



EMPLOYMENT TRIBUNALS

Claimant: Ms. S Rootes

Respondent: Edward Harte Solicitors

Heard at: London South Employment Tribunal by video (CVP)

On: 20 February 2023 and 21 February 2023

Before: Employment Judge Macey – Sitting Alone

Representation

Claimant: Mr. Matovu, Counsel

Respondent: Mr. Brown, Counsel

CORRECTED RESERVED JUDGMENT

1. The claimant's complaint of unlawful deductions from wages for failure to pay holiday pay is dismissed upon withdrawal.
2. The claimant's complaint of failure to provide an itemised pay statement is dismissed upon withdrawal.
3. The claimant's complaint of unfair dismissal is well-founded. This means that the respondent unfairly dismissed the claimant.
4. The claimant contributed to her dismissal to the extent of 75%, to be applied to the basic and compensatory award for unfair dismissal.
5. The claimant's complaint of breach of contract is not well-founded and is dismissed.
6. The tribunal will decide the remedy for unfair dismissal at a further hearing on **3 July 2023** and case management orders for this remedy hearing will be sent to the parties.

CORRECTED REASONS

CLAIMS AND ISSUES

1. The claimant brings complaints of unfair dismissal and wrongful dismissal. The claimant withdrew her complaints of unlawful deductions from wages for failure to pay holiday pay and failure to provide an itemised pay statement.
2. I agreed with the parties the issues for me to decide. Although the **Polkey** and contributory conduct issues concerned remedy and would only arise if the claimant's complaint of unfair dismissal succeeded. I agreed with Mr. Matovu and Mr. Brown that I would consider them at this stage and invited them to deal with them in evidence and submissions.
3. The issues were agreed to be as follows:

Unfair dismissal

- 3.1. What was the principal reason for the claimant's dismissal? The respondent says it was a reason relating to the claimant's conduct.
- 3.2. Was the reason for the claimant's dismissal a potentially fair one. The respondent says it was a reason relating to the claimant's conduct within the meaning of section 98(2)(b) of the Employment Rights Act 1996 ("ERA").
- 3.3. Did the respondent have a genuine belief in the claimant's misconduct?
- 3.4. Was the respondent's belief in the misconduct a reasonable one based on an investigation falling within the range of reasonable responses open to the respondent?
- 3.5. Did the respondent follow a reasonably fair procedure in dismissing the claimant?
- 3.6. Was the dismissal a response to the claimant's conduct that fell within the range of reasonable responses open to the respondent?
- 3.7. Should any compensatory award awarded to the claimant in respect of unfair dismissal be wholly or partially reduced because the dismissal would have occurred in any event regardless of any unfairness found (**Polkey -v- A E Dayton Services Ltd [1987] UKHL 8**)? The respondent states that the claimant would have been dismissed in any event, therefore, any award should be reduced by 100%.
- 3.8. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the

dismissal, as set out in section 122(2) ERA, and if so, to what extent?

The respondent said that if I decided the claimant was unfairly dismissed, the award should be reduced by 100%.

- 3.9. Did the claimant, by her blameworthy conduct or culpable conduct, cause or contribute to her dismissal to any extent, and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award under section 123(6) ERA. The respondent said that the compensation should be reduced by 100%.

Breach of contract

- 3.10. How much notice was the claimant entitled to receive?

- 3.11. Did the claimant fundamentally breach her contract of employment by committing an act of gross misconduct? This required the respondent to prove that the claimant committed an act of gross misconduct.

- 3.12. For the breach of contract claim this means I need to decide whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.

PROCEDURE, DOCUMENTS AND EVIDENCE HEARD

4. The form of this hearing was a remote hearing by CVP.
5. There was a bundle of documents of 398 pages. I read those documents that were referenced in the witness statements and that were referred to in the hearing. The claimant also disclosed Appraisal Documents (originally created by the respondent) on the first day of the hearing and on the second day of the hearing Mr. Matovu applied for these Appraisal Documents to be added to the bundle. As these documents were originally created by the respondent and contained information relevant to the claimant's relationships with her colleagues I allowed these documents to be added to the bundle.
6. There were separate written witness statements. The claimant gave evidence for herself and relied on the written witness statement of Josephine Baker (a friend and former employee of the respondent). Josephine Baker did not attend the tribunal to provide evidence in person and the respondent did not agree the contents of her statement. I attributed less weight to this statement given that Josephine Baker did not attend the hearing. Brian Donnan (Solicitor and Partner at the respondent), Sarah Platt (Office Manager and PA to Mr. Donnan at the respondent), Heidi Rush (Human Resources Consultant for HR Smart Ltd), Phoebe Palmer (former employee of the respondent) and Samantha Dawkins (Partner at the respondent) gave evidence for the respondent. The respondent also relied on the written witness statement of Julia Wysznska (Accounts Manager at the respondent), this contained evidence relevant to the claimant's withdrawn complaints of unlawful deductions from wages and failure to provide an itemised pay statement.

FACTS

7. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents.
8. The claimant was employed by the respondent as a Legal Secretary between 3 March 2003 and 18 October 2021. The respondent is a small firm of solicitors and has approximately 20 employees. The claimant received a traditional upbringing including in relation to the role of women in society.
9. There was no written contract of employment or Section 1 statement in the bundle of documents. The Respondent has an Equality and Diversity Policy [215-218] and a Disciplinary Procedure [213]. Clause 6 of the Equality and Diversity Policy states:

“Disciplinary issues arising from a possible breach of this policy will be dealt with through the firm’s normal disciplinary process. Anyone who knows or suspects discrimination or harassment is taking place should make an appropriate report without delay.”

10. The Disciplinary Procedure [213] defines gross misconduct as follows:

“Gross misconduct (dismissal): negligence resulting in serious loss, damage, injury, assault or attempted assault; theft; malicious damage to property; wilful disregard of duties or instructions relating to the employment; deliberate and serious breach of confidence relating to the firm’s or its client’s affairs; the use for personal ends of confidential evidence obtained by you in the course of your employment; falsification of records; conduct violating common decency; or conviction on a criminal charge relevant to your employment. (In serious cases, dismissal will be without notice).”

11. The respondent holds an appraisal meeting with its employees each year. The claimant has Appraisal Documents for 2015, 2016, 2017 and 2021. Question three on these Appraisal Documents is *“Relationship with other members of staff”*. This particular question is for the employee to answer. Question 7 is *“Areas in which employer feels may be room for improvement”*. The latter question is something the employer answers/ completes.
12. One of the claimant’s neighbours is a man in a same-sex couple and they exchange greeting cards and postcards with the claimant [240-245]. Another of the claimant’s neighbours is a woman in a same-sex relationship who co-parents a young boy with her partner, this neighbour and the claimant have gone for drinks together at the local pub. Two of the claimant’s good friends outside of work are a gay man and a man who is bisexual. The claimant knows these individuals because they are all members of The Brighton & Hove Heritage Commission.
13. The claimant is also a Christian and goes to St. Nicholas’ church. St. Nicholas’ Church is an openly gay church, and a large number of the congregation are gay. The claimant speaks to many of the members of the

congregation regardless of their sexuality. Ms. Baker has provided hearsay evidence that she has witnessed the claimant speaking to gay men and gay women at St. Nicholas' church and the claimant has told Ms. Baker that she is particularly fond of the church's vicar, a man who is in a civil partnership with his husband.

14. The claimant is also a member of the Arts Society of Sussex and many of the members are gay. The claimant has been to meetings and lectures and even on trips abroad with the Society with many gay people.
15. On 14 May 2007 Mrs. Dawkins joined the respondent as a paralegal (later Mrs. Dawkins was admitted as a solicitor on 15 May 2008 and was promoted to Salary Partner in 2015 and then Equity Partner in 2020). When Mrs. Dawkins first arrived at the respondent no-one knew about her sexuality (being gay). After a number of months Mrs. Dawkins' sexuality became more widely known.
16. The respondent says in or around September 2007 Mrs. Dawkins went into the kitchen. The claimant was already in the kitchen making a drink. The claimant turned towards the door and when she saw it was Mrs. Dawkins entering she looked Mrs. Dawkins up and down and then turned her back on her. Mrs. Dawkins' perception was that the manner in which the claimant looked her up and down was "like I was a piece of dirt on the floor". Mrs. Dawkins said "hello" but the claimant refused to acknowledge Mrs. Dawkins or engage in any conversation with Mrs. Dawkins. The claimant then left the kitchen without making any eye contact or speaking to Mrs. Dawkins. The claimant says she did not behave in this way in September 2007. I find that the claimant did behave in this way in September 2007 because Mrs. Dawkins explained in cross-examination that this particular incident stuck in her memory, because it was the first time she had experienced being treated differently due to, in her view, her sexuality and it was very upsetting for her.
17. Mrs. Dawkins spoke to Mrs. Platt about the claimant's behaviour towards her. Mrs. Platt then spoke to Elizabeth Taylor (a Partner at the respondent at the time). Elizabeth Taylor spoke to the claimant either the same day or the next day. Elizabeth Taylor told the claimant that she needed to make more of an effort to be friendly towards Mrs. Dawkins and, especially being a firm of solicitors, that it was unacceptable to be discriminating towards anyone and that the claimant must get over it. The claimant replied that she would make more of an effort with Mrs. Dawkins because she did not want the working atmosphere to be uncomfortable.
18. The next time the claimant spoke with Mrs. Dawkins she apologised to Mrs. Dawkins very sincerely if she had appeared less than friendly and said, "can we put this behind us and start again?" and Mrs. Dawkins agreed. After this the claimant and Mrs. Dawkins exchanged pleasantries. Mrs. Dawkins was located on the fourth floor of the office and the claimant for much of the time was based on the first floor. The claimant and Mrs. Dawkins did not see each other very often and the claimant did not work directly with Mrs. Dawkins until 2021.

19. In 2013 the claimant was asked to cover for the secretary who worked for Manjinder. Afterwards the claimant told the fee-earner she usually worked for that Manjinder had been unpleasant to the claimant. The claimant also told another employee at the respondent in reference to Manjinder, "she's got a chip on her shoulder, she's half-caste." The respondent carried out a disciplinary process in respect of this and the claimant was given a written warning that remained on her file for 12 months from July 2013 [220, 222, 223-224]. During this disciplinary process the claimant was referred by the respondent to its Equality and Diversity Policy [215-218].
20. In July 2014 Mrs. Dawkins was pregnant with her first child and it became evident that she was pregnant. When Mrs. Dawkins saw the claimant at this time the claimant would either look away or not make eye contact.
21. Mrs. Platt organised a baby shower for Mrs. Dawkins at the respondent's office on 9 January 2015. The respondent states that the claimant had made unpleasant remarks to another member of staff about Mrs. Dawkins and her pregnancy. In response to this Mrs. Platt spoke to the claimant just before Mrs. Dawkins' baby shower and said that perhaps it would be a good idea if the claimant did not attend the baby shower. The claimant admits that Mrs. Platt did advise her against going to Mrs. Dawkins' baby shower, but she does not know why Mrs. Platt said that.
22. Given the lack of detail in Mrs. Platt's witness statement about who the remarks were made to and what was said I find that no unpleasant remarks were made by the claimant about Mrs. Dawkins and her pregnancy at this time. I do find, however, that Mrs. Platt did tell the claimant not to attend the baby shower.
23. When Mrs. Dawkins brought her first child into the office while she was on maternity leave (6 months from 12 January 2015) the claimant would leave the room. Mrs. Dawkins had to walk through the claimant's office in order to see a colleague in the accounts department. The claimant did not speak to Mrs. Dawkins, did not look at Mrs. Dawkins' son and never held him.
24. The claimant had an appraisal on 22 April 2015 [Appraisal Documents]. The claimant's answer to question 3 was "Good." The respondent's answer to question 7 was "*Not a concern but simply to continue with the consistent performance shown particularly over the last year.*"
25. The respondent states that Mr. Donnan spoke to the claimant informally in 2015 after Mrs. Dawkins had her first child. Mr. Donnan's daughter (who was employed by the respondent at that time) had reported to Mr. Donnan that the claimant had expressed the view that gay couples should not be able to have children together. The respondent further states that Mr. Donnan spoke to the claimant about allegations of discriminatory language concerning Mrs. Dawkins and her baby and during the course of that discussion he stated that he was not making assumptions and that if ever any formal complaint of such a nature arrived on his desk that he would obviously take it very seriously.

The respondent further states that Mr. Donnan also explained to the claimant he did not need her to respond. The claimant does not remember this informal discussion.

26. The respondent does not have contemporaneous supporting documents about this informal discussion, nor have I had the benefit of sworn evidence from Mr. Donnan's daughter. This incident is also not mentioned in the Appraisal Documents dated 22 April 2015 and 5 May 2016. I do note, however, in cross-examination the claimant stated she does not recall the conversation, which is not as strong as saying it did not happen. I find that Mr. Donnan did have this informal conversation with the claimant in 2015 about alleged discriminatory remarks relating to Mrs. Dawkins and her baby.
27. The claimant had an appraisal on 5 May 2016 [Appraisal Documents]. In answer to question 3 the claimant said, "*Ok on the whole no problems. Get on well with and enjoy working with Anna very much.*" In answer to question 7 the respondent said, "*Maybe able to field more calls – if required by Anna.*"
28. When Mrs. Dawkins was pregnant again in July 2016 she received the same treatment from the claimant specified in paragraph 20 above and when she brought her daughter (her second child) into the office the claimant behaved in the same manner as specified in paragraph 23.
29. The claimant states that she did not engage with Mrs. Dawkins and her young babies due to a past unhappy experience that makes it difficult for her to be around babies. The claimant also states that she avoided Julia Wysznska when she brought her two babies to the office (Julia Wysznska is heterosexual). The respondent states the claimant did not avoid Julie Wysznska when she brought her babies to the office. I have not had the benefit of sworn evidence from Julie Wysznska and her written witness statement does not cover this issue. I find the reason why the claimant avoided engaging with Mrs. Dawkins and her babies on the occasions she brought them into the office whilst on maternity leave was due to the claimant's past unhappy experience.
30. In the last quarter of 2017 the claimant attended Equality training at the respondent. This training was internal training provided by a partner at the respondent who specialised in employment law.
31. Miss. Palmer started working for the respondent on a full-time permanent basis as a receptionist on 4 May 2021. Miss. Palmer knew Mrs. Platt's niece, but prior to working for the respondent Miss. Palmer did not know Mrs. Platt. Miss. Palmer at this time was manning the telephones in reception and the majority of the respondent's staff were working remotely from home. There were two other members of staff who were generally in the office, one of whom was the claimant.
32. On 9 June 2021 Miss. Palmer sent a text message to a small group chat called "Luvs of my lyf" that comprised herself and her two best friends [59]. This stated:

*“Sheena Who I loved so much
Has just told me she will never speak to a lesbian because it’s a deadly sin
And not only that
She is okay with gay men
But not gay women
I don’t know how to act I have to be professional
She won’t speak to sam because she’s a lesbian
Like won’t even look at her because in her words “she’s repulsive”.*

33. The respondent says that the claimant did make the statements specified in the text message [59] to Miss. Palmer on 9 June 2021. The claimant says that she did not make these statements. I find that the claimant did make the statements specified in the text message dated 9 June 2021 [59] to Miss. Palmer. Miss. Palmer cross-refers in her evidence to the statement she gave to Mrs. Platt on 27 September 2021 [64] and that the content in that statement [64] is true and correct. This statement [64] specifically includes allegations of comments made by the claimant very similar to the content of the text message [59]. Although Miss. Palmer did have some inconsistencies in her evidence compared to the documents concerning her motivation in coming forward with the allegations in September 2021 (see below) I do not consider that this undermines her credibility for the entirety of her evidence. The text message [59] is a contemporaneous document and although it is hearsay evidence it is supporting evidence of Miss. Palmer’s evidence for those specific comments by the claimant.
34. The respondent also says the claimant on the same date (9 June 2021) called Mrs. Dawkins a “dirty dyke”. The claimant says she did not say this and would not use such language. I find that the claimant did not say this. Miss. Palmer’s explanation for not including the words “dirty dyke” in the text message [59] is that she would not use such offensive language in a text message, particularly as one of the individuals in the group chat is gay. I do not find this explanation entirely convincing. If such an offensive term had been used by the claimant I think it is more likely that Miss. Palmer would have referred to the claimant using a very offensive term to describe Mrs. Dawkins without actually using the word itself, rather than not referring to the incident at all.
35. Mr. Donnan held a meeting with the claimant on 10 June 2021 [60-61]. This covered the claimant previously requesting a pay rise, whether the claimant had asked if she could be made redundant (or was merely enquiring whether she was at risk of redundancy) and her alleged behaviour of leaving a client waiting outside the office.
36. On the evening of 23 September 2021 Miss. Palmer decided to raise a complaint about the claimant. She discussed this with her housemates on that evening and they all agreed that she should make a complaint. The respondent says that Miss. Palmer had been prompted to make the complaint in September 2021 because the claimant had told Miss. Palmer that the claimant was intending to approach Denise to ask her whether she (Denise) was a retard and that the claimant had said to Miss. Palmer that she (the

claimant) was going to approach Mrs. Dawkins and ask her why she would not wear skirts like a woman and that Miss. Palmer could not tolerate the idea of the claimant approaching these staff members in this way and upsetting them. The claimant says she did not make these statements to Miss. Palmer.

37. Miss. Palmer does not refer to this being her motivation for coming forward with the allegations in any of the meetings that are outlined below in September 2021. I also note that Miss. Palmer told Mrs. Platt on 27 September 2021 [64-65] that leading up to Gay Pride weekend (beginning of August 2021) the claimant had stated to Miss. Palmer that she was going to ask "*all the lesbians in the office*" why they don't dress like women, why they don't wear dresses and skirts.
38. I find that this was not Miss. Palmer's motivation for coming forward with the allegations in September 2021.
39. On 24 September 2021 Miss. Palmer spoke to one of the solicitors at the respondent, Ms. Govan. At the end of the discussion Ms. Govan advised Miss. Palmer to talk to Brian (Mr. Donnan) or Sarah (Mrs. Platt). Ms. Govan made a note of this conversation [63].
40. Miss. Palmer then sent a WhatsApp message to Mrs. Platt on the same date [62]. This stated:

"Hi Sarah, I have just spoken to Yasmin about something that's been playing on my mind/ feel like should be raised but I feel quite uncomfortable about it as I am worried the person will know its 100% come from me. But I don't think its really right not to mention and would like to speak about it with you confidentially if OK x."
41. Mrs. Platt then telephoned Miss. Palmer [62]. Mrs. Platt confirmed with Miss. Palmer that "*we would deal with the situation back in the office on Monday.*" Following her conversation with Miss. Palmer Mrs. Platt then spoke to Mr. Donnan. Mr Donnan asked Mrs. Platt to speak to Miss. Palmer and Ms. Govan.
42. Mrs. Platt and Miss. Palmer had a meeting on 27 September 2021 [64]. The allegations Miss. Palmer made against the claimant during this meeting included, amongst others:
 - 42.1. The claimant had asked Miss. Palmer whether she had a boyfriend and Miss. Palmer had confirmed she did.
 - 42.2. The claimant had then later said to Miss. Palmer that she knew Miss. Palmer was fine as she wore skirts and dresses.
 - 42.3. That on 9 June 2021 the claimant had said to Miss. Palmer that she wouldn't speak to Sam (Mrs. Dawkins) when she first started as she was a "dirty dyke" and that the claimant had said she was never going to speak to lesbians as it is a deadly sin and further that the claimant said she finds it hard to look at Sam Dawkins and MS Buckland as they are repulsive and disgusting.

- 42.4. That leading up to Gay Pride weekend (beginning of August 2021) the claimant had stated to Miss. Palmer that she was going to ask "*all the lesbians in the office*" why they don't dress like women, why they don't wear dresses and skirts.
- 42.5. The day MS Buckland came to collect her belongings the claimant had told Miss. Palmer that MS Buckland was a dirty lesbian and had made vomiting noises/ actions at Miss. Palmer.
- 42.6. That on one occasion the claimant had been by the window in reception when a taxi was pulled over by the Police and the claimant had said, "*I hope the dirty immigrant gets kicked out of this country*".
- 42.7. That the claimant had told Miss. Palmer that Brian (Mr. Donnan) had told the claimant that she had to speak to Sam.
- 42.8. That the claimant told Miss. Palmer that the claimant had been pulled up before about Sam and had said she doesn't care.
- 42.9. That the claimant had made comments to Miss. Palmer that "*fat women deserve to be raped*" and that Miss. Palmer should be OK and if she was it would be sad.
43. Mrs. Platt had a meeting with Ms. Govan on 28 September 2021 [65]. Ms. Govan relayed the conversation she had had with Miss. Palmer on 24 September 2021. This included the following:
- 43.1. That the claimant had made comments to Miss. Palmer concerning her sexuality, such as was she a lesbian, or bisexual and the claimant hoped Miss. Palmer was not.
- 43.2. That on one occasion Miss. Palmer had hugged a female friend outside of work and the claimant on seeing this again questioned Miss. Palmer about whether she was gay.
- 43.3. That the claimant had called Mrs. Dawkins a "*dirty little dyke*" in front of Miss. Palmer and the claimant had called MS Buckland a "*dirty little fat dyke*".
- 43.4. That the claimant had referred to the taxi driver as a "*dirty little immigrant*".
- 43.5. That the claimant had made comments about Miss. Palmer's state of dress and that when walking home in gym gear if Miss. Palmer got raped it would be sad, but it was OK if a fat woman was raped.
44. During this meeting Ms. Govan said Miss. Palmer had told her other homophobic comments made by the claimant about Mrs. Dawkins but according to the meeting note [65] Ms. Govan couldn't remember all of what Phoebe (Miss. Palmer) had said because Ms. Govan had been a little shocked by the news.
45. Mrs. Platt had a further meeting with Miss. Palmer on 28 September 2021 [66-67]. The allegations stated in that meeting by Miss. Palmer mirror those stated in their meeting on 27 September 2021 [64]. In this meeting Mrs. Platt asked Miss. Palmer what had prompted her to speak about her concerns about the claimant's comments. Miss. Palmer replied that it had been on her mind a lot recently. That Miss. Palmer had got to the stage where she would get very anxious when she heard the claimant's footsteps on the stairs or

knew that the claimant was coming down as Miss. Palmer wouldn't know what the claimant was going to come out with next and it was making her feel really uncomfortable. That she was beginning to feel that if she did not say anything she would be condoning the behaviour.

46. Mrs. Platt did not speak with the claimant nor did Mr. Donnan ask Mrs. Platt to speak with the claimant. Mrs. Platt did not produce a report of her investigations. Mrs. Platt passed the notes of the meetings to Mr. Donnan.
47. The respondent wrote to the claimant on 29 September 2021 inviting her to a disciplinary hearing on 6 October 2021, suspending her on full pay and outlining the allegations [70 – 71]. The letter states:

“The allegations relate to:

- 1. Defamatory remarks relating to one of our partners, Samantha Dawkins which are homophobic.*
- 2. Defamatory remarks relating to one of our ex-employees, [...] Buckland, which are homophobic.*
- 3. Racist comments relating to passengers in a taxi that had been pulled over outside the office by the Police.*
- 4. Questioning a member of staff regarding the way she dressed expressly inferring from her dress sense that she was either gay or bisexual.*
- 5. On seeing a member of staff hugging a female friend outside the office questioning her as to whether she was gay.*
- 6. Sharing homophobic, racist and other highly inappropriate views of staff members (and others) with a member of staff.*
- 7. Making derogatory remarks about another member of staff including describing her as a “retard”.*
- 8. Making derogatory remarks about overweight women, stating that it was OK if they were raped.*
- 9. Inciting a member of staff not to speak to one of the Partners and to leave her employ as we (presumably the Partners) were horrible to work for.”*

48. The letter also stated, *“You are also entitled to a witness who should be a work colleague. Please let us know who you want as a witness...”* and *“You should be aware that these allegations, if found against you, may amount to gross misconduct for which one of the possible sanctions is summary dismissal with or without notice.”*

49. The letter enclosed the following:

- 49.1. The note of the meeting on 10 June 2021 between the claimant and Mr. Donnan [60-61].
- 49.2. The attendance note of the discussion between Mrs. Platt and Miss. Palmer on 28 September 2021 [66-67].
- 49.3. The attendance note of the discussion between Mrs. Platt and Ms. Govan on 28 September 2021 [65].
- 49.4. The respondent's Disciplinary Procedure [213-214].
- 49.5. The respondent's Equality and Diversity policy [215-218].

50. The claimant requested a delay and the disciplinary hearing commenced on 11 October 2021. Mr. Donnan chaired the meeting and Mrs. Platt was the note-taker. Tom Callaghan accompanied the claimant. There are handwritten notes [226-227] and typed notes of this meeting [89-91]. At the start of the meeting the claimant handed to everyone present her statement [95-96] and character references from Jonathan (Jonny Warren) and Audrey Smith [87-88]. Jonny Warren is the claimant's neighbour and is in a same-sex relationship. The claimant's statement denied all the allegations. In her statement [95-96] the claimant also highlighted the investigation appears unbalanced, with no attempt to interview other members of staff to gain other's opinions regarding how the claimant conducts herself. This statement [95-96] also referred to the claimant's long service with the respondent, but it does not state at any point that she had a clean disciplinary record.
51. During this meeting the claimant denied all the allegations. She particularly stated that she would not use such language. The claimant said Miss. Palmer had fabricated the whole thing, but she did not put forward any motive as to why Miss. Palmer would have fabricated the whole thing.
52. The claimant also referred to finding it difficult to speak to Mrs. Dawkins when Mrs. Dawkins first started, and that Elizabeth Taylor had spoken to her.
53. During this disciplinary meeting Mr. Donnan also asked the claimant about when Mr. Donnan had spoken to the claimant in 2015 about Mrs. Dawkins. The claimant stated Elizabeth Taylor had spoken to her, not Mr. Donnan.
54. Mr. Donnan adjourned the disciplinary hearing. The notes state this was for Mr. Donnan *"to consider both the answers given in writing by Sheena and those given orally... Secondly BD confirming he would carry out any other prudent investigations."*
55. Following this meeting Mr. Donnan asked Mrs. Platt to speak to her niece.
56. Mr Donnan also spoke to Miss. Palmer [99] and his daughter [112] on 11 October 2021. At some point an attendance note was made of a conversation with Mrs. Platt [111].
57. On 11 October 2021 Mr. Donnan asked Miss. Palmer if she was certain and in no doubt about the allegations and that Miss. Palmer confirmed she was certain. Mr. Donnan asked her how she could be so certain, especially when mentioning the precise date of 9 June 2021. Miss. Palmer told Mr. Donnan about the text message to her friends on that date [59] and at the end of the meeting she confirmed she would send it to Mr. Donnan.
58. Mr Donnan's evidence is that during this meeting on 11 October 2021 Miss. Palmer had said the reason she had come forward was because the claimant had spoken of approaching Mrs. Dawkins to ask her why she did not wear women's clothes and also approaching Denise as to why she was such a retard. This is not in the typed note of the meeting [99] nor in the handwritten

notes of the meeting [228-229]. Neither the typed note of the meeting [99] nor the handwritten note of the meeting [228-229] mention any motivation for Miss. Palmer coming forward with the allegations in September 2021. If Miss. Palmer provided this motivation to Mr. Donnan in their meeting on 11 October 2021 it was different to what she has said to Mrs. Platt on 28 September 2021 [66-67].

59. Mr. Donnan's daughter was employed by the respondent between June 2014 and September 2016 as a receptionist. Mr Donnan's daughter stated in the meeting on 11 October 2021 [112] that when she was employed the claimant on seeing students of Asian appearance outside the office would sing a "chinky chink" song. Further that when Mrs. Dawkins visited the office during her maternity leave the claimant would come down to reception and say awful things about Mrs. Dawkins and the baby. In particular saying the baby did not look normal and referring to him as "it". Also, that once when Mr. Donnan's daughter challenged the claimant stating, amongst other things, that times had changed and many people in same-sex relationships have children the claimant had replied that it was not right.
60. Mrs. Platt spoke to her niece on 12 October 2021 [100]. Mrs. Platt's niece confirmed in this meeting that she and Miss. Palmer had spoken about the claimant a number of times regarding the comments that the claimant had been making to Miss. Palmer. Also, that Mrs. Platt's niece had encouraged Miss. Palmer to speak up about the issues. That Miss. Palmer was the type of person who only wanted to see the good in people and would generally try to ignore things "like that", but it was clearly bothering Miss. Palmer.
61. Mr. Donnan also checked the claimant's disciplinary record. In cross-examination he stated this was because the claimant had maintained she had a clean record and that this should be checked. Neither the claimant's statement for the disciplinary [95-96], nor the notes of the disciplinary meeting [89-91] and [226-227] indicate the claimant said this at any point. Rather in these documents the claimant refers to her long service with the respondent and requests that Mr. Donnan speak to other employees at the respondent.
62. On looking at the claimant's personnel record Mr. Donnan found three disciplinaries. Two related to poor conduct by the claimant, but not of a discriminatory nature and I find that these two disciplinaries were not taken into account during the disciplinary process in October 2021. Mr. Donnan also found the previous disciplinary action taken against the claimant relating to her comments about Manjinder in 2013.
63. On 11 October 2021 Mr. Donnan wrote to the claimant [94] enclosing the notes of the disciplinary hearing. In respect of the claimant's request to widen the investigation to include speaking with other employees the letter states: "*I may extend the investigation a little but I remain of the view that it is right to contain the investigation to those people who were affected first hand*".
64. On 12 October 2021 Mr. Donnan wrote to the claimant [106-107] informing her that he had carried out further investigations and inviting the claimant to a

disciplinary hearing on 18 October 2021. He enclosed the following in his letter:

- 64.1. The note of Mr. Donnan's meeting with Miss. Palmer [99];
 - 64.2. The note of Mrs. Platt's meeting with her niece [100];
 - 64.3. The screenshot of the text message dated 9 June 2021 [59];
 - 64.4. A statement from Sarah Platt, date unknown [111];
 - 64.5. The notes of Mr. Donnan's meeting with Mr. Donnan's daughter [112]; and
 - 64.6. Copies of the records relating to the disciplinary against the claimant in 2013 relating to her comments about Manjinder [113-116].
65. The letter [106-107] stated that Mr. Donnan was not going to take character references from members of staff generally relating to the claimant.
66. The claimant prepared a statement (dated 15 October 2021) for the reconvened disciplinary hearing [126-127] and this was emailed to Mr. Donnan before the reconvened disciplinary hearing. This pointed out it was a still a case of Miss. Palmer's word against the claimant's word, that the other statements were making allegations that were groundless or unfounded and from many years ago, and that in respect of the disciplinary action that was conducted in 2013 that this had been dealt with many years ago and the claimant has "*since acted accordingly*". The claimant also raised concerns about the credibility of the statement of Mr. Donnan's daughter given she is the daughter of the disciplining officer and in 2021 was no longer an employee of the respondent. The claimant also raised concerns about Mr. Donnan's decision to not take character references from other members of staff.
67. The reconvened disciplinary hearing took place on 18 October 2021 [117-121]. It was chaired by Mr. Donnan, the claimant was accompanied, and Mrs. Platt was the note-taker for the respondent.
68. At the start of this meeting [117-121] Mr. Donnan did ask for the claimant's comments on Miss. Palmer's statement to him [99], the screenshot of the text message [59] and the statement provided by Mrs. Platt's niece [100]. The claimant denied the allegations and said she would not use such language. In respect of her relationship with Mrs. Dawkins the claimant said the following, "*I have female lesbian friends who I go for drinks with, Sam and I hug each other, I work well with Sam.*"
69. The majority of the reconvened disciplinary hearing focused on the new information (concerning allegations about the claimant's behaviour from 2007 – 2015) that Mr. Donnan had provided to the claimant in his letter dated 12 October 2021 [106-107]. In respect of her relationship with Mrs. Dawkins in 2007 the claimant said (in the meeting) it felt difficult to be friendly with Sam (Mrs. Dawkins), but she had spoken to Sam "*and said to put it behind us and we get on well.*" The claimant attributed the difficulties to Mrs. Dawkins not being chatty and friendly. Mr. Donnan asked if it was because of Mrs.

Dawkins' sexuality and the claimant replied, "*Not really I just felt different towards her.*"

70. Mr. Donnan also asked the claimant about the previous disciplinary from 2013 concerning her comments about Manjinder. During the reconvened disciplinary hearing on 18 October 2021 the claimant said she didn't recall calling Manjinder a half caste in 2013.
71. The meeting closed on 18 October 2021 just after 11.00am. The notes [117-121] state "*Meeting closed just after 11.00 to reconvene at 12 No one wanted to say anything further*". The claimant says Mr. Donnan sent her a dismissal letter dated 18 October 2021 [137-140] upholding allegations 1 - 7 of the suspension letter [70-71] and dismissing her. The respondent says Mr. Donnan found against the claimant in the disciplinary meeting on 18 October 2021 and a confirmatory dismissal letter dated 18 October 2021 was sent to the claimant [122-125]. The letters at [122-125] and [137-140] are identical. The dismissal letter dated 18 October 2021 [137-140] states the disciplinary meeting reconvened shortly before 12.30pm to provide a decision. I find that Mr. Donnan did provide the decision initially on 18 October 2021 in person and the dismissal letter dated 18 October 2021 is confirmation of that decision. The notes of the disciplinary hearing on 18 October 2021 [117-121] do not include the content of what was said shortly before 12.30pm and I find that the letter dated 18 October 2021 repeats what was said in the meeting on 18 October 2021 about the decision.
72. It is clear from Mr. Donnan's evidence and the dismissal letter [137-140] that Mr. Donnan did prefer Miss. Palmer's word over the claimant's word for a number of reasons. Mr. Donnan stated that there were certain markers that had confirmed Miss. Palmer had struggled with this for some time before coming forward. On cross-examination he confirmed he had found Miss. Palmer genuine and overwhelmed when he had spoken with her [99]. The dismissal letter [137-140] also states it struck Mr. Donnan that Phoebe (Miss. Palmer) was clearly someone that was torn between reporting these allegations or keeping quiet, but she was feeling increasingly uncomfortable with the situation and this was revealed by the text message [59]. Mr. Donnan also relied on the statement by Mrs. Platt's niece [100] that Miss. Palmer had confided in Mrs. Platt's niece and that Mrs. Platt's niece had stated that reporting a colleague was not something Miss. Palmer would have entered into lightly and rather it would have taken a great deal of courage to do.
73. Mr. Donnan did not compare the content of the text message [59] with the various statements provided by Miss. Palmer in September 2021 [64, 66-67]. Mr. Donnan also admitted in cross-examination that he gave no real weight to the character references from Jonathan (Jonny Warren) and Audrey Smith [87-88].
74. The dismissal letter [137-140] also indicates that Mr. Donnan took account of the claimant's acceptance that she did have some difficulties with Mrs. Dawkins in 2007. The dismissal letter states:

“It appears to be an admission of sorts that you were having difficulties with Sam, although today you appeared to backtrack somewhat in stating that they did not relate to her sexuality.”

75. It is clear from Mr. Donnan’s evidence and the dismissal letter [137-140] that Mr. Donnan did consider whether the claimant was being honest in the disciplinary meetings by firstly referring to Miss. Palmer stating, *“Sheena also said Brian had told Sheena that she had to speak to Sam”* and, *“Sheena also told me that she had been pulled up before about Sam and she doesn’t care”* on 27 September 2021 [64] and 28 September 2021 [66-67].
76. The claimant’s recollection was that it was Elizabeth Taylor who had had a conversation with the claimant about Sam (Mrs. Dawkins) and that the claimant had not made these statements to Miss. Palmer. Mr. Donnan relied on his own memory that he had spoken to the claimant in 2015 about her behaviour towards Mrs. Dawkins and the statement of his daughter [112] provided in October 2021. There were no contemporaneous supporting documents for this conversation in 2015. Mr. Donnan’s conclusion was that the claimant was not being truthful about the fact of Mr. Donnan’s and the claimant’s conversation in 2015.
77. Secondly, in assessing the claimant’s honesty, Mr. Donnan also referred to the previous disciplinary action in 2013. The claimant in the disciplinary meeting on 18 October 2021 had stated that she did not recall calling Manjinder a half-caste. There were contemporaneous supporting documents for this incident and Mr. Donnan refers to those documents in the dismissal letter [137-140].
78. In the dismissal letter [137-140] it states, *“It follows from all of the above that I do not accept that you have responded frankly and honestly to the allegations raised”*.
79. Later towards the end of the dismissal letter [137-140] it states:
- “My findings therefore are that you have seriously breached your contract of employment. There is implied into every contract of employment the term of trust and confidence. That term has been irretrievably broken and it would appear from Phoebe’s evidence (which I find credible and honest) that you do not care what we have to say in the way in which we must conduct ourselves. You have also seriously breached the diversity policy (in particular but not limited to paragraph 2 and paragraph 7.*
- These are all, save for allegation 9, matters that I find against you and amount to gross misconduct (wilful disregard of your duties under the said policies and/or deliberate and serious breach of confidence relating to the firm and/or conduct violating common decency). I am therefore making a decision today that you should be dismissed summarily without notice which this letter confirms.”*

80. The dismissal letter [137-140] states that it was allegation 9 that was not found against the claimant. I find, therefore, that all the other allegations were found against the claimant. I find that the respondent summarily dismissed the claimant for seriously breaching its Equality and Diversity Policy [215-218] for the following reasons:

- 80.1. Defamatory remarks relating to one of the respondent's partners, Samantha Dawkins, which were homophobic.
- 80.2. Defamatory remarks relating to one of the respondent's ex-employees, MS Buckland, which were homophobic.
- 80.3. Racist comments relating to passengers in a taxi that had been pulled over outside the respondent's office by the Police.
- 80.4. Questioning a member of the respondent's staff regarding the way she dressed expressly inferring from her dress sense that she was either gay or bisexual.
- 80.5. On seeing a member of the respondent's staff hugging a female friend outside the office questioning her as to whether she was gay.
- 80.6. Sharing homophobic, racist and other highly inappropriate views of the respondent's staff members (and others) with a member of staff.
- 80.7. Making derogatory remarks about another member of the respondent's staff including describing her as a "retard".
- 80.8. Making derogatory remarks about overweight women, stating that it was OK if they were raped.

81. The dismissal letter [137-140] also confirmed the claimant's right to appeal within 7 days and that any appeal should be directed to Robert McDonald.

82. The claimant sent her appeal by email on 20 October 2021 [149] to Mr. Donnan. This appeal letter [145] firstly requested that the claimant's appeal be heard by someone outside of the firm such as an independent HR consultant. The grounds of appeal included, amongst others:

- 82.1. That the dismissal letter [137-140] had referred to both the recent complaints made by Miss. Palmer and historic allegations and that it was difficult to understand the precise basis of the decision to dismiss.
- 82.2. That if the dismissal was due to the recent complaints made by Miss. Palmer that it was not reasonable or fair to believe Miss. Palmer over the claimant in relation to the very serious allegations that Miss. Palmer had made.
- 82.3. That the investigation was not a fair, proper or thorough process, that the respondent wished to cover it up rather than scrutinise the allegations that had been made.
- 82.4. That the investigation had been motivated by a pre-existing wish to dismiss the claimant, possibly because she was an older worker.
- 82.5. That there had been a lack of training and support.

83. On 1 November 2021 Mr McDonald wrote to the claimant [161] confirming his decision to instruct HR Smart Limited to conduct the appeal. Mr McDonald then wrote to the claimant on 17 November 2021 inviting her to an appeal on 18 November 2021 [166]. There was email correspondence with the claimant

between 8 and 15 November 2021 organising the details of the appeal hearing, including its location, the date and representation. I do not have the benefit of those emails in the bundle, however, the claimant does not dispute this.

84. The appeal hearing took place on 18 November 2021. It was chaired by Mrs. Rush and the claimant was accompanied by one of her friends, Mr. Gray. There are no typed notes of this appeal hearing and no notes of the appeal hearing were sent to the claimant. The claimant's grounds of appeal [145] were discussed and then Mrs. Rush and the claimant talked further. Mrs. Rush considered the claimant's grounds of appeal to be:

- 84.1. Bias/ unbalanced investigation.
- 84.2. The respondent not following ACAS process.
- 84.3. An employee with less service being believed over the claimant.
- 84.4. That no training or support was given by the respondent leading to generational differences.

85. During the appeal hearing the claimant requested that character statements be taken from employees at the respondent. The claimant named 3 employees in the appeal hearing and named further employees in an email dated 22 November 2021.

86. On 25 November 2021 Mrs. Rush held an online meeting with Mr. Donnan and Mr. McDonald. There are no notes of this meeting. The purpose of the meeting was for Mrs. Rush to raise questions regarding the internal disciplinary investigation and to seek confirmation of the process and the decisions that had been made. By the appeal stage Mrs. Rush was under the impression that only allegations 1-7, as outlined in the suspension letter [70-71], had been upheld against the claimant. Mrs. Rush could not remember whether she was given this information by the respondent in the online meeting on 25 November 2021.

87. All the individuals the claimant had named were contacted on 2 December 2021. There were 13 named employees and they were asked if they wished to participate [172-185]. In cross-examination the claimant stated that three employees she had not named to Mrs. Rush had been contacted in addition to the named individuals. One of these additional employees was contacted by the respondent [184], but she did not comment [183]. I was not referred to any documents relating to the other two additional employees by the claimant or the respondent.

88. Out of the 13 named employees 7 declined to participate and 6 agreed to participate. Mrs. Rush sent questions in advance to the 6 who agreed to participate. These questions were:

- 88.1. In what capacity did you know the claimant?
- 88.2. To describe their working relationship with the claimant?
- 88.3. To describe the claimant in three words or phrases.

- 88.4. Were they aware of any discriminatory actions or behaviour carried out by the claimant? And if yes, to provide the details.
- 88.5. To put forward any further information they felt relevant.
89. On 8, 10 and 13 December 2021 Mrs. Rush undertook the interviews for the character statements either on the telephone or online. For most of the participants Mrs. Rush discussed the questions with the employees and typed up their statement for them to check and amend. Mrs. Dawkins had prepared her statement prior to the interview with Mrs. Rush and they discussed Mrs. Dawkins' statement during the interview.
90. The character statements are at pages [187-196 and 234] in the bundle. Mrs. Rush did not take the statement of the respondent's former temporary receptionist [219], nor did she refer to this statement when making her appeal decision.
91. One of the character statements [191] stated they were not aware of any discriminatory actions or behaviour by the claimant and another character statement [196] stated they were only aware of the allegations made by Miss. Palmer because that individual had accompanied the claimant to the disciplinary hearing. A third character statement [234] stated that she had "*heard office gossip*" but had not heard or seen anything directly.
92. A character statement by a conveyancing assistant at the respondent [187-188] alleged that the claimant had stated to her 2-3 years ago that a particular same-sex couple had young boys round to their home. The claimant had said that she had a friend that knew them.
93. Another character statement by a solicitor [189] stated "*Before lockdown... I was in the kitchen, SR made a race related comment, whilst I don't remember the exact comment I do recall being offended and corrected SR immediately at the time advising it was inappropriate.*"
94. Mrs. Dawkins' character statement [192-195] was very similar to the evidence she gave to the tribunal about the claimant's behaviour towards her since 2007. In addition, it contained a highly prejudicial assertion by another staff member and that staff member telling Mrs. Dawkins she should be careful of the claimant.
95. These character statements were not sent to the claimant before Mrs. Rush made her appeal decision.
96. On 15 December 2021 Mrs. Rush wrote to the claimant informing the claimant of the appeal outcome decision [197-202]. Six of the character statements [187-188, 189, 191, 192-195, 196 and 234] were attached to the appeal outcome decision letter.
97. The appeal outcome decision letter [197-202] informed the claimant that the investigation prior to the claimant being invited to a disciplinary hearing had been conducted by Mrs. Platt and that the claimant had been given

opportunity to state her case in the disciplinary hearing, that Mr. Donnan carried out further investigations before making his decision and that historical information had been taken into account. Mrs. Rush also stated that the previous disciplinarys on the claimant's file (including the one relating to Manjinder) should not have been taken into account. In respect of length of service Mrs. Rush explained that "*length of service is not felt to be a relevant in this matter*".

98. In respect of training and support Mrs. Rush explained she had found that the respondent undertook Equality Training in the last quarter of 2017 and the claimant had been recorded as attending the training. No certificate was issued because it was internal training not external accredited training. Mrs. Rush also noted that the respondent's Equality and Diversity Policy [215-218] was known to the claimant.
99. Mrs. Rush in the appeal outcome decision letter [197-202] explained she had found that the ACAS code of practice on disciplinary and grievance procedures had been followed. Also, that there was no evidence to support the claimant's assertion that the disciplinary process was motivated by the claimant's age or wanting to remove the claimant from the business and that the claimant had been advised on numerous occasions throughout the summer of 2021 that the claimant's role was safe, ongoing and not subject to redundancy.
100. Mrs. Rush then reviewed the allegations to state which ones had evidence of reasonable belief. Mrs. Rush only looked at allegations 1-7 outlined in the suspension letter [70-71]. Mrs. Rush confirmed in cross-examination that she had been informed by the respondent (but she could not remember when) that it had not found against the claimant in respect of allegations 8 and 9 as outlined in the suspension letter [70-71]. Mrs. Rush confirmed to me that she did swap over allegations 6 and 7 in her appeal outcome decision letter [197-202]. Therefore, her section on allegation 6 in the appeal outcome decision letter [197-202] actually relates to allegation 7 in the suspension letter [70-71] and her section on allegation 7 in the appeal outcome decision letter relates to allegation 6 in the suspension letter [70-71].
101. For each allegation Mrs. Rush identified from Miss. Palmer's statement dated 28 September 2021 [66-67] and Ms. Govan's statement dated 28 September 2021 [65] which paragraphs of those statements provided evidence to support the allegation. Mrs. Rush also referred to the text message [59], the statement from Mrs. Platt [111] and the character statement from Mrs. Dawkins [192-195] as all providing evidence to support allegation 1.
102. For allegation 6 – sharing homophobic, racist and other highly inappropriate views of staff members (and others) with a member of staff (as per the suspension letter [70-71]) Mrs. Rush also referred to Mr. Donnan's daughter's statement [112], the statement from Mrs. Platt [111], Mrs. Dawkins' character statement [192-195], the character statement by a solicitor at the respondent [189] and the character statement by a conveyancing assistant at

the respondent [187-188] as all providing evidence to support allegation 6. Mrs. Rush struck out the disciplinary record from 2013 (relating to comments about Manjinder) due to the time since this had occurred.

103. Mrs. Rush decided that allegations 5 (on seeing a member of staff hugging a female friend outside of the office questioning her as to whether she was gay) and allegation 7 (making derogatory remarks about another member of staff's mental capacity and calling her a retard – as per the allegations in the suspension letter [70-71]) should be struck out due to insufficient evidence and the evidence being noted as one individual's word against the claimant's.

104. The following allegations were upheld by Mrs. Rush:

- 104.1. Defamatory remarks relating to one of the respondent's partners, Mrs. Dawkins, which are homophobic;
- 104.2. Defamatory remarks relating to one of the respondent's ex-employees, MS Buckland, which are homophobic;
- 104.3. Racist comments relating to passengers in a taxi that had been pulled over outside the office by the Police;
- 104.4. Questioning a member of staff regarding the way she dresses expressly inferring from her dress sense that she was either gay or bisexual; and
- 104.5. Sharing homophobic, racist and other highly inappropriate views of members of staff members (and others) with a member of staff.

105. The last paragraph of the appeal outcome decision letter states [197-202]:
"In conclusion I do feel there is satisfactory evidence to support that a fair process has been undertaken and that five of the seven allegations should be upheld. Therefore, I am upholding the decision to summarily dismiss you from the Firm. This concludes the appeal process and there is no further right of appeal."

106. The claimant's dismissal therefore stood and she presented her complaint of unfair dismissal and wrongful dismissal to the tribunal on 10 January 2022.

107. In respect of the allegations that still stood by the end of the appeal process my findings are set out below.

Defamatory remarks relating to one of the respondent's partners, Samantha Dawkins, which were homophobic.

108. I find that the claimant did not call Mrs. Dawkins a "dirty dyke" or a "dirty little dyke". This is a matter of Miss. Palmer's word against the claimant. The claimant has maintained throughout the disciplinary hearings, the appeal hearing and the tribunal hearing that she would not use such language. I accept her evidence on this particular point. I also did not find Miss. Palmer's explanation for not including this particular incident in her text message [59] convincing (see above.)

Defamatory remarks relating to one of the respondent's ex-employees, [...] Buckland, which were homophobic.

109. I find that the claimant did not call MS. Buckland a “*dirty little fat dyke*” or a “*dirty lesbian*” for the same reasons as in paragraph 108 above.

Racist comments relating to passengers in a taxi that had been pulled over outside the respondent’s office by the Police.

110. I find that the claimant did not say “*I hope the dirty immigrant gets kicked out of this country*” when the Police pulled over a taxi outside of the office. This is a matter of Miss. Palmer’s word against the claimant’s word. There is no supporting evidence for this apart from a historic disciplinary of a discriminatory comment related to race some 8 years prior to 2021 and hearsay evidence from a staff member at the respondent of an alleged discriminatory comment related to race made to her at another time (2-3 years prior to 2021) and the staff member cannot remember the exact comment. On this particular point I accept the claimant’s evidence that she did not make this particular comment.

Questioning a member of the respondent’s staff regarding the way she dressed expressly inferring from her dress sense that she was either gay or bisexual.

111. I find it more likely than not that the claimant did say to Miss. Palmer that the claimant knew she (Miss. Palmer) was fine because she wore skirts and dresses. This is slightly different to the allegation made by the respondent in the disciplinary process, but the inference is that gay women do not wear skirts and dresses. Although again this is Miss. Palmer’s word against the claimant’s there is evidence that the claimant does have a bias against gay women. I have found that the claimant made the comments to Miss. Palmer that are outlined in the text message [59]. One of those comments is that the claimant is okay with gay men, but not gay women. I also note that out of the specific examples of gay friends that the claimant and Ms. Baker have provided all but one are gay men, and that the character reference she provided to the disciplinary was from a gay man not a gay woman.

Sharing homophobic, racist and other highly inappropriate views of the respondent’s staff members (and others) with a member of staff.

112. I do find that the claimant made the following comments to Miss. Palmer on 9 June 2021:

- 112.1. That she will never speak to a lesbian because it’s a deadly sin.
- 112.2. That she is okay with gay men, but not gay women.
- 112.3. That she won’t speak to Sam (Mrs. Dawkins) because she’s a lesbian.
- 112.4. That she won’t even look at her because “*she’s repulsive*”.

113. My reasons for accepting Miss. Palmer’s evidence on this point is that she has consistently referred to these statements being said to her on 9 June 2021 when she was questioned by Mrs. Platt [64] and [66-67] and there is

also a contemporaneous text message [59] to her two best friends on 9 June 2021 explaining the claimant had said these statements to her and that Miss. Palmer did not know how to act. No evidence has been presented to the tribunal that this text message [59] has been faked.

114. These are homophobic (but not racist) and inappropriate views that the claimant is sharing with Miss. Palmer about gay women in general and Mrs. Dawkins in particular.

LAW

115. Section 94 of the ERA confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the tribunal under section 111. The employee must show that she was dismissed by the respondent under section 95, but in this case the respondent admits that it dismissed the claimant (within section 95(1)(a) of the ERA).
116. Section 98 of the ERA deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.
117. Section 98(4) of the ERA then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.
118. In misconduct dismissals, there is well-established guidance for tribunals on fairness within section 98(4) in the decisions in **Burchell [1978] IRLR 379, Post Office v Foley [2000] IRLR 827 and Hope -v- British Medical Association [2022] IRLR 206**. The tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the tribunal would have handled the events or what decision it would have made, and the tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones [1982] IRLR 439, Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, and London Ambulance Service NHS Trust v Small [2009] IRLR 563**).

119. There must also be a reasonably fair procedure. The Employment Appeal Tribunal in **Bentley -v- Engineering Co Ltd -v- Mistry [1979] ICR 47** held that natural justice required not merely that an employee should have a chance to state their own case but that he must know sufficiently what was being said against him so that he could put forward his own case properly. The Court of Appeal re-affirmed this in **Louies -v- Coventry Hood and Seating Co Ltd [1990] ICR 15** and held that if heavy reliance is placed upon the statements of witnesses, the dismissal is likely to be unfair unless the employee has sight of the statements or is told what is in them.
120. The Court of Appeal in **Hussain -v- Elonex plc [1999] IRLR 420** stressed that there is no hard and fast rule that in all cases an employee must be shown copies of witness statements obtained by an employer about the employee's conduct. Mummery LJ stated "*What emerges... is not that there is a failure of natural justice where witness statements are obtained but not disclosed, but there is a failure of natural justice if the essence of the case on the employee's conduct is contained in statements which have not been disclosed to him, and where he has not otherwise been informed at the hearing, or orally or in other manner, of the nature of the case against him.*" This case was applied by the Scottish EAT in **RBS -v- Donaghay [2011] UKEATS/0049/10/BI**. Whether a failure to disclose information renders a dismissal unfair is a fact-sensitive question (**Old -v- Palace Fields Primary Academy UKEAT/0085/14/BA**).
121. In **John-Charles -v- NHS Business Services Authority UK EAT/0105/15/BA** the Employment Appeal Tribunal held it is not necessarily unfair to take into account a warning which was not extant at the time of the misconduct in question; the question remains what it reasonable in all of the circumstances.
122. An employee should have the opportunity to make representations on the relevance of the warning.
123. In **Diosynth Ltd -v- Thomson [2006] IRLR 284** the dismissal was unfair because the expired warning tipped the balance towards the decision to dismiss.
124. **Diosynth** was distinguished in **Webb -v- Airbus UK Ltd [2008] ICR 561**. The Court of Appeal held that it was open to a tribunal to find a dismissal fair even where an employer has taken into account a spent warning. In **Webb** the employer had shown that the reason for the dismissal was the later misconduct and the previous misconduct affected the decision as to what sanction to impose.
125. Defects in the disciplinary process may be capable of being cured by a fair appeal, depending upon the seriousness of the allegations made against the employee, how serious the unfairness was and the substance of the appeal process. The Court of Appeal emphasised that there is no rule of law that earlier unfairness can be cured by an appeal by way of rehearing and not by way of a review, because the examination should be

of the fairness of the disciplinary process as a whole. Each case will turn on its own facts (**Taylor -v- OCS Group Ltd [2006] ICR 1602**).

Polkey

126. As recorded at paragraph 2 I agreed with the parties at the start of the hearing that if I concluded that the claimant had been unfairly dismissed I should consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed, in accordance with the principles in **Polkey v AE Dayton Services Ltd [1988] AC 344**. The burden of proof is on the respondent.
127. There are three possible outcomes: first, I may find that the claimant would clearly have been retained if proper procedures had been adopted, in which case no reduction ought to be made. Second, I may conclude that the dismissal would have occurred in any event, with a possible delay to allow for a fair procedure. This may result in a limited compensatory award only to take account of any additional period for which the employee would have been employed had the proper procedure been adopted. Third, it may be impossible to say what would have happened, and I should make a percentage assessment of the likelihood that the employee would have been retained.
128. In undertaking this exercise, I am not assessing what I would have done; I am assessing what this employer would or might have done. I must assess the actions of the employer before me, on the assumption that the employer would this time have acted fairly though it did not do so beforehand: **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274 at para 24**.

Contributory fault

129. I also agreed with the parties that if the claimant had been unfairly dismissed, I would address the issue of contributory fault.
130. The tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the ERA.
131. Section 122(2) provides as follows:
- “Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.”*
132. Section 123(6) then provides that:
- “Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of*

the compensatory award by such proportion as it considers just and equitable having regard to that finding.”

Breach of contract

133. An employer will be in breach of contract if they terminate an employee’s contract without the notice to which the employee is entitled, unless the employee has committed a fundamental breach of contract which would entitle the employer to dismiss without notice. If there is no expressly agreed period of contractual notice, there is an implied contractual right to reasonable notice of termination. This must not be less than the statutory minimum period of notice set out in section 86 of the ERA. For someone who has been employed 18 years, this is 12 weeks’ notice.

134. I must decide whether the claimant committed an act of gross misconduct entitling the respondent to dismiss without notice. In distinction to the claimant’s claim of unfair dismissal, where the focus was on the reasonableness of management’s decisions, and it is immaterial what decision I would myself have made about the claimant’s conduct, I must decide for myself whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.

CONCLUSIONS

Unfair dismissal

135. Mr. Matovu and Mr. Brown provided me with both written and oral submissions which I have considered and will refer to where necessary in reaching my conclusions.

136. The respondent’s case is that it dismissed the claimant by reason of her conduct because it believed the claimant had made numerous offensive and/or discriminatory comments as reported by one of its employees, Miss. Palmer. The claimant does not dispute the label the respondent has attached to the reason for the dismissal. It was not put to Mr. Donnan that he had any ulterior motive for dismissing the claimant. Mrs. Rush (who heard the appeal) was an external HR Consultant and it was not suggested that she dismissed the appeal due to anything other than a genuine belief in the claimant’s guilt.

137. Conduct is a potentially fair reason for dismissal under section 98(2) ERA. The respondent has satisfied the requirements of section 98(2).

138. Mr. Matovu submits that the dismissal was substantively and procedurally unfair. Mr. Brown submits that taking the disciplinary process and the appeal process together the dismissal was substantively and procedurally fair.

139. In respect of the substantive fairness of the dismissal I turn to section 98(4) and the test in **Burchell**.

140. I conclude that both Mr. Donnan and Mrs. Rush held a genuine belief that the claimant was guilty of the misconduct of which she was accused. Their evidence was clear about why they dismissed, the dismissal letter [137-140] and the appeal outcome letter [197-202] were also clear about why they dismissed the claimant. Mr. Donnan's evidence was that when he spoke to Miss. Palmer on 11 October 2021 he found her genuine and overwhelmed. The dismissal letter [137-140] confirms this and that he was struck by how she was torn between reporting the allegations or keeping quiet, but she was feeling increasingly uncomfortable with the situation, and this was revealed by the text message [59].
141. For the appeal Mrs. Rush carried out a review of the dismissal and not a rehearing, she, therefore, did not reinterview Miss. Palmer as part of the appeal. Also, it was not put to her that she did not have a genuine belief in the guilt of the claimant. I conclude that she relied on Mr. Donnan's genuine belief and she took Miss. Palmer's statement on 28 September 2021 [66-67] at face value.
142. In respect of whether Mr. Donnan and Mrs. Rush had reasonable grounds on which to base their genuine belief in the guilt of the claimant Mr. Brown submits Mr. Donnan is entitled to rely on his own opinion of whether Miss. Palmer was believable. Mr. Brown also submits that the text message broadly corroborates Miss. Palmer's evidence [59] as does Mrs. Platt's niece's statement of 12 October 2021 [100].
143. I conclude that the text message [59] only supports one particular aspect of the allegations that Miss. Palmer made in September 2021. That being that the claimant did make the comments I have outlined in paragraph 112 above. I also conclude that Mrs. Platt's niece's statement [100] only confirms that Miss. Palmer spoke to Mrs. Platt's niece about the comments the claimant was alleged to have made to Miss. Palmer and that she was struggling with the decision about whether to report them. There is no detail in Mrs. Platt's niece's statement [100] about what the alleged comments were.
144. Mr. Donnan also relied on the claimant's failure to recollect their (Mr. Donnan's and the claimant's) informal discussion in 2015 about alleged discriminatory remarks made by the claimant concerning Mrs. Dawkins and her baby to conclude that the claimant was not being honest during the disciplinary hearings in October 2021. Given that this occurred 6 years previous to the disciplinary hearings, there were no contemporaneous supporting documents for the informal discussion, this informal discussion was not mentioned in the Appraisal Documents dated 22 April 2015 and 5 May 2016 and the claimant had said in the disciplinary hearings she did not recollect this informal discussion in 2015, as opposed to saying it definitely did not happen, it was not reasonable to rely on this as a reason to doubt the claimant's honesty in the disciplinary proceedings.
145. Mr. Donnan also relied on the claimant's failure to recollect that she had called Manjinder a "half-caste" in 2013 as a reason to doubt the

claimant's honesty in the disciplinary hearings in October 2021. Again, I conclude that as this incident happened 8 years prior to the disciplinary hearings in 2021 and as the claimant had said in the disciplinary hearing on 18 October 2021 that she did not recollect calling Manjinder a "half-caste", as opposed to saying she definitely did not say it, it was not reasonable to rely on this as a reason to doubt the claimant's honesty in the disciplinary proceedings in October 2021.

146. Mrs. Rush did not rely on these historic matters in her review of what evidence supported the allegations and rather relied on the content of Miss. Palmer's statement [66-67], Ms. Govan's statement [65], three of the character statements [187-188, 189 and 192-195] and the text message [59]. I conclude she did have reasonable grounds for her genuine belief in the guilt of the claimant.

147. I conclude that although Mr. Donnan did not have reasonable grounds to find that the claimant was being dishonest in the disciplinary proceedings he did have reasonable grounds to find that Miss. Palmer was being honest about the allegations due to his own assessment of her genuineness and that he found her to be overwhelmed and torn between reporting the allegations or keeping quiet when he spoke to her on 12 October 2021. Mr Donnan, therefore, had reasonable grounds for his genuine belief in the claimant's guilt.

148. Mr. Matovu submits that the respondent did not carry out a reasonable investigation because it was unbalanced against the claimant and the respondent did not scrutinise the allegations made by Miss. Palmer. Mr. Brown submits that taking the disciplinary and appeal process together a significant number of individuals were spoken to. Mr. Brown also submits that this is not a case in which the claimant is able to point to one or more individuals who were not contacted but would likely have given evidence in her favour.

149. Firstly, at the investigation stage the respondent did not interview the claimant, only Miss. Palmer and Ms. Govan were interviewed by Mrs. Platt. It is troubling that Mrs. Platt did not interview the claimant during her investigation, while the allegations were so serious a disciplinary hearing was inevitable, a reasonable investigation would have sought the claimant's response to the allegations and further investigations could have been carried out prior to moving to the disciplinary process.

150. However, the claimant did respond to the allegations in the disciplinary hearing on 11 October 2021, that hearing was then adjourned, and further investigations were carried out by Mr. Donnan before the reconvened disciplinary hearing on 18 October 2021. I conclude that the opportunity to respond to the allegations on 11 October 2021 cured any unfairness in failing to interview the claimant during the investigation.

151. In respect of the process being unbalanced because Mr. Donnan did not take into account the character references provided by the claimant to the disciplinary hearing and that he instead favoured the evidence of Miss. Palmer and Mrs. Platt's niece I conclude that a reasonable employer would be entitled to do so, but a reasonable

employer would have provided an explanation in the decision provided face-to-face on 18 October 2021 and in the dismissal letter [137-140] as to why it was not attaching any weight to those character references.

152. In addition, the reliance on historical matters including the claimant admitting to having difficulties with Mrs. Dawkins in 2007, the claimant's failure to recollect calling Manjinder a half-caste in 2013, the claimant's failure to recollect Mr. Donnan's and the claimant's informal discussion about alleged discriminatory remarks concerning Mrs. Dawkins and her baby in 2015 and Mrs. Platt's allegations of discriminatory remarks made by the claimant about Mrs. Dawkins and her baby prior to Mrs. Dawkins' baby shower [111] instead of focusing on the specific allegations that had been made in 2021 did render the investigation unbalanced and unfair.
153. It was not fair and reasonable to use these historical matters to determine whether the claimant was being honest or dishonest in the disciplinary hearings in October 2021.
154. Mrs. Rush's review at the appeal stage did not answer the claimant's grounds of appeal about the process being biased and/or balanced. The appeal outcome letter [197-202] does not cover this apart from mentioning that historical information was taken into account. Mrs. Rush did, however, strike out relying on the disciplinary action against the claimant in 2013 when she reviewed what evidence supported which allegation. Mrs. Rush did not consider the impact of the use of the other historical matters outlined above on the fairness of the investigation.
155. In respect of scrutinising the allegations a reasonable investigation does not require extensive, no stone unturned investigations. I do, however, conclude that a reasonable employer, given the serious nature of the allegations, would have compared Miss. Palmer's text message [59] to the allegations she made to Mrs. Platt on 28 September 2021 [66-67], and would have compared the allegations she made to Ms. Govan [63] with the allegations she made to Mrs. Platt [64 and 66-67], to check for differences and inconsistencies.
156. There was the omission of the very offensive term from the text message [59], with not even the incident of Mrs. Dawkins being called a very offensive term being mentioned. There were other inconsistencies between Miss. Palmer's statements to Ms. Govan and Mrs. Platt. For example, in her statement to Ms. Govan [63] Miss. Palmer said that the claimant had called Mrs. Dawkins a "dirty little dyke" whereas to Mrs. Platt she had said the claimant had called Mrs. Dawkins a "dirty dyke". This comparison was not done by Mr. Donnan or Mrs. Rush. Mrs. Rush simply identified which parts of Miss. Palmer's statement [66-67] and Ms. Govan's statement [65] supported the allegations
157. Overall, I conclude that the respondent did not carry out a reasonable investigation within the band of reasonable responses and the dismissal, therefore, was substantively unfair.
158. In respect of whether the respondent followed a reasonably fair procedure I conclude that Mrs. Platt was not a truly independent

investigator. She was directed by Mr. Donnan as to who to interview and Mrs. Platt did not have a free hand to conduct the investigation as she saw fit. This makes the dismissal procedurally unfair.

159. I also conclude that the failure by Mrs. Rush to send the character statements [187-196 and 234] to the claimant for her response to their contents prior to Mrs. Rush deciding the outcome of the appeal was also procedurally unfair. Three of these character statements contained new material that was prejudicial to the claimant. The character statement of Mrs. Dawkins [192-195] contained new information that was highly prejudicial to the claimant. Mrs. Rush also relied on the content of these three prejudicial character statements [187-188, 189 and 192-195] in her appeal outcome letter when assessing what evidence there was to support the allegations. The fact that it was the claimant who requested that these characters statements be sought does not remove the requirement of natural justice that the claimant should be able to respond to further prejudicial allegations in those character statements.

160. I have considered the size of the respondent's undertaking. This is a small employer, but it is a law firm, it has well-drafted written policies, and an external HR consultant was used for the appeal. A formal disciplinary process was followed, although it was flawed. Within the range of reasonable responses, the respondent's size and resources does not excuse the substantive and procedural unfairness in this case.

161. I conclude, therefore, that the claimant was unfairly dismissed by the respondent within section 98 of the ERA.

Polkey

162. As recorded at paragraph 2 above, I agreed with the parties at the start of the hearing that if I concluded that the claimant had been unfairly dismissed, I should consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed according to the principles in **Polkey**.

163. Mr. Brown submits that a 100% reduction should be made to the compensatory award on the ground that the claimant would inevitably have been dismissed absent any identified procedural flaw. Mr. Matovu submits that **Polkey** is only relevant to procedural shortcomings, not substantive shortcomings and unfairness. In the alternative Mr. Matovu submits that if all irrelevant and prejudicial material is properly left out then we are left with one person's word against the claimant's with no dates being specified in the allegations and in these circumstances there is a good chance a reasonable employer would not have dismissed the claimant.

164. **Polkey** reductions do tend to arise in cases where there has been procedural unfairness, but necessarily so. I have concluded that one element of the **Burchell** test had not been met by the respondent and there are a few elements which make the dismissal substantively unfair and a couple of elements that make the dismissal procedurally unfair. I,

therefore, conclude that it is not a case where a **Polkey** reduction should be made.

Contributory fault

165. I also agreed with the parties that if the claimant had been unfairly dismissed, I would address the issue of contributory fault. Mr. Matovu submits that I should not rely on Miss. Palmer's evidence due to the inconsistency between her explanation for her reasons for coming forward with the allegations stated in her evidence compared to the reasons stated to Mrs. Platt in 28 September 2021 [66-67]. Mr. Matovu also submits that the claimant denies the allegations and that no contributory fault should be found against her.

166. Mr. Brown submits that a 100% reduction should be made to both the basic and the compensatory award because the claimant did in fact make offensive/ discriminatory comments and that she is guilty of the conduct alleged against her.

167. I did find that the claimant did make the following comments to Miss. Palmer on 9 June 2021:

167.1 That she will never speak to a lesbian because it's a deadly sin.

167.2 That she is okay with gay men, but not gay women.

167.3 That she won't speak to Sam (Mrs. Dawkins) because she's a lesbian.

167.4 That she won't even look at her because "*she's repulsive*".

168. These are homophobic views about gay women that the claimant is sharing with a less experienced, relatively new member of staff, at the respondent. They are unpleasant and personal about Mrs. Dawkins. They are clearly blameworthy. I have taken into account that they are not quite as offensive as the allegations brought against the claimant by the respondent in the disciplinary process. I have concluded that the basic award and compensatory award should be reduced by 75% to reflect the claimant's culpability.

Breach of contract

169. The claimant was dismissed without notice. She brings a claim in respect of her entitlement to 12 weeks' notice.

170. The respondent says that it was entitled to dismiss her without notice due to the numerous offensive and discriminatory comments that the claimant has made during her employment. The claimant says that she did not commit an act of gross misconduct.

171. I set out my conclusions about the claimant's actions at paragraphs 167 and 168 above. They are equally applicable to the question whether the claimant was guilty of misconduct entitling the respondent to dismiss without notice. I find that the claimant was, and the claimant was not entitled to notice pay. Her complaint of breach of contract fails and is dismissed.

Employment Judge Macey
Date: 22 May 2024

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