking manner"* the following comment; *"I wish I could impregnate you"*. A1 stated that only another colleague, A2, had heard this as she was stood behind the Claimant in the corridor. A1 stated she would like to put a formal complaint against the Claimant for sexual harassment.
22. The Claimant was suspended the same day at 13:15 as a *"formal complaint had been made of sexual harassment"* [p.164]. JU wrote to the Claimant the same day inviting him to an Investigation Meeting on the following day and reminding him of his right to be accompanied [p.165].
23. JU and a colleague (NM) interviewed the witness, A2, on 30 January 2023 at 08:30 [pp.170-176]. In relation to the 29 March 2023 incident, A2 stated that they (referencing the Claimant and VS) were saying *"Its [sic] pregnancy season"* and that the Claimant then said to A1 that *"if you want to get pregnant come with me"*. She also expressed her concerns on how the Claimant treated younger girls and described being uncomfortable around him. She stated that she used to get on with the Claimant until January but she was weary of him talking to girls after he she saw him talking to a 17-year old colleague, backing her up into a corner, resulting in that colleague asking the Claimant to get away from her and hitting him with a tea towel.
24. JU and a colleague (NM) interviewed the Claimant on 30 March 2023 at 11:30. The Claimant was unaccompanied, he was reminded of his right to be accompanied and he confirmed he was content for the interview to proceed. The Claimant confirmed that VS had stated her daughter is pregnant and he then mentioned that his daughter is also pregnant. He denied making the comment to A1 but later stated *"I could have said it"*. He stated that he may say *"you look good today, you look sexy today"*. The Claimant also accepted he had said things like *"you look sexy girls"*. He appeared to acknowledge this may not be appropriate language as he did say he would take issue with anyone calling his daughter 'sexy'.
25. The Claimant was asked about the 9 January 2023 conversation and confirmed that he had been told *"that if it happened again I will be in trouble"*. The Claimant accepted completing the harassment training on more than one occasion and signing for receipt of the employee 2023 handbook.
26. JU and a colleague (NM) interviewed another witness, A3, on 30 January 2023 at 14:00 [pp.177-178]. He confirmed that he never heard the comment made but described the incident as *"it was like she was cornered, she was in the breakfast room, clearing and he was in there, he was backing her into the corner. I told him to move away, she was clearly scared. I told him to move away"*. He stated A1 approached him after, was upset, told him that the Claimant had commented *"about getting her pregnant/impregnated"* and asked him to do something, hence he reported it to Human Resources. He also confirmed that A2(the other witness) had complained to him in the past about the Claimant's comment to her in a lift. A3 also stated that the Claimant had told him that *"I like been [sic] around these young girls"* and A3 expressed his concerns about the Claimant's behaviour around younger females.

### *The Disciplinary Hearing*

27. On 31 March 2023 JU wrote to the Claimant [pp.182-183] to invite him to a Disciplinary Hearing on 6 April 2023. She also emailed [pp. 180-181] this letter alongside the documents and interview notes (relating to the Claimant and the three witnesses), as referred to above. The letter stated as follows (names changed to initials):

*The purpose of the disciplinary hearing will be to consider and discuss the following disciplinary allegations and to allow you to make representations on the same:*

- *That on Sunday 26th March 2023 around 9-10am you made an inappropriate comment (sexual innuendoes, sexual epithet) to A1 a Casual Worker in the Food & Beverage Department. It is alleged that you said “come with me if you want to get pregnant or I will impregnate you”. This was after a conversation you were having with VS, F&B Associate in the temporary prep area (Boardroom).*
- *That on 29th March 2023, A3, F&B Supervisor witnessed you been in A1’s personal space, A3 states that you were leaning into her while she was clearing the restaurant during breakfast. A3 witnessed this and immediately asked you to move away from her as she was clearly distressed.*
- *During your investigation meeting on 30th March 2023 you admitted to using sexual innuendoes, sexual epithets towards the young Casual Workers, such as “you look sexy, you look sexy girls”.*
- *That your behaviour and conduct towards A2 and A1 was unwanted and unwelcomed.*
- *That during a conversations [sic] with A3 your language regarding young females was inappropriate and could be deemed as offensive and of a sexual nature. This was in reference to a comment you made to A3 regarding your secret to still feeling young. A3 asked you what the tick [sic] was to this and your reply was “I like been [sic] around these young girls”*

28. The Claimant attended the Disciplinary Hearing on 6 April 2023, which started at 10:55 [pp.184-188] and was unaccompanied. He was reminded of his right to be accompanied and confirmed he was content for the meeting/hearing to proceed. The hearing was conducted by AM and a colleague from Human Resources took notes (JV). AM confirmed he had read the investigation notes and familiarised himself with the relevant policies and procedures prior to the hearing.

29. At the hearing, the Claimant explained that he was talking to VS about their daughters being pregnant, A1 “made a comment and I said why would you like a baby. I never said I would impregnate you”. Regarding comments he makes with others, the Claimant stated “sometimes I say you look sexy, pretty” and he accepted this was not appropriate. He denied backing anyone into a corner. He also stated that “I might be saying things and people taking out of context. I don’t think I’m saying things bad but it’s a sexual nature.” He also accepted he now understood using the word ‘sexy’ is a sexual comment.

30. The hearing was adjourned and reconvened at 12:50. Upon resuming, AM reiterated the relevant parts of the Harassment policies, noted the Claimant’s acknowledgment of comments to young females about looking ‘sexy’ and ‘pretty’, and reminded the Claimant of the 9 January 2023 letter by reading this out. AM then went on to announce his decision as:

*Based on the severity of this which is classed as gross misconduct and falls under sexual harassment I have decided that you will be dismissed from your role as Kitchen Porter with immediate effect. This is summary dismissal.*

31. The Claimant was reminded of his right to appeal. In response to the outcome, the Claimant stated *"I know I've been a dick"* and apologised.
32. On the same day, AM wrote to the Claimant with the outcome [pp.191-193] and a member of Human Resources emailed this to the Claimant on 12 April 2023[p.194]. The outcome letter stated(names changed to initials):

*I concluded that the allegations were proven... My reasons for reaching this conclusion are as follows:*

*1. That during your disciplinary meeting you admitted to using sexual innuendoes towards young casual workers such as "you look sexy today / you look pretty today", therefore this allegation was proven.*

*2. That during your disciplinary meeting you admitted that your behaviour in your own words is disgusting, therefore this allegation was proven.*

*3. That you were spoken to in January 2023 regarding an allegation of inappropriate language used towards a female casual worker, after this conversation with NM, Executive Chef and JU, HR Manager you were issued with a letter on 9th January 2023. This clearly detailed that "if any further information relating to matters of a similar nature that we would have no option other than to investigate this matter through our disciplinary process". You admitted to receiving this letter and recall the contents of that discussion and therefore this allegation was proven.*

*....*

*Having considered the nature of the allegations which have been found to be proven, it is clear to me that the allegation of your use of sexual innuendoes and behaviour is a particularly serious matter and not something which we tolerate in our culture here at Marriott and in no way condone this behaviour. I do not find that there are any mitigating circumstances which could lessen the penalty to be imposed upon you. Therefore, I have concluded that you should be summarily dismissed from your employment with Marriott, without payment of notice or payment in lieu of notice.*

### *The Appeal*

33. The Claimant appealed in writing against that decision on 17 April 2023 [pp.195-206]. His grounds of appeal were the same as the grounds of appeal attached to his ET1 claim form, namely that he disputes the evidence supported the allegation made, takes issue with the evidence given by the witnesses, and submits the decision was based on false witness testimonies without any documents or other evidence. He also submits his account was dismissed by the interviewers who were prejudiced and biased against him, and that he was coerced to admit guilt.
34. The appeal was acknowledged by email by TN [p.207].
35. The Appeal Hearing was held virtually on 1 June 2023. The appeal was attended by the Claimant, conducted by TN and a colleague from Human Resources took notes (JV) [pp.209-210]. The Claimant was invited to explain the main points of appeal that he

wished to be considered. He denied saying such things, stated (wrongly) that A1 had not complained and that he talks to everyone like that and not just young females. He also took the view that if anyone was not comfortable with what he was saying then they should tell him and he would stop.

36. In a written decision dated 2 June 2023 [pp.211-212], TN dismissed the Claimant's appeal and upheld AM's decision of dismissal. Some of the reasons mentioned include:

*I must acknowledge that certain words and language you used when addressing female colleagues were deemed inappropriate....  
...you should not be waiting for people to tell you they find your behaviour or language unacceptable as you should be conducting yourself in an appropriate manner at all times.*

*It is clear that certain younger female staff members felt uncomfortable with both your manner of addressing them and the comments you directed towards them...*

*Whilst you strongly deny the allegation that you whispered in a female staff members ear that you would impregnate them, it seems that there is a pattern of behaviour of how you speak to some of the younger females within the F&B team and some things which you feel are just banter and being friendly, we would consider them to be wholly inappropriate and feels that this does constitute sexual harassment.*

*....a conversation took place in January regarding allegations made against you...it was made explicitly clear what behaviour was acceptable and what would not be tolerated.*

*The fact that you admitted that one of the staff members herself told you that she thought you were a predator and didn't like how you spoke to her and other younger members of the team, should have made you stop immediately and reconsider your interactions, particularly considering the conversation you had with HR in January.*

*Having reached these conclusions, I also considered the level of punishment imposed by Alan Malloy which was your summary dismissal from the hotel. Whilst he has noted your dedicated service of over 20 years to Marriott...it is important to emphasise that any type of harassment within our hotels is strictly prohibited. I am mindful of the extremely serious nature of your actions and my view is that these outweigh any other mitigating factors that might exist.*

## The Law

37. Potentially fair reasons for dismissal are set out at section 98 ERA Act as follows:

*"(1) in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –  
(a) the reason (or, if more than one, the principal reason) for the dismissal, and  
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(2) A reason falls within this subsection if it –*

*...*

*(b) relates to the conduct of the employee,*



...

(4) *Where the employer has fulfilled the requirement of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason) shown by the employer*

(a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee,*

(b) *shall be determined in accordance with equity and the substantial merits of the case."*

38. In a case in which the employee's conduct is said to be the reason for dismissal, the employer must show that misconduct was the reason for the dismissal. According to the Employment Appeal Tribunal in **British Home Stores Limited v Burchell [1980] ICR 303**, a threefold test applies. The employer must show that:

- a. It believed that the employee was guilty of misconduct;
- b. it had in mind reasonable grounds upon which to sustain that belief;
- c. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

39. This means that the employer need not have conclusive direct proof of the employee's misconduct; only a genuine and reasonable belief, reasonably tested.

40. In **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** the EAT held that the function of the Employment Tribunal was to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair.

41. Exactly what type of behaviour amounts to gross misconduct depends upon the facts of each 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**). The conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence.

42. In **Paul v East Surrey District Health Authority [1995] IRLR305, CA**, the Court of Appeal held that an employer is entitled to take into account not only the nature of the conduct and the surrounding facts but also any personal circumstances affecting the employee. The Court found that the attitude of the employee to his or her conduct may be a relevant factor in deciding whether a repetition of it is likely and commented: '*Thus an employee who admits that the conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely.*'

43. When considering dismissal for gross misconduct, the Tribunal has to be satisfied that the employer acted reasonably both in characterising it as gross misconduct, and then in deciding that dismissal was the appropriate punishment (**Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854**).

## Conclusions

### *Potentially Fair Reason*

44. I find that the Respondent dismissed the Claimant for a potentially fair reason, namely, his conduct. The Claimant has not asserted any alternative reason for his dismissal. The Respondent was consistent throughout the disciplinary process that the reason for the Claimant's dismissal was his conduct.
45. I find that the AM, as the decision maker, held a genuine belief in the matters listed within the outcome letter. I accept he genuinely believed that the Claimant breached the Harassment policies. There was no dispute in relation to the policies and standards that were required. AM was able to take into account the evidence in support of the 29 March 2023 incident, the Claimant's admissions about making 'sexy' related comments and the Claimant's acknowledgements reflected in the 9 January 2023 letter.
46. AM was reasonably entitled to conclude that the impregnating comment had been made on the evidence before him. The complainant, A1, was interviewed the same day and confirmed she would like to lodge a complaint for sexual harassment. There was also relevant witness evidence from the following day, 30 March 2023, when the Claimant, A2 and A3 were spoken to by JU investigating the matter. A2 stated she had heard the comment and although the wording quoted was not the same, I accept that the gist of what was said was essentially the same, namely about impregnating A1. A3 did not hear the comment but did state that he observed the complainant was cornered, backed into a corner, scared, he had to intervene to ask the Claimant to move away and after speaking to A1 she had told him about the impregnating comment.
47. In cross examination, the Claimant stated he had actually said "*maybe will happen to you one day, you'll have baby*", but I could place little weight on this as this is not what he had stated in his earlier accounts closer in time, which is what AM was considering when making the decision. I also note that in the Disciplinary Hearing the Claimant had told AM that he had said "*why would you like a baby*", which is different to what he was now saying. The Claimant also accepted he had been told by A3 to move away from A1, but denies being anywhere close to her. However, he did not explain why A3 would have instructed him to move away from the complainant. It was put to him that the reason this was said to him was because he was getting too close to A1 and the Claimant responded "*maybe, but I was doing my job*". This seems to add weight to A3's account and concerns, which is what AM had before him at the material time.
48. AM had evidence from two witnesses who heard the comment and another confirming that straight after the incident he was told of the comment by A1. These were consistent and contemporaneous accounts and AM was able to place weight on these. The Claimant had accepted "*I could have said it*" and this contemporaneous admission would reasonably attract more weight, as it was stated in his first account. AM also had evidence of such conduct on multiple occasions against multiple individuals, including A1, A2 and the individual referred to by A2. In light of all the material before AM, he was entitled to conclude that the allegation was true.
49. Although A1 had stated that it was said by the Claimant "*in a joking manner*", it is reasonable to expect the Claimant would be aware that even said in such a manner would not be acceptable. Irrespective of the details of the 1 January 2023 incident, the Claimant had been accused of a similar conduct, namely an inappropriate sexual comment against a female. The Claimant was spoken to, reminded to complete harassment related training and issued with a formal letter. The Claimant had also undertaken some harassment training in December 2022. AM is entitled to conclude

that the Claimant was aware of the standards expected of him and yet was continuing to engage in inappropriate behaviour/comments.

50. AM was also aware of the pattern of behaviour alleged. A2 had recounted seeing the Claimant back someone else into a corner resulting in the colleague asking him to get away from her and hitting him with a tea towel. A2 had stated she was uncomfortable around him. A3 had also corroborated support for a comment made in the lift by the Claimant to A2.
51. Furthermore, AM had noted the Claimant's attitude in relation to such comments and language. A2 confirmed that the Claimant had told him that he likes being around young girls. Such a comment gives a reasonable interpretation of concern for the Respondent. On the first interview given, which arguably carries more weight as it was the Claimant's first account given, the Claimant had stated he had said things like "*you look sexy girls*" and stated that he may say "*you look good today, you look sexy today*". Such comments were reasonably viewed as not appropriate in the workplace. I do not accept the Claimant's account in his oral evidence that he was nervous and had agreed with the interviewers. He specifically states "*I have said things like 'you look sexy girls'...I know it's against the law*". In cross examination, he stated that he made such comments to a colleague of his age, but I was able to place little weight on this as he did not provide this explanation in any of the earlier discussions or meetings, thus there was no such explanation before AM at the material time. Further along in cross examination, the Claimant examination stated he only says "*you look nice*" to his own daughters and I could not dispute the Respondent's counsel's suggestions that this was an attempt to water down the "*you look sexy girls*" comment, which he had admitted in the earlier accounts.
52. When considering the 29 March 2023 complaint through the prism of the harassment policy, it was reasonable for the respondent to conclude that the unwanted and unwelcome behaviour would satisfy the definition of 'harassment' for AM. A3 had confirmed that when he saw the incident where he intervened to ask the Claimant to move away, A1 was "*clearly scared*". The Respondent did not have to factor in any earlier incident or other concerns as the policy stated that harassment could be an isolated incident. AM is entitled to reasonably conclude that such a comment, as alleged by A1, was a sexually suggestive comment, offensive, an unwanted sexual advance and thus amounting to sexual harassment.
53. When factoring in that the Claimant had been spoken to about a similar incident and issued a formal letter a few weeks earlier in January, AM is able to reasonably conclude that the Claimant would have been more than sufficiently aware of the need to be circumspect in his conduct.
54. I do not accept the Claimant's submission that there was no evidence he had made the comment and that the investigation had been based on hearsay. The complainant, A1, gave first hand evidence, A2 had stated she had witnessed it and A3 did not hear the comment but did observe an altercation that day and his evidence corroborates the accounts provided. AM had stated in oral evidence that he had nothing to suggest that these three individuals were untruthful. The Claimant submitted that two witnesses are best friends and the other is their supervisor. However, this does not undermine the credibility of their account. AM had clarified in oral evidence that he had statements from three individuals, there had been a consistent theme of behaviour and the words used were also consistent. TN also explained that there were multiple witnesses affirming a common theme with the pattern of behaviour. Whilst the Claimant did argue that A2 may dislike him after he had commented on her looking like "*a scruff*", he was unable to provide any evidence as to why A1 and A3 may not be telling the truth. I can

also not ignore the Claimant's acknowledgement of various comments he had made, which is part of the evidence that was before AM and thus he was able to take it into account. In light of all the above, I do not accept the Claimant's arguments that the Respondent's evidence is weak.

55. I accept that AM genuinely believed the Claimant's actions to be a breach of the harassment policy and of such severity as to amount to gross misconduct.

*Reasonable Grounds for belief following a reasonable Investigation*

56. The Respondent conducted a fair and reasonable investigation in establishing the facts. I have outlined the investigation above. By the end of the following day, the complainant had been interviewed, along with all the other witnesses. The Claimant was also interviewed and able to put his account to the Respondent. The relevant material was provided to the Claimant ahead of the Disciplinary Hearing. The Claimant was allowed to be accompanied at all stages. In my view, the Claimant's representations had been considered at all stages. The Claimant was also given a right of appeal, which he did exercise.
57. The Claimant takes issue with VS not being interviewed. However, A1 had stated that the Claimant and VS were chatting, then the Claimant was backing away into the hallway with a trolley and the comment was whispered to her near the entrance. I did not read that account to mean that it had been stated in the presence of VS. As the Claimant was alleged to have whispered the comment, then it follows that in all likelihood it meant that even if VS was close by she may not have heard it. I also note that the Claimant had never raised the lack of VS being interviewed at the material time, which would be odd if he genuinely believed she would have supported his account. Therefore, I do not consider the lack of VS being interviewed renders the investigation as unreasonable. Even if she had said otherwise, the Respondent was still faced with three witnesses reporting the harassing conduct. The misconduct was serious, there was a pattern of inappropriate sexualised comments made, the Respondent had a zero tolerance policy on sexual harassment and had a duty to protect their female employees.
58. I do not accept that the Claimant never got a chance to properly explain himself in the Investigation Meeting of 30 March 2023 and the Disciplinary Hearing of 6 April 2023. He had been reminded of his right to be accompanied at both instances but was content to proceed. I have had sight of the minutes of both the Investigation Meeting and the Disciplinary Hearing, and in my view, the Claimant had been able to engage throughout. In the Investigation Meeting, he was asked if he had anything else to add and he confirmed his reply as 'no'. In cross examination he accepted he had been given an opportunity to provide representations at the Disciplinary Hearing.
59. The Claimant says he was nervous and confused in the Investigation Meeting and simply agreed with those interviewing him. I reject this submission as I have seen the minutes of the Investigation Meeting and the Claimant actively engaged throughout by providing explanations. He made some admissions but denied other matters.
60. The Claimant took issue with not being told the identity of the complainant for the January 2023 incident. I do not accept this, as A2 had told the Respondent in her interview that after reporting the incident in January she did not come to work for 21 days and upon return she ended up in the same lift as the Claimant who stated "*I'm not talking to you as you will report me again*". The Claimant was challenged that he knew it was A2 that was the complainant in January and in cross examination stated he could not remember this (as opposed to denying it), nor could he recall making the comment

or being in the lift. I consider it is clear that A2 was the complainant. In any case, this was an informal complaint, appears to have been anonymous at the time and there is no criticism for the Respondent ensuring the Claimant is made aware to be careful in the future.

61. In the circumstances, I do not find that the Respondent could have done anything more in relation to the investigation and that the investigation was reasonable.

*Procedurally fair disciplinary process*

62. The process followed by the Respondent was fair. The Claimant knew what the case was that he had to answer, and he was given a proper opportunity to put his position forward including any mitigating circumstances.
63. The Claimant elected not to be accompanied/represented despite being given the opportunity at the Disciplinary Hearing and the Appeal Hearing. Both hearings were undertaken by different managers. He was provided with sufficient notice of both hearings and he never raised any objection in relation to having insufficient time. He also provided very detailed 12-page submissions ahead of the Appeal Hearing.
64. The Claimant had a fair hearing in relation to both the Disciplinary Hearing and the Appeal Hearing.

*Range of Reasonable Responses*

65. The employer acted reasonably, both in characterising the Claimant's conduct as gross misconduct, and then in deciding that dismissal was the appropriate punishment. The single incident alone is capable of undermining trust and confidence in the employer/employee relationship. The Claimant was also directed to undertake training and acknowledged he had read and understood the handbook, which contained the harassment policies.
66. In oral evidence, the Claimant accepted he was aware of the harassment policy, he received the employee handbook every year and accepts there was a zero tolerance policy to sexual harassment. In cross examination, the Claimant accepted that the Respondent had duty to protect young females from unwanted sexual comments from male colleagues. The Claimant cannot say he was not put on notice until the 29 March 2023 incident. In relation to the 9 January 2023 letter, the Claimant accepted that at the relevant time he had admitted to the Respondent that any derogative comments and inappropriate behaviour would be a dismissible offence. The Claimant confirmed that he understood that he had been warned and that any similar allegation would lead to a disciplinary process.
67. The Claimant had signed to confirm he had received the 2023 handbook, and that he had read and understood it. He also accepted having done harassment training in 2020 and 2022. The harassment policy places responsibility on each employee to exercise their "*own good judgement to avoid engaging in conduct that may be perceived by others as harassment.*"
68. Despite the January letter to the Claimant, allegations arose on 29 March 2023 and these were supported by multiple witnesses. The Respondent is able to conclude that the Claimant would create a risk if he were to continue to remain employed. It is reasonably open to both AM and TN to conclude that another warning would not suffice given there has been multiple warnings. I accept that both AM and TN, when considering the matter, had in mind the need to protect the younger females employees.

69. The Claimant relies on his 22 years' service and this has been factored in at appeal by TN. In the appeal outcome letter, TN did note the long service and acknowledged that the Claimant was a highly valued colleague, but explained that any mitigating factors are outweighed by the extremely serious nature of the conduct.
70. The Respondent's decision to dismiss the Claimant is within the band of reasonable responses.
71. For the above reasons, the Claimant's complaint for unfair dismissal is not well founded and is dismissed.

Employment Judge Rakhim

9 December 2023