



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C Sieberer

**Respondent:** Apple Retail UK Limited

**Heard at:** London Central Tribunal (by CVP) **On:** 30 and 31 May 2024

**Before:** Employment Judge Walker

## Representation

Claimant: Mr. M Palmer of Counsel

Respondent: Mr. N Caiden of Counsel

# RESERVED JUDGMENT

The claimant's claim succeeds. The claimant was unfairly dismissed. Remedy will be considered at a future date.

# REASONS

## The Claim

- 1 The claimant, Mr Sieberer, brought a claim against the three respondents for unfair dismissal. It appears the claimant was uncertain about the precise identity of his employer. The claimant now agrees that Apple Retail UK Limited is the employer and therefore the correct respondent. In the circumstances claims against Apple and Apple (UK) Limited were dismissed on withdrawal by the claimant.
- 2 The claimant argued that his dismissal was unfair for a number of reasons. The claimant has sufficient service to bring an ordinary unfair dismissal claim.

## The Evidence

- 3 The tribunal heard from Mrs Surtees, who dismissed the claimant in her capacity as a Team Leader of People Planning Operations for the respondent and from Mr A Potter who heard the claimant's appeal in his capacity as an Employee Relations Business Partner for the respondent at the time.

- 4 The tribunal also heard from the claimant on his own behalf and had a bundle of documents which had been agreed.

### **Background**

- 5 The case was heard by CVP. I was satisfied that everyone could hear each other. Everybody had the relevant documentation. The technology worked correctly. However, on the first day it was clear that the claimant was in Austria. That is not a country on the list of countries which have given permission for evidence to be provided to a UK tribunal from their jurisdiction. The parties agreed that I should hear the respondent's witnesses on day one. The claimant would then fly to the United Kingdom so that he could give evidence on day two from this jurisdiction, which he did. In consequence, it was not possible to conclude the matter on day two and I therefore reserved the decision.

### **The Issues**

- 6 The issues which arose were the following.
- 6.1 What was the reason or principal reason for the dismissal? The tribunal notes that the respondent argues the reason was conduct.
- 6.2 Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the claimant? The tribunal's determination of whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.
- 6.3 In conduct cases, it is usually necessary to determine whether:
- (a) at the time of dismissal, there were reasonable grounds for believing the claimant was guilty of the misconduct alleged,
  - (b) at that time the belief was formed the respondent had carried out a reasonable investigation,
  - (c) the respondent had otherwise acted in a procedurally fair manner; and
  - (d) dismissal was within the range of reasonable responses.
- 6.4 The claimant argued in his ET1, that to amount to gross misconduct, his conduct must have amounted to repudiation of the contract which would involve either deliberate wrongdoing or gross negligence (*Sandwell and West Birmingham Hospitals NHS trust v Westward* 17 December 2009 UK EAT/0032/09/LA). In contrast this was an error by the claimant which he immediately admitted to having made.
- 6.5 The claimant argued that there was no lawfully permitted ground to dismiss him or otherwise that the act of dismissal did not fall within the range of reasonable responses.
- 6.6 The claimant argued that the respondent had failed to carry out a fair and proper investigation and consider all the circumstances of the case.
- 6.7 The claimant argued that the respondent had failed to differentiate between the sanction appropriate as between a male employee who

made comments about the photos taken by the claimant to other colleagues and the conduct of the claimant in taking photos, which was different.

- 6.8 The claimant argued that the respondent characterised his conduct as harassment, but this was misconceived as the person whose photograph was taken was not aware at any stage of that fact.
- 6.9 The claimant argued that the respondent had failed to consider the mitigating circumstances. The conduct was entirely out of character. The claimant argued that the respondent failed to have regard to the claimant's length of service and clear personal record. The claimant had a good record with the respondent. The claimant's colleagues defended the claimant and said he had never shown inappropriate behaviour towards them at any time and the respondent failed to take account of the catastrophic impact of dismissal on the claimant, his finances, visa and family life.

### **Facts**

- 7 The claimant had initially worked for the respondent (or at least another company within the respondent group) in Vienna. In 2021 the respondent reorganised itself so that there was a group called People Planning Operations which consolidated and centralised scheduling for all Apple's stores. The claimant joined that team. In doing so he was required to move to London. He did so on his own. His family remained in Austria. The claimant's first language is German. He speaks good (but not perfect) English. He did not request an interpreter.
- 8 The claimant had a small group of friends with whom he worked in London which included another German speaker, Thomas. The claimant was married but Thomas was not. As they lived near each other and spoke the same language, they became friends. Thomas and the claimant were party to an i-message group with two female colleagues, Laura and Hana.

### **Apple Policies**

- 9 The policies to which I was directed include the Harassment and Bullying Policy, the Disciplinary Policy and Procedure and the Appeals Process. I was also provided with a copy of the Business Conduct Policy and the claimant's contract of employment.

#### **The Harassment policy states:**

*Apple also prohibits harassment and sexual harassment of any kind.*

*Examples of harassing conduct include but are not limited to slurs, jokes, statements, written or electronic communications, pictures, drawings, posters, cartoons, and gestures. Examples of prohibited sexual harassment include but are not limited to unwelcome sexual advances, requests for sexual favors, and other verbal, visual or physical acts of a sexual nature.*

*An employee may be found to have harassed - whether sexually or based on any protected characteristics – or bullied an individual, even if that was not the intent. Harassment and bullying are not about individual intent, but how the behaviour affects another person.*

*Any such behaviour, whether isolated or repeated, may be subject to*

*disciplinary action up to and including termination of employment.*

The Disciplinary Policy set out examples of gross misconduct which include:

*Serious breach of procedure or policy  
Any act of discrimination, bullying or harassments of colleagues ...  
Recording other team members on any device without their permission.*

The Business Conduct policy includes a statement of the principles guiding Apple's business practices which included:

*Respect - treat customers, partners, suppliers, employees and others with respect and courtesy.*

- 10 Apple employees were required to undergo annual training and that involved a computerised training module which might take some two hours, I was not shown any documentation, nor was I given any explanation as to what exactly that training involved or how detailed it was.

### Photographs

- 11 On 24 March 2023, the claimant took a photograph in the canteen showing the food counter with sushi in metal trays. Behind the food counter, it is possible to see a female employee dressed in a black T-shirt and trousers with an office pass attached to her waistband.
- 12 The claimant made a note on the i-message system he shared with his three colleagues reading: "*M\*\*, you're welcome Thomas*". The tribunal understand that the reason for this was that Thomas had expressed interest in the female employee in the photograph but did not know her name. The claimant had identified her name from her pass. The photograph was also relevant because the group had a standing joke about their inability to get sushi and this photograph showed sushi was available at the time. I have not included the employee's name but her full first name was in the message. I will refer to her as "M" throughout this judgment.
- 13 There were a couple of comments in response to the photograph one of which was Thomas commenting: "*Look at bae there... so cute (face emoji blowing kisses) working her ass off but still looking great*"; and another one from Thomas immediately below saying "*That's my girl*", to which there was a bubble response "*haha*" from Hana.
- 14 On 14 April the claimant took another photograph which we do not have. I am told that photograph was taken from three floors away looking downstairs and it was possible to see a female employee working on a sofa. No one suggests that photograph was anything other than the female employee in her work clothes. The claimant sent that photograph to Thomas directly in a WhatsApp message, and not to the group.
- 15 Having sent the phone second photograph, the claimant decided to delete it from his phone. He told the tribunal you can do that if you do it within an hour of the picture.
- 16 Thomas showed the photograph to another employee who was a member of their first group, Hana. He also talked about the female employee to her.
- 17 Hana discussed Thomas' behaviour with another colleague called Grace. She explained that Thomas had been talking about two female employees at Apple that he had a crush on, and Hana told Grace that Thomas had made more comments

since seeing photographs of the employees, and that the pictures were taken by the claimant without the female employee's consent. This resulted in Grace telling Hana to raise it with a manager. Hana raised it with a manager. She gave him a screen shot of her phone showing the first photograph and the comments Thomas had made. This in turn resulted in a disciplinary investigation into both the conduct of Thomas and the claimant.

- 18 Neither Thomas nor the claimant ever spoke to M or approached her. It seems likely she has no knowledge at all about these events.

#### Disciplinary Investigation

- 19 The disciplinary investigation was conducted by Mr Clinton who was the manager to whom Hana had spoken. He interviewed Hana, Grace and another female employee, Marion. He obtained screenshots of Hana's phone which showed the first photograph and comments in the i-message group. The second photograph was never seen by anyone other than Thomas and the claimant.
- 20 A separate investigation was conducted into Thomas by the same manager.
- 21 The notes taken of witness interviews show that Hana met with Mr Clinton first and gave a statement on 19 April at about 10.00am. She stated that on 18 April Thomas had shown her photographs of female employees whom she didn't know. He had spoken about the women frequently and had crushes on them. Hana said Thomas referred to them as his "work wives". He told her that the claimant had sent him these pictures on 14 April when the claimant had been in the office and Thomas was not. Hana stated the conversation with Thomas shocked her and made her deeply uncomfortable. Hana said one of the female employees previously worked that another office and Thomas had made comments about her. At the time she had believed that that person was a close friend or knew Thomas well, but she had learned that he did not actually know her, only that he was attracted to her. She stated that when Thomas saw female employees walking past his desk to the break and other common areas, he had made statements like "my work wife is looking beautiful today". When he showed her to photographs on 18 April he had said: "seeing her at work like that makes me more in love with her." She considered the comments highly inappropriate, demeaning and unprofessional.
- 22 Hana realised that about a month ago a non-consent picture of another employee was shared on a social i-message group with her by the claimant. She didn't realise at the time but, said Thomas had made a comment about that employee (which I have cited above). She said that Thomas told her that this person had a boyfriend as he had seen him picking her up from work. She also stated that previously Thomas had been annoyed that their manager had not hired someone who was younger who would go out socialising with him and also commented when a male member spoke to them from another group that he didn't like that guy. He had said, "*he's working in the same team as my work wife. We should have got her on to speak instead*".
- 23 Hana said she had not heard the claimant make any verbal inappropriate comments, but he had taken the pictures and shared them.
- 24 Grace, whom Hana had first approached on 18 April gave a statement to Mr Clinton at 11.15 on 19 April. She explained the background to her conversation with Hana. It is not clear why Grace was asked for a statement. The Investigation manager did not give evidence, so I do not know why her statement was thought relevant as Grace had no involvement with Thomas or the claimant. In contrast the other member of the WhatsApp group, Laura, was not asked for a statement, although she would have seen the first photo. Grace's statement is basically "hearsay" as all she could say is what Hana had told her. Her statement said: "*Grace states*

that Hana said the pictures were taken without the female employee's consent and Thomas was showing them to Hana. Hana shared with Grace how uncomfortable this had made her." It is not clear what exactly Hana told Grace had made her uncomfortable as Hana did not complain about the photos making her uncomfortable when she was interviewed. Hana's reference was to the comments making her uncomfortable.

- 25 The statement finished stating: "*Since learning about this incident Grace states she is uncomfortable and angry that the pictures were allegedly taken of a female employee, without their consent. Grace stated that the idea that this breach of privacy and objectification may be happening to Apple colleagues or potentially to others on the PPO team also made her feel deeply uncomfortable.*" There is no suggestion that Grace ever saw any photographs.
- 26 Another employee called Marion gave a statement through a different manager that afternoon. Marion had not seen the photographs and was not a member of the i-message group. She stated that Thomas and the claimant had both sat near her and Thomas would make comments to the claimant about women passing nearby such as: "*Look there is another one*" or "*I have to suck my stomach in when she comes over*". These were all made in German. The claimant had moved desks, so Marion was happy because, after that, Thomas had no one to talk to in that way. She did not suggest the claimant had talked in that way.
- 27 There was no interview with Laura, the other female member of the i-message group who would have seen the first photo.
- 28 Thomas was interviewed by Mr Clinton on 20 April and the claimant was interviewed by Mr Clinton shortly afterwards. The claimant quickly and openly admitted he had taken a picture of a female employee in the communal area from the 8th floor and that the employee had not consented to that picture. The claimant also admitted taking the photograph of the female employee in the canteen. He was asked whether he thought the photographs were sexual harassment and said they probably were. When asked whether he agreed that he had recorded an employee without their consent, he agreed.
- 29 The Claimant agreed with Marion's statement about the way in which Thomas spoke about women in the office, and said he wasn't involved in making the comments and he tried to end the conversations with Thomas.
- 30 The claimant said:
- "Right now its even clearer for me than before that is wrong what I did. I am really sorry now. I'm trying to ask myself why I got carried away with this to give Thomas this, I didn't do it on purpose. I thought the photos were neutral. They weren't showing the person in a sexual way. I'm not sure that's 100% clear in English what I mean. I know that doesn't make it OK. I regret sharing these photos with Thomas. But I get that it was wrong. I have deleted the photos on my device. Shortly after I realised it wasn't right, I deleted it from the WhatsApp conversation with Thomas."*
- 31 Having conducted the interviews Mr Clinton produced an investigation outcome report. The outcome of the investigation was a recommendation that there be a disciplinary process.
- 32 Between the investigation and the disciplinary hearing, the claimant took some time to research the respondent's policies and to update himself on them.

#### Disciplinary hearing – Invitation

- 33 By a letter dated 28 April 2023, the claimant was invited to a disciplinary hearing. The letter said:

*“Alleged misconduct:*

*The hearing will consider your alleged involvement in:*

- *Taking pictures in two separate incidents of a female Apple employee without her consent*
- *Sharing these pictures with Thomas [ ], Process Analyst, again without the consent of the female employee in the pictures.*

*This may amount to a breach of Apple's Business Conduct Policy and Apple's Harassment and Bullying policy specifically sexual harassment and potential gross misconduct as per Apple's Disciplinary Policy and Procedure: 1) Serious breach of policy or procedure, 2) Any act of discrimination, bullying, or harassment of colleagues, customers, or any other person, 3) Recording other team members on any device without their permission.”*

- 34 It was noted that the disciplinary hearing manager could issue a decision which could result in disciplinary action up to and including termination of contract without noticeable payment in lieu of notice. The claimant was given information about his right to be accompanied.

Disciplinary hearing

- 35 The disciplinary hearing took place on 3 May 2023. Mrs Surtees carried out the disciplinary hearing. There was a note taker. The claimant declined his opportunity to be accompanied. Although the claimant was not a native English speaker, he did not have an interpreter. The claimant accepted in the hearing that he had thought he understood all the questions and that he thought he replied correctly. However, if the notes are verbatim, on occasions the claimant's English is not perfect and not always clear.
- 36 The claimant accepted he taken the first photograph without any question and took responsibility for that. He tried to explain the context and also that he had not pushed back against Thomas but rather would not respond to him or be what he called described as “passive” if he thought Thomas was acting over the top. When asked if he had ever given Thomas feedback to say stop talking like that, he said that he had sometimes asked Thomas to stop or said that he didn't want to talk about such matters right now but had never taken him aside and told him that his not OK and he was making people feel uncomfortable.
- 37 The claimant was asked whether sending Thomas a picture of a girl that he was talking about might have given him the permission to behave in the way he was behaving. The claimant said: *“Yes you are right. I have not seen it this way but I always gave Thomas and everyone in the group the feeling that this is a topic that is OK. As I said, I think it was not only myself, but everyone in the group to make this topic feel accepted.”*
- 38 The claimant was asked about the second picture and confirmed it was a photo of the same person and that he had shared it privately with Thomas in a WhatsApp conversation. He had deleted the picture shortly afterwards, when he decided it wasn't correct and didn't feel right.
- 39 The claimant described the second photograph saying that he was on the 8th floor in a communal area close to a railing and could see down to the 5<sup>th</sup> floor. He had seen the female employee having lunch on the 5<sup>th</sup> floor. He hadn't wanted to show

her in a bad way. It wasn't an explicit photograph. He did not follow her somewhere making a private photograph of her. It was an open space and it was something his colleagues could have observed if they were there. He accepted that that did not make it OK and making a photograph of someone else however close so far away was still a photograph of a colleague and still wrong.

40 When asked what didn't feel right, he said:

*"It didn't feel right to make a photo of someone who doesn't know about it and share it with others. That was the main thing. I thought I've crossed a line here. Of course I knew about our photo policy, Not in as much detail as I know now, but I knew it was not ok and that was why I deleted it."*

41 When asked what he meant by saying he knew the policies a bit better now he had reviewed them, and whether he was up to date on the training, he said that he was up to date with it and had done it every year: *"Especially over the last few weeks I did a lot of research into harassment and bullying in the people web site."*

42 The claimant was asked from that research was there anything he found which would be relevant to his hearing. The claimant explained his thoughts about the situation and said:

*"Taking the photo was wrong, there is no doubt and I can clearly see this now. However, the photos themselves are not sexual, they're not showing the person in a bad way. They're neutral. Happened in an open space. My intention for taking these photos was never to bully, harass or discriminate against this person or anyone else. What I've learned, it's not only about the intention but about how actions are received, and how actions are making others feel. So, yeah, then this is maybe something that's more relevant. This is what I've learned actually, but at the same time, I think that like. I read what Hana had said, but according to the statements no one felt harassed by the photographs themselves. It was more that Hana said that this conversation with Thomas shocked her, or she considered the comments inappropriate. It was more about the comments than the photo. At the same time, you are also asking why I shared this. As I said it was a very thoughtless moment where I got carried away and got the feeling that this is something ok, and accepted as it's a topic in our friends group. It was not recognisable for me that someone else feels uncomfortable or harassed by this in this friends environment that I described. Also to add, I haven't shared the photos with anyone else or anyone else at Apple".*

43 The claimant was asked how the employee concerned, M, might feel if she knew someone was taking secret pictures of her. How would he think if it was him, or a female colleague that someone had taken secret pictures of. How would that make him feel. The claimant said:

*"I thought about the same, and as you say it's not ok. It doesn't show respect. What if someone else did the same to me, If I was in her position, I think it would depend on the situation or the intent, and how I am portrayed in these pictures. I think M would be surprised, and she would feel uncomfortable, but at the same time there was never, with the photos, I didn't portray her in a bad way. The main reason was that a colleague of mine like her or has a crush on her and saying good things about her. In his context, she might maybe, I don't know if she would feel harassed, its still not ok, but yeah."*

43 Mrs Surtees asked the claimant whether the pictures were taken because of M's gender, to which the claimant said no. When asked if he would take a picture of a



man the same way he said he would if Thomas had a crush on a man. It was not to do with gender but about the fact that his friend liked the person. He was asked whether they had anything else to add.

- 44 The claimant said: *“Yes. A few things. I just wanted to highlight again in terms of sexual harassment or harassment. There was no comment made from myself that was going for myself, neither verbally or spoken. Hana stated she had not heard me make any verbal comments. I believe Marian had said that also and Thomas said that “Christoph was not the initiator”. I just wanted to make clear that besides the photo, I did not go in this direction.”*
- 45 He said: *“Also in the summary from Tom, I already asked Tom this, it says that Recording other team members on any device without permission. I just want to make clear I've never recorded anyone else in terms of audio or video, it is only the discussed photos”.*
- 46 In response Mrs Surtees said: *“We'll just make sure it's in the disciplinary that we are only discussing two photos, no audio no video”.*
- 47 Then the claimant said:

*“My last point. I said it to Tom already. I want to use the time to say I deeply regret my actions. It was a thoughtless moment where I didn't realise in this moment, I didn't mean anything bad to anyone. I do take responsibility for this. I am ready to apologise to the colleague, to Monica, for the photos. I don't know if this is OK or not. I think you've got to know me, and I'm a very respectful person, and I really value the company's values, and I am really glad I have these policies. I've made these mistakes, it is very clear for me now. I said to Tom, from the first second of this investigation, I've tried to be super transparent. I realised it, admitted what I did, and admitted my mistakes. If there is a future, I will be super mindful, I have learnt this lesson and I won't be doing it again.”*

#### Disciplinary Outcome

- 48 Mrs Surtees met with three other managers, two of whom were in the Employee relations team. Mrs Surtees discussed her findings with those colleagues, but says the decision was hers alone. There are no minutes of that discussion.
- 49 On 11 May 2023, there was a follow up meeting with the claimant. At this meeting, Mrs Surtees explained her conclusions on the disciplinary to the claimant. She read them from what was probably a draft of her outcome letter since the notes of that meeting show they are the same as the contents of that letter.
- 50 The dismissal letter referred to the two charges regarding taking the two pictures and sharing them. It confirmed the dismissal and stated the reasons for dismissal are as follows:

*“You took pictures of an unknown female colleague on two separate occasions without her knowledge or consent on 24 March 2023 and 14 April 2023. We have discussed that you were not asked to take or share these by anyone and chose to do this on your own. This demonstrates a lack of respect which is one of Apple's guiding principles of business conduct.*

*These pictures were taken in cafe Macs when the employee was working on 24 March and from the 8th floor balcony looking down to the fifth floor in the Battersea office when the employee was having a lunch break on 14 April. On both occasions the employee was unaware the pictures were*

*being taken.*

*Pictures are listed as an example of harassing conduct within Apple's Harassment and Bullying Policy which you have stated you are familiar with and have completed annual business conduct training throughout your five years at Apple.*

*You have further shared the photos you have taken of a female colleague without permission. The first picture was shared and commented on via a group message and the second was shared with Thomas via WhatsApp and later deleted. In your hearing we have discussed that the taking and sharing these photos violates the individual's privacy.*

*You acknowledge that after you sent the second picture you felt "I think this wasn't correct, this doesn't feel right" and deleted the photo and accompanying WhatsApp message. Although you saw that this behaviour is not acceptable after the second picture you failed to raise this concern with either your line manager or business conduct.*

*In your hearing I have found that you still fail to see the severity of your actions, justifying the pictures that they don't show the female in a bad way and were not explicit. You have further stated that the pictures were taken from far away and you did not actively follow her to take them so further failed to see how this was still intrusive. I find this lack of understanding of Apple's core values and culture concerning which also leads me to a deep concern on an ability to alter and change your behaviour moving forward. These behaviours we have discussed are all examples of harassment and highly inappropriate for the workplace.*

*You've described the way your colleague, Thomas has spoken about female colleagues in the past as making you uncomfortable however through your actions you have encouraged this behaviour and disrespected your colleagues privacy."*

### Appeal

51 The claimant appealed the dismissal on 14 May 2023. His appeal was heard by Alexis Potter. The claimant raised some procedural points about the length of time the disciplinary process had taken and the fact there was no independent person from employee relations involved in the process. He referred to data privacy regarding the phone screen shots. He made some substantive points saying that the termination letter stated that he had failed to understand the severity of his actions, but he denied that. He argued that reading the minutes of the disciplinary hearing he thought it was clear that he had been well aware of the severity of the matter and did not justify the pictures but had to use that opportunity to defend himself and bring forward arguments in his favour. He had mentioned several times that he thought his actions were wrong and he regretted them. He also argued that he did not think his actions amounted to gross misconduct. Additionally, he said that he had never been part of any investigation and had never received a disciplinary sanction before in his 5 years working for the respondent. He also thought no distinction had been drawn between himself and his colleague whose case was intertwined but fundamentally different. He continued saying that the stated reasons for his dismissal include describing his actions as harassment. However, the statements from his colleagues proved his behaviour had never been seen or received as a form of harassment.

52 Mr Potter interviewed the claimant on 18 May. It seems his main objective was to understand his grounds of appeal. On 22 May, he interviewed the investigating

officer and Mrs Surtees the dismissing officer. Mr Potter specifically asked Mrs Surtees why she considered the claimant's actions to amount gross misconduct.

53 Mrs Surtees explained:

*"When it comes to Business Conduct you have the main guiding principles and subsections within that. What he had done violated another employee. A female employee, taking photos twice, sharing it allowing another's behaviour. This amounted to Gross Misconduct as it sat under the Bullying and Harassment policy. In the hearing he showed remorse, he had read the policy and he understood the magnitude but his remorse was because he had been caught and he knew it was wrong, what I didn't feel was that he sensed the magnitude of what he had done, therefore I thought we might see a repeat, because he thought it wasn't sexual or followed her he didn't think it was so bad and I saw this as a red flag and I have a responsibility to protect employees the office as a safe place all these reasons made it gross misconduct and therefore dismissal."*

54 When asked how she decided this constituted harassment, Mrs Surtees said:

*"Obviously we all do Business Conduct training every year so I knew what was in there. We have a very clear policy which I reviewed and the very specific harassment policy talks about pictures of people and protected characteristics so in this case someone's gender because they were talking about appearance of a woman and having a crush on a woman, this was very clearly called out in the policy and of all of us can read it but as part of my investigation I went to look at the policy."*

55 When asked about the decision to dismiss Mrs Surtees said:

*"Sure, so it was clear and Christoph was being honest that he had taken the pictures and shared them both, group iMessage thread and singular WhatsApp. The investigation showed the intent was to discuss the person's appearance. I was looking to find any other reasons, did the person know or was it an accident for example. I was also looking to see if there was any cultural difference, he had moved to London in 2021-22 as part of PPO so I was conscious of any nuisances from Austria, but Business Conduct is worldwide. I was looking to see remorse, there was but the magnitude of what he had done did not come through, therefore I didn't have a belief that a similar behaviour would not be repeated in the future, and therefore I felt that I needed to dismiss. I felt that given what he had done this was the right outcome and it was gross misconduct."*

56 I have checked the investigation notes, and I cannot find any reference which supports the comment that the investigation showed the intention was to discuss M appearance.

57 Mrs Surtees was asked whether she considered a final written warning. She said:

*"Yes so I considered FWW as I have touched on, I also partnered with ER and PBP to understand any similar cases or anything else I should consider, but the act itself of taking pictures of female employee without them knowing and then to have also shared the picture and how far it sat outside our cultural and values felt the severity of situation warranted dismissal beyond FWW. I wasn't and couldn't be sure it wouldn't happen again in the future and I have a responsibility to protect the wider team we work with."*

58 Mrs Surtees was questioned about the claimant having admitted everything and said he was sorry from the very first investigation meeting. Mr Potter asked for

help in understanding why Mrs Surtees did not believe the claimant understood the severity of his actions.

59 Mrs Surtees explained;

*“There was no question that he was sorry. I think I said in the notes that he was completely honest and helpful in the investigation. There was a difference to him being sorry because he was in a disciplinary process and some of the way he expressed himself in terms of they were saying nice things so therefore it wasn't that bad. I think he failed to see the severity and potential impact on the individual were they to find out about the photos. There is a fundamental difference there between being sorry you found out I did something bad and understanding his actions so as not to repeat them. There was definitely something in there that didn't feel like he was sorry. I also think that Christoph had an opportunity, he said he deleted the WhatsApp photo and message because he realised it was wrong and at that point he had opportunity to flag it himself to his manager or PBP but he didn't and I think he was sorry that someone had raised that his behaviour was a concern “*

60 In relation to the question about how important this was in the decision making. i.e. in deciding to go with the termination, Mrs Surtees said:

*“I think it was an element of it. It's so severe to me and our policies to take a photo without consent, it sits outside Business Conduct and Privacy which is a fundamental value at Apple. The decision was multi layered which is why I wanted to take time to consider, it wasn't just because of the severity he didn't see, but the severity of what he had done, especially a female employee.”*

61 Mr Potter upheld the dismissal. His letter of 23 May 2023 attached an appeal outcome report. This report explained his findings. The claimant had raised points of procedure such as the length of time it had taken, the fact that no one from Employee Relations was involved and that it was dealt with by people within his operational team as well as concern that private photographs and messages were used. Mr. Potter addressed all of these matters on the basis of information provided to him largely by Mr Clinton.

62 Mr Potters summary of the claimant's objections to the substantive decision were:  
*You do not believe that your actions demonstrated harassment or that it was gross misconduct. Therefore, the decision to dismiss was disproportionate and overly harsh. Additionally, he noted there is a point in the outcome that states you do not have an understanding of your actions. You believe this was a factor in the decision to dismiss and disagree that you did not show understanding during the investigation and disciplinary.*

63 In relation to those complaints, Mr Potter made a lengthy reference to the points he had been told by Mrs Surtees, He then simply said:

*“Despite you informing me at the appeal hearing that no one had received your behaviour as harassment I have found that witnesses to the case who were interviewed stated that they have been made to feel uncomfortable by the sharing of the photos and that they found it an invasion of privacy and also objectifying behaviour. I find it concerning that you do not understand that this constitutes harassment.*

*In conclusion I believe that your actions did constitute harassment as described in Apple's Harassment and Bullying policy and this is considered gross misconduct for which summary dismissal is a potential outcome.*

*Given that you were unable to demonstrate to Rachel that you fully understood the impact of your behaviour, and that even during your appeal, you have not fully comprehended the severity of what you did, I believe that the hearing managers decision to terminate your employment to be the correct course of action. ”*

- 64 In practice the only witness who said she had been made to feel uncomfortable by the sharing of the photos and that she found it an invasion of privacy and also objectifying behaviour was Grace, who was not a party to the photo sharing and said this after knowing a little about it but never having seen the photos. The one female who had seen the photos, Hana, did not say that in the investigation.

### Thomas

- 65 The investigation and disciplinary procedure involving Thomas ran concurrently with that dealing with the claimant. I have noted Mr Clinton was also the investigating officer and Mrs Surtees was also the disciplinary officer. My objective is to say as little as possible about Thomas' situation, but some submissions were made by the respondent's counsel, so I must make a few points.
- 66 The claimant had told Mr Clinton that he shared the pictures because Thomas asked him for it. He said that he took the photos because there were days when he was in the office and Thomas wasn't. Thomas was asking if she was there.
- 67 In the disciplinary interview the claimant was asked when he took the second photo and who he shared it with. He explained that *“As I said when I was in the office and the others were not, the topic was “is she there”, have you had lunch yet?”. By accident I wanted him to know that she was there”*.
- 68 Thomas was told by Mrs Surtees that the first matter was relating to Thomas asking the claimant to take pictures of a female employee without her consent. Thomas said he never asked the claimant to take any pictures, adding: *“Maybe he got that feeling”*. Later, Mrs Surtees said to Thomas, *“To recap did you ask Christoff to send you a picture”* to which Thomas said *“No”*.
- 69 Mrs Surtees concluded that Thomas did not ask the claimant to take the pictures. She did however conclude that he was guilty of gross misconduct in other respects and he was dismissed. Thomas also appealed his dismissal and Mr Potter conducted the appeal. His outcome letter set out a number of matters from his discussion with Mrs Surtees. One is that Mrs Surtees had explained that Thomas had commented about a person's appearance in photos that he knew had been taken without permission and shared them in electronic communication. This was based on the protected characteristic of gender and included a conversation about Thomas having a “crush” on the person (M) and referring to them as “Bae” and “looking great”. Mr Potter noted that Mrs Surtees considered this to be an example of unwelcome sexual advances.

### Mrs Surtees' evidence

- 69 I have noted the reasons for dismissal given to the claimant and recorded in the dismissal letter. I have also noted the explanation given to Mr Potter when he asked Mrs Surtees to explain why she considered the claimant's conduct to be gross misconduct and why summary dismissal was her decision rather than a final warning. I have also noted her various references to harassment.
- 70 In her witness statement Mrs Surtees relied on the harassment policy which references pictures as a potential form of harassment and gave some explanations which were not in the dismissal letter. In her oral evidence her position changed.

- 71 In the course of her oral evidence Mrs Surtees specifically said that she did not dismiss the claimant because of harassment.
- 72 Mrs Surtees accepted in her oral evidence that the pictures were not compromising. She had only seen one, but this simply showed a female employee going about her work. Mrs Surtees emphasised the Business Conduct policy and said the claimant didn't have permission to take the photos or share them.
- 73 Mrs Surtees referred in her witness statement to a number of factors which influenced her decision.
- She noted that the claimant had felt taking the second photo was not the right thing to do but had not done anything to address this.
  - She said he did not really grasp that what he had done was wrong as the photos were not sexual in nature and that M may have been flattered by the attention. She thought there was therefore a risk that he would repeat his behaviour.
  - She said that while he had shown remorse for his actions, this was not remorse for the hurt that his actions had caused. This alongside his failure to understand why his behaviour was wrong played a significant part in her decision making.
  - She said she took into account the impact on other female colleagues who had seen the photographs which had been taken and shared without consent.
- 74 Taking those bullet points in turn, there is no doubt that the claimant admitted he had taken the second photo and then felt it was wrong. From the disciplinary interview notes, I see that Mrs Surtees considered he could have reported himself.
- 75 On the second bullet point, nowhere in either the investigation or at the disciplinary notes can I locate a record that the claimant said that M may have been flattered by the attention. I have noted the claimant's response when asked by Mrs Surtees about how he thought M would feel. He said it's not OK and he thought she would feel surprised and uncomfortable but pointed out that she hadn't been portrayed in a bad way. The nearest I can find is that he then said, given the context, he didn't know if she would feel harassed.
- 76 On the third bullet point, when Mrs Surtees was asked in the course of the hearing what she meant by her suggestion that the claimant showed remorse for his actions but not remorse for the hurt that his actions had caused, and what hurt this was, Mrs Surtees said she said she was referring to Hana. Mrs Surtees maintained that Hana was uncomfortable around the photos as a whole. I do not know where Mrs Surtees obtained this information. Hana's investigation statement specifically refers to the conversation with Thomas making her feel uncomfortable. She does not state how the photos made her feel. Grace's statement reports that Hana told her she felt uncomfortable but does not explain clearly what Hana said to her.
- 77 On the fourth bullet point, Mrs Surtees' reference to the impact on other female colleagues who had seen the photographs must be a repetition of the same point as only Hana had seen a photo. No other female colleagues had seen any photos apart from Laura who was not interviewed. Mrs Surtees said that the photos contributed to other female employees feeling uncomfortable with the sharing of the photograph and subsequent comments on the photos. This seems to muddle up Grace's statement with Hana who, as I have noted, said she was uncomfortable with the comments. Mrs Surtees explained that in her view, it was never about the

photos being compromising but about the fact there was no permission to take the photographs or share them.

- 78 With regard to questions about whether the claimant had self-awareness that he done something wrong, she accepted that he did feel he'd done something wrong. Mrs Surtees accepted that the claimant had been honest and cooperative, and she accepted he regretted his actions. However, she considered that he had not accepted the severity of what had happened particularly when he maintained the photographs were of a neutral nature. That was of concern to her. Mrs Surtees considered that even if they were not compromising, to take the photographs and share them was not acceptable
- 79 Mrs Surtees gave evidence that she thought there was a serious breach in the recording of two photographs without permission. The business conduct policy referred to respect. The claimant conceded he had taken pictures and shared them and that was reason enough for his dismissal.

#### Reason for dismissal

- 80 Mrs Surtees position changed. Her witness statement did not refer to the facts correctly, such as when she asserted that the claimant had said M may have been flattered. She placed emphasis on harassment in her dismissal letter and in her explanation to Mr Potter, but in her oral evidence denied that aspect of her decision. Mr Potter concluded the reason for dismissal was harassment, having reviewed the position and talked to Mrs Surtees.
- 81 As I have noted, Mrs Surtees' witness statement referenced the hurt which the photos had caused and the impact on other female colleagues who had seen the photos when there was only a statement from one other colleague who had seen one photo and whose complaints were centred on the comments, not the photos. I have also noted that although Mrs Surtees referred to a violation of privacy in the dismissal letter, she did not refer to this when explaining her gross misconduct decision to Mr Potter. She did not refer to the recording policy.
- 82 Having reflected on the entire position I conclude that the reason (or at least the principal reason) that Mrs Surtees dismissed the claimant because she thought that the claimant was guilty of sexual harassment by the taking and sharing of photos because they were of a female colleague and because of the reference in the harassment policy to photos.

#### Mitigation

- 83 There was no direct evidence of Mrs Surtees considering mitigation, but I gather from the notes of her meeting with Mr Potter, that Mrs Surtees did consider a lesser sanction of a final written warning but decided against it. She told Mr Potter that the severity of the situation warranted a dismissal. She also said she couldn't be sure it wouldn't happen again in the future. Additionally, when asked about the claimant having said he was sorry, she said "*There's a fundamental difference between finding out you found out I did something bad and understanding his actions so as not to repeat them*". It was her feeling that the claimant wasn't sorry. She also referred to the fact that the claimant had deleted the second photo but had not flagged it himself to his manager or PBP. She thought he was sorry that someone had raised his behaviour as a concern. Mrs Surtees did not mention having considered the claimant's length of service or previous good record.

#### Submissions

- 85 Both Counsel provided me with written submissions and also with oral submissions. I do not propose to repeat the written submissions in detail.

Claimant's submissions

- 86 Counsel for the claimant did not dispute the procedural steps taken in the investigation or at the disciplinary hearing. The claimant did consider the appeal to be a rubber stamping with no thought or real analysis. The main thrust of the claimant's argument was that the dismissal fell outside the band of reasonable responses open to the respondent and thus dismissal was not appropriate.
- 87 The claimant suggested that the fact that Mrs Surtees dealt with both the disciplinary for the claimant and for Thomas had contaminated her decision making.
- 88 Mr Palmer submitted that the claimant had admitted his actions were disrespectful, but they could not amount to harassment. Neither Hana nor Marion expressed any discomfort with the photos. The one employee who did complain was Grace, who had never seen the photos and only she suggested the act of taking photos was a breach of privacy and objectifying behaviour.
- 89 Mr Palmer also pointed out that the prohibition on recording on any device was not a term usually used for a one off photo but described an on-going item such as an audio file or a video.
- 90 The appeal did not correct any flaws in the disciplinary as Mr Potter simply took the dismissing officer's explanation at face value and did not apply any analysis to them.
- 91 The claimant contended that dismissal was outside the range of reasonable responses.
- 92 I had asked both Counsel to comment on the Brito-Babapulle case. Mr Palmer said it didn't follow that where gross misconduct was found it should automatically lead to dismissal and Mrs Surtees had not given proper consideration to the relevant mitigation.

Respondent's Submissions

- 93 The respondent submitted that this was a case where the claimant was trying to persuade the tribunal to substitute its own view for that of the respondent employer. It was made clear by the Court of Appeal in British Leyland (UK) Limited v Swift 1981 IRLR 91 that the tribunal must not substitute its own view for that of the employer. The tribunal could not ask whether a lesser sanction would have been reasonable, but rather whether or not a reasonable employer might dismiss the employee.
- 94 The respondent submitted that it was clear that the dismissal was for conduct which is a potentially fair reason. I was reminded of the disciplinary policy which gave examples of gross misconduct including any act of harassment and recording other team members on any device without their permission. Further, I was reminded that respondents harassment policy pointed out that harassment could occur even if that was not the intent, and that examples of harassments included pictures.
- 95 The respondent argued that it had met the burden under section 98(1) of demonstrating the reason for the dismissal and that it was a potentially fair reason. The claimant had admitted the conduct in question namely the taking of photographs and sharing them. The respondent was entitled to take those



admissions at face value.

- 96 There could be no argument about the investigation. That met the required test of reasonableness. The respondent submitted that the claimant understood that the respondent placed great emphasis on data and privacy and the issue of consent and when he had referred to in the appeal hearing to being aware that we have seen zero tolerance to this that was what he was referring to.
- 97 The respondent argued that the claimant was not advancing a case that there was inequality of treatment in that others who had carried out the same act were treated differently to him or that it was common in the business for other people to take photographs and for no action to be taken.
- 98 The respondent argued that during the process, the claimant had not clearly argued that the photos were not recordings, as was being argued now. It was reasonable to consider that harassment had been committed. The claimant had initially said that he thought he probably had committed sexual harassment. By the stage of appeal, he appeared to be saying he had not, but the appeal officer rejected this.
- 99 The respondent submitted that dismissal fell within the reasonable band. The respondent objected to claimant's submission that it could not be harassment because the subject of the picture was unaware. The respondent argued that two other colleagues did complain and in particular Grace was uncomfortable and angry about it. Further he suggested that Hana was upset by conduct which the respondent concluded had at the very least been facilitated by the claimant.
- 100 The respondent also argued that there was a different analysis needed for the claim of harassment when an employee is pursuing a claim for an employment tribunal and thus needs to know the conduct for it to create the proscribed environment. This is not the case when harassment is considered in the employer's internal process.
- 101 By way of example, it would be nonsensical for a manager to become aware of racist comments being made about a colleague who was unaware of them and then to be unable to take action without telling that colleague, and thereby offending them deeply. It was not reasonable to have to inform M that she was having photographs taken of her and shared without her knowledge before the claimant could be disciplined for it.
- 102 Even if the harassment label were challenged, the taking of photos was not dependent on harassment. The claimant knew that his conduct was wrong. The respondent had a zero tolerance approach to this sort of matter and the claimant should be taken to have understood that dismissal was likely for this type of offence.
- 103 Additionally, actions after the offence are relevant in assessing the reasonableness and the respondent argued that the claimant was dishonest in trying to remove culpability and arguing that he'd been pressured into taking the photos and taking the second photo would not have been his choice.
- 104 As regards mitigation, the respondent had considered dismissal was warranted. The claimant committed not one but two errors of judgement and taking two photographs at different times on each case sharing them. That's the respondent argued were four errors in this case and it was not a one off act. The claimant did not have long service. He had 5 years – that was not long service as would be the case if he had 20 years' service.

- 105 As regards the argument that Thomas's actions were worse than the claimant's, this did not mean that he should not be dismissed. It was immaterial whether his conduct was of less seriousness. The respondent was entitled to look at the conduct itself and conclude it was, in itself, sufficiently serious to merit dismissal.
- 106 As regards the appeal it was natural for Mr. Potter to have repeated what other people had told him, given the type of appeal.
- 107 On contributory fault, it was argued that the claimant had sent the pictures. In his witness statement it was suggested that the claimant came to an agreement with Thomas. This was not a one off. It was not a fancy in the heat of the moment. It was repeated act as there were two photos. There were two instances of sharing the photos and thus there were four things he had done which were wrong. It appeared to indicate there was a plan. That in the circumstances the respondent argued there should be a deduction of 100% for contributory fault.

### **The Law**

- 108 Section 98 of the Employment Rights Act 1996 provides as follows.

#### 98 General.

- (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 requirements 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, and

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

- 109 In conduct dismissals tribunals have regard to British Home Stores v Burchell (1978) IR 379. Although the Court of Appeal has suggested this test is not ideal, it has acknowledged that this has been the standard test for decades and accordingly, we must consider:

(a) whether the employer had a genuine belief that the employee was responsible for the misconduct,

(b) whether the employer had reasonable grounds on which to base that belief, and

- (c) whether at the time the employer formed that belief, it had carried out as much investigation as is reasonable in all the circumstances.
- 110 The tribunal must only take into account what was known to the employer at the time of dismissal – W. Devis & Son v Atkins (1977) AC 931. It must consider the facts known to the decision-maker, even if other facts were known within the organisation, but not within the group of people responsible for the investigation – Royal Mail Ltd v Jhuti (2019) UKSC 55.
- 111 The tribunal must not substitute its own view for that of the employer, provided the employer’s action was within the range of responses of a reasonable employer. This principle applies both to findings on whether the decision itself was reasonable, and on whether the process adopted was reasonable – Foley v Post Office (2000) IR LR 82, and Sainsbury’s Supermarkets Ltd v Hitt (2002) EWCA Civ 1588.
- 112 There are provisions to reduce both the basic and the compensatory awards. Section 123 (6) of the Employment Rights Act provides that can occur where the tribunal finds that the dismissal “was to any extent caused or contributed to by any action of the complainant”. In such circumstances it must reduce it “by such proportion as it considers just and equitable”. When doing so it must consider four questions: what was the conduct said to be contributory fault; irrespective of the employer’s view, was that conduct blameworthy; did that blameworthy conduct cause or contribute to the dismissal; if yes, to what extent is it just and equitable to reduce the award - Steen v ASP Packaging Ltd (2014) ICR 56.
- 113 The test to be applied by the tribunal is ‘*an objective assessment of the reaction of the hypothetical reasonable employer to*’ the conduct in question as stated by the Court of Appeal in Fuller v London Borough of Brent [2011] IRLR 414 and reaffirmed by the Court of Appeal in Turner v East Midlands Trains Ltd [2012] ICR 375 and Newbold v Thames Water Utilities Ltd [2015] IRLR 734. The employer must act ‘proportionately’ Connolly v Western Health and Social Care Trust [2018] IRLR 239. Further, under S98(4), regard must also be had to ‘equity and the substantial merits of the case’
- 114 In Brito-Babapulle v Ealing Hospital NHS Trust, the Employment Appeal Tribunal found that when considering the fairness of a dismissal, and in particular whether the decision to dismiss falls within the band of reasonable responses open to a reasonable employer, an employer (or Tribunal) should not jump straight from a finding of gross misconduct to a conclusion that dismissal was within the range of reasonable responses. The Employer should consider any mitigating factors – a finding of gross misconduct will not necessarily justify instant dismissal.
- 115 Kuzel v Roche Products Ltd 2008 ICR 799 is authority for the principle that the tribunal does not have to find that the reason for the dismissal, was what was asserted by either side.
- 116 Section 26 of the Equality Act 2010 defines harassment as arising where:
- 1) A person (A) harasses another (B) if –
    - (a) A engages in unwanted conduct related to a relevant protected characteristic and
    - (b) the conduct has the purpose or effect of
      - (i) violating B’s dignity or
      - (ii) creating an intimidating, hostile degrading, humiliating or offensive environment for B.
  - 2) A also harasses B if -

- (a) A engages in unwanted conduct of a sexual nature, and
- (b) The conduct has the purpose or effect of referred to in subsection 1(b).

4 In deciding whether the conduct has the effect referred to in subsection 1(b) each of the following must be taken into account

- (a) the perception of B
- (c) the other circumstances of the case
- (d) Whether it is reasonable for the conduct to have that effect.

### **Conclusions**

117 I have considered the issues and submissions.

#### **What was the reason or principal reason for the dismissal?**

118 I have noted that the reason (or principal reason) for dismissal was because Mrs Surtees thought that the claimant was guilty of sexual harassment by the taking and sharing of photos of a female colleague because of the reference in the harassment policy to photos. This clearly relates to conduct which is a potentially fair reason for dismissal.

#### **At the time of dismissal, there were reasonable grounds for believing the claimant was guilty of the misconduct alleged.**

119 I am mindful of the importance of not substituting my own view for the view of the respondent. However, I have considered whether, at the time of the dismissal, there were reasonable grounds for believing the claimant was guilty of sexual harassment as defined in the Equality Act or indeed some sort of more general concept of harassment as submitted by the respondent.

120 There was no doubt the claimant had taken two photographs of a female employee and had shared them, the first with a small group of colleagues and the second one with one other male colleague.

121 It is my conclusion that Mrs Surtees originally assumed the mere fact of taking a photograph of a female without her consent was inevitably harassment and that harassment was gross misconduct. At this hearing, Mrs Surtees denied that harassment was the reason for dismissal, despite the dismissal letter and her explanation of the reason for dismissal she gave to Mr Potter, both of which clearly referenced harassment. I have noted that Mrs Surtees had described to Mr Potter in their meeting about Thomas that she considered certain actions amounted to sexual advances, even though there was no attempt to communicate or contact the female in question, which seems a questionable description of the concept.

122 I have considered the submissions of the respondent's counsel that the policy did not refer to harassment in the legal sense. He said that it is not necessary for the tribunal to require the respondent to apply the technical elements of harassment in the Equality Act to their policies. He also suggested that the respondent would be unable to take action in relation to inappropriate conduct if it were forced to make the subject of the harassment aware of it when they had not been directly informed. I reject both those arguments.

123 First, harassment can exist when third parties feel uncomfortable as a result of conduct of which the subject is unaware, which arises when comments are not made directly at the person but as an aside. The people who can assert that harassment are those who are affected and have heard the racist comments. Thus, the suggestion that the respondent could not take any action if there had been for example a racist comment is simply incorrect.

- 124 Secondly, I cannot understand what the respondent's policy was describing, if not harassment in the legal sense, or something very similar. I was never shown any of the training materials which explained what staff were told it meant. The actual policy is vague and does not contain a clear definition of harassment. It has two parts. The first refers to methods by which harassment can occur. That lists jokes, written or electronic communication and posters as well as photographs. Not all jokes amount to harassment and not all electronic communications such as emails do either. Clearly staff at the respondent do joke and do send emails to each other without there being any concern. They probably put up posters. The methods listed have to have something which is harassment within them. They are not by themselves harassment even if they reference a female. Mrs Surtees did not consider this.
- 125 The second part of the policy states that harassment and bullying are not about individual intent but how behaviour affects another person. There was no mention in the dismissal letter of Mrs Surtees' conclusion about how the photographs had affected other people.
- 126 In the appeal meeting with Mr Potter when asked about how she decided this was harassment Mrs Surtees said she knew what was in the Business Conduct policy and she said: "*the very specific harassment policy talks about pictures of people and protected characteristics so in this case someone's gender because they were talking about appearance of a woman and having a crush on a woman, this was very clearly called out in the policy*". There was no allegation put to the claimant as a disciplinary charge that he was talking about M. In fact, there is a lot of evidence to indicate the claimant didn't comment about women. There is no mention by Mrs Surtees about the effect of the photographs.
- 127 Mrs Surtees went on to explain to Mr Potter that the investigation showed the intent was to discuss the persons appearance. I could not find any reference to that in the investigation notes. In short, Mrs Surtees seems to have focused on the photographs being taken of a woman and regarded that as enough for harassment to have taken place. She may also have conflated Thomas actions in talking about his crush on M with the claimant, about whom the only evidence was that he took the photos and shared them.
- 128 I have gone on to consider what the policy might mean if not harassment in the full legal sense or something close to that. If it was harassment under the Equality Act 2010, there would have to be something from which you could determine the conduct was unwanted or would probably have been unwanted, and then you would need to determine that it violated the person's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for them. The government's generalized effort to explain: "workplace bullying and harassment" is that it is behaviour that makes someone feel intimidated or offended. In other words, someone has to feel offended for there to be harassment. As M was unaware, the only person who was interviewed who saw the photos was Hana and she did not refer to them in terms which indicated any such reaction.
- 129 As I have noted, Mrs Surtees made no mention of someone being offended at the time of the disciplinary but has raised the concept of hurt in in her witness statement and then denied in her oral evidence that the dismissal was due to harassment.
- 130 If Mrs Surtees no longer thinks the situation amounted to harassment, she clearly does not consider that was reasonable grounds for a decision of that nature at the time.
- 131 My conclusion is that there were no reasonable grounds for the decision at the time that the claimant had committed sexual harassment or indeed any harassment, whether as defined in the Equality Act or pursuant to some more general idea of the concept. There was no evidence (apart from Grace who never saw them) to indicate

anyone took offence at the photographs. Mrs Surtees assumed the mere taking of photographs without consent of a woman was in itself harassment, which is not the case, and she did not consider the actual impact of the photographs.

At that time the belief was formed the respondent had carried out a reasonable investigation,

132 There is no issue with the investigation. The facts were largely known. An investigation does not have to be perfect. The issue in this case was the conclusion that the events found to have occurred could be harassment.

Had the respondent otherwise acted in a procedurally fair manner?

133 The claimant argued that the respondent had failed to consider the mitigating circumstances. The conduct was entirely out of character. The claimant had a good record with the respondent. The claimant's colleagues defended the claimant and said he had never shown inappropriate behaviour towards them at any time and the respondent failed to take account of the catastrophic impact of dismissal on the claimant, his finances, visa and family life. The claimant argued that the respondent failed to have regard to the claimant's length of service and clear personal record.

134 There was little evidence about this. I found a reference to consideration of a lesser sanction in the appeal notes of the meeting between Mrs Surtees and Mr Potter but there is no indication that Mrs Surtees took into account the claimant's previous good record or the impact of dismissal upon him. On balance does not seem, from the evidence, that Mrs Surtees did consider mitigation as required by the case of Britobabapulle.

135 To the extent the respondent argues that the appeal cured any prior defects, as I will explain, the issue is a substantive one about the reason for dismissal and apart from the question of mitigation, not a matter of procedure.

Was dismissal within the range of reasonable responses.

136 The claimant was not guilty of harassment as such. Rather, he had taken two photographs of a female employee, M, without her consent both of which were not in any way sexual. He had shared those photographs to a very limited degree. He had not commented on M when doing so. To his knowledge, his colleague had said silly things but nothing hostile or likely to be offensive, degrading or humiliating in his comments about M. The claimant had clearly expressed regret. In those circumstances, dismissal is outside the range of reasonable responses.

137 The respondent did not produce any training materials indicating that employees had been told that this sort of action (or indeed anything similar) was harassment. On its face, taking two photos of a colleague and sharing them with a small audience is not something that any reasonable employer would treat as grounds for dismissal.

138 I have looked at this in several ways to see if there is another way in which it would still fall within the range of reasonable responses. I considered the other disciplinary matters which were said to be relevant in the light of the respondent's submissions. Recording people does not necessarily or clearly encompass photographs. The claimant tried to raise this with Mrs Surtees, but she seemed to miss the point of the comment, which is where potentially the claimant's language could have been a problem. However, this was not relied upon by Mrs Surtees as the reason for dismissal.

139 The respect policy is a very wide ranging concept and far from clear so that employees would not know to what it applied. While an admirable policy, it is too vague

to meet the ACAS requirement for clarity so as to say a breach of respect is gross misconduct. Clearly employers can reasonably dismiss for gross misconduct when actions are obviously very serious even if they have not been flagged as potentially gross misconduct. That is accepted. However, the employee should be able to recognise that the conduct in question is the sort of thing that would be gross misconduct. I cannot place the taking of two photographs and sharing them with a small audience when there is nothing offensive about the photos as meeting that test.

140 The explanation given by Mrs Surtees that she thought the claimant regretted having been caught rather than regretting the incident is incomprehensible. The claimant had no previous disciplinary record. The additional explanation that Mrs Surtees could not be sure this would not happen again as the claimant appeared not to recognise the seriousness of his actions was in effect an objection to the claimant trying to point out that his actions were not necessarily harassment, which in fact was an entirely reasonable assertion. To hold him responsible for trying to defend his actions is not a fair disciplinary process.

141 The claimant argued that the respondent had failed to differentiate between the sanction appropriate as between a male employee who made comments about the photos taken by the claimant to other colleagues and the conduct of the claimant in taking photos, which was different. There is some evidence suggesting that there was a conflation of the two situations. The assertion made by Mrs Surtees that the investigation showed that the intention of taking the photographs was to discuss the person's appearance, was something I simply could not locate within the investigation.

142 I have considered all the submissions made by the respondent. I was told that the respondent's brand placed great emphasis on data and privacy and the issue of consent. As I understand it the respondent's counsel suggested this matter was so important to the respondent group that it was a justification for dismissal. There was no evidence from the respondent's witnesses to support this despite the fact that I had offered both parties the opportunity to ask supplementary questions. It was a point which was only put to the claimant in cross examination. However, this submission requires me to make findings of fact about the significance of this to the respondent. Without proper evidence on the point, I do not believe it is a matter which I can take into consideration.

143 I have been referred to the appeal, largely because the claimant argued that the appeal was a rubber stamping effort and not a genuine one. The appeal officer's explanation for concluding there had been harassment was to refer to what he termed, "*witnesses to the case who were interviewed*" who stated: "*they had been made to feel uncomfortable by the sharing of the photos and that they found it an invasion of privacy and also objectifying behaviour*". In fact, he was referring to comments made by Grace, someone who was not a witness as such. It is difficult to know why Grace was interviewed in the investigation, as her only role was to suggest that Hana report the matter that concerned her. She could not shed any light on events herself. In contrast, Laura, the other member of the WhatsApp group, was not interviewed despite the fact that she was a potential witness. In short, to the extent the appeal officer also concluded there had been harassment, this does not in my view overcome the problems with the substantive decision made by Mrs Surtees, as this decision was also confused.

144 In summary, every way I considered this dismissal, it falls outside the range of reasonable responses test.

Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant?

145 For all the reasons I have described above, I do not think that the respondent acted reasonably in treating the events in question as a sufficient reason to dismiss the claimant. The dismissing officer described the conduct as harassment and then withdrew that in this hearing. The conduct in question did not amount to harassment. It was not a reasonable conclusion that it did. The dismissing officer regarded the claimant's efforts to show he had not committed harassment during the disciplinary hearing (which is held precisely for the purpose of enabling the accused to defend their actions), as an indication he did not appreciate the seriousness of his actions although he had taken time to read and research the policies and apologised profusely and spontaneously throughout. The dismissing officer did not consider mitigation in any meaningful way.

#### Contributory Fault

146 I was asked by the respondent to consider the question of contributory fault in the event that the dismissal was found to be unfair.

142 There are four questions I must ask myself: what was the conduct said to be contributory fault; irrespective of the employer's view, was that conduct blameworthy; did that blameworthy conduct cause or contribute to the dismissal; if yes, to what extent is it just and equitable to reduce the award - Steen v ASP Packaging Ltd (2014) ICR 56.

143 The respondent made submissions arguing that there were four separate offences being taking the two photographs and sharing them each once each, thus in total, twice. I accept the argument that their conduct said to be blameworthy was the taking of two photographs and sharing both of them. I think it is unrealistic to treat each one of those as a separate offence. That was not the way the respondent regarded the matter at any time. However, the two photographs and the sharing of them is the conduct I have to consider. The claimant's position was that there should be no deduction.

144 Was the conduct blameworthy? The conduct was something which should not have happened as the claimant accepted, and thus it is blameworthy.

145 Did that conduct contribute towards the dismissal? Clearly that was the conduct which was considered the basis for the dismissal.

146 To what extent should the award be reduced and is it just and equitable to reduce the award? The respondent argues that the matter was so serious that there should be 100% deduction.

147 I have read the judgement of the Honourable Mr Justice Langstaff in the case of Steen v ASP Packaging Limited carefully. On this point he says it is not a question of what the employer thought but it is for the employment tribunal to evaluate. The tribunal is not constrained in the least when doing so by the employer's view of the wrongfulness of the conduct. It is the Tribunal's view alone which matters.

148 Question 4 is to what extent the award should be reduced and to what extent is it just and equitable to reduce it. There is a difference between the wording in section 122 and section 123(6). Section 122 applies to the basic award and for that I have to consider whether it is just and equitable to reduce the amount of the basic award. A similar question which is very likely, but not inevitably, going to lead to the same conclusion is to what extent the compensatory award should be reduced.

149 While I consider there was blameworthy conduct which did have a contribution towards the dismissal, the conduct was not harassment as assumed by the respondent. It was arguably an invasion of privacy of M but this is a world in which



there are cameras in all sorts of locations. Despite the best efforts of the information commissioner and the data privacy legislation, we all live with cameras around us every day. The photographs were not intrusive. They were not sexual. There was no factual evidence to demonstrate that the claimant took them in order to discuss M's appearance. What is clear is that the claimant took the photographs to demonstrate that M was at the office when Thomas was not. The fact is the claimant took two photographs of a female employee without her permission and sent one to a small group and then a later one to Thomas. The first is not remotely sexual and does, in addition to showing the female, also show the sushi that the group and joked about never being able to find at lunch. The second we have not seen but believe it to be a distance photo, showing the same female in a in a non-sexual way in a relaxed work setting. That was a stupid form of engagement with Thomas's teenage style crush, but it was not serious misconduct.

150 In all the circumstances I consider that a 10% reduction should be applied to the compensatory award. The Honourable Mr Justice Langstaff suggests that it's likely but not inevitable that the same consideration would apply to the question of whether it is just and equitable to reduce the basic award. Having contemplated that, I have decided it would be just and equitable to apply that deduction to both awards.

151 All other aspects of remedy will be considered at a future hearing.

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Employment Judge N Walker

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13 June 2024

Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

18 June 2024

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FOR THE TRIBUNAL OFFICE