EMPLOYMENT TRIBUNALS

Claimant: Mr I Koh

Respondent: HILTI (Great Britain) Limited

Heard at: Manchester (by CVP) **On:** 25 and 26 June 2024

Before: Employment Judge McDonald
(sitting alone)

REPRESENTATION:

Claimant: Mr R Downey, Counsel
Respondent: Mr S Proffitt, Counsel

JUDGMENT having been sent to the parties on 5 July 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This was the claimant's claim arising from his dismissal by the respondent for gross misconduct on 22 February 2023. The hearing took place on 25 and 26 June 2024. The claimant was represented by Mr Downey of counsel on a direct access basis. The respondent was represented by Mr Proffit of counsel.

2. I gave oral judgment on the afternoon of 26 June 2024 dismissing the claimant's complaints of unfair dismissal and wrongful dismissal. The claimant had withdrawn his complaint relating to holiday pay so I also dismissed that complaint in my judgment.

3. The judgment was sent to the parties on 5 July 2024. The respondent requested written reasons within the 14 day time limit for doing so. I apologise to the parties that other judicial work and my absence from the Tribunal for various reasons has led to a delay in providing these written reasons.

4. These written reasons are not a verbatim transcript of my oral reasons. The substance of my findings, decision and my reasons for them remain the same. I have in some places re-ordered the text and changed the wording to clarify it. I have also set out some matters more fully than I did in giving oral reasons. That applies particularly to the background to the preliminary issue, the account of what happened at the hearing, the background facts and the relevant law. Where there are differences, these written reasons take precedence over the oral reasons.

The issues in the case

5. The issues in the case had been identified by Employment Judge Benson at the preliminary hearing on 16 November 2023 and set out in a List of Issues which I have annexed to these reasons. Mr Downey confirmed during the final hearing that after discussing the claim with Mr Proffitt it was accepted that the claim for unpaid holiday pay could not succeed. The claimant withdrew that complaint. That means the issues I have to decide are the complaints of unfair dismissal and wrongful dismissal and the compensation to be awarded if either or both those complaints succeeded.

The hearing and the evidence

6. The hearing took place remotely by CVP videolink. As I explain below, the claimant attended throughout from Singapore but did not give oral evidence.

7. There was an agreed bundle of documents of 333 pages.

8. In terms of witness evidence, I had a written witness statement from the claimant. For the respondent I heard evidence from 3 witnesses. Mr Akash Chawla ("Mr Chawla") was employed as a Trade Manager, Interior Finishes and was the investigating officer. Mr Daniel Henley ("Mr Henley") was employed as a Trade Manager, Building Construction and made the decision to dismiss the claimant. Mrs Samantha Lane ("Mrs Lane") was employed as Channel Director and heard the claimant's appeal against dismissal. Each provided a written witness statement. Each also gave oral evidence which included being cross examined by Mr Downey.

9. I heard evidence until the middle of the morning of Day 2 of the hearing. I heard oral submissions from Mr Downey and Mr Proffitt at the end of the morning of Day 2 of the hearing. Having deliberated, I gave oral judgment towards the end of the afternoon of Day 2.

Preliminary Matter – the impact of the claimant being resident in Singapore

10. There is one preliminary matter which I need to deal with, which is the claimant's evidence. He did not give oral evidence at this hearing. The reason for that is that the claimant is resident in, and a citizen of, Singapore.

11. Singapore is a "red list" country for the purposes of the Foreign and Commonwealth Office list of countries whose residents can give evidence from abroad remotely in Tribunal hearings. Singapore will only give consent for evidence to be given remotely if the Tribunal provides an undertaking that the person in

question shall not be subjected to any penalty or liability or otherwise be prejudiced in law by reason of that person's failure to attend as requested.

12. This final hearing of the case was originally due to take place on 20 September 2023. On 3 August 2023 the claimant wrote to the Tribunal to ask for permission to give evidence remotely from Singapore. On the Regional Employment Judge's direction, the Tribunal responded to say that it could not give the undertaking required by Singapore because the Employment Tribunal Rules 2013 provide that if a party fails to attend their claim may be dismissed. The hearing on 20 September 2023 was postponed to a date when the claimant was able to attend in person or remotely from within the Tribunal's jurisdiction.

13. The claimant requested a case management preliminary hearing to discuss this issue. His view was that it was disproportionate to require him to attend the final hearing in person if he could participate in the hearing (with the exception of giving oral evidence) from Singapore. That resulted in the preliminary hearing conducted by Employment Judge Benson on 16 November 2023. Mr Downey represented the claimant at that hearing.

14. At that preliminary hearing, Employment Judge Benson ordered the claimant to notify the respondent and the Tribunal by 14 February 2024 whether he intended to give evidence remotely by way of video and if so, which country he would be located in when giving the evidence. Alternatively, the claimant was to notify the Tribunal and the respondent by that date if he had decided not to give evidence in person and instead rely on his written statement.

15. On 14 February 2024 the claimant confirmed in writing that he would not be giving evidence in person and would be relying on his written statement. His explanation was that the cost of travelling to attend would be highly challenging. As I have said, he attended the hearing throughout remotely by video from Singapore.

16. I heard submissions from Mr Downey and Mr Proffitt about the weight I should give to the claimant's written witness statement. A tribunal will usually give less weight to the evidence of a witness who gives evidence by written statement only when compared to that of a witness who gives oral evidence and can be cross examined on that evidence. That is not an invariable rule, however. Mr Downey's submission was that I should give the claimant's written statement greater weight in this case because the claimant had effectively been prevented from giving oral evidence rather than choosing not to attend to do so. Mr Proffitt in response said that this was a matter where the claimant had chosen not to attend. He cited the availability of nearby countries on the "green list" which the claimant could have travelled to in order to give his evidence remotely.

17. On balance I prefer Mr Proffitt's submissions on this point. I accept that the "red list" rule did place a hurdle in the way of the claimant attending. However, it does seem to me that there were steps which he could have taken to attend and give evidence, particularly given the timescale since this issue was raised. As Mr Proffitt submitted, that would not necessarily involve the claimant in the expense of flying to England to give evidence. He could instead have travelled to a much nearer "green list" country to do so. I do not find there were reasons for giving the claimant's written

evidence more weight than I would give to that of any witness who chose not to attend to give oral evidence.

18. In general, that meant that in deciding any disputed matters which involved evaluating the claimant's evidence against that of the respondent's witnesses, I have preferred the respondent's witnesses' evidence. That is because they did attend to give evidence in person and were subject to cross examination by Mr Downey. In the event, there were no core factual disputes (or no significant such disputes) which involved me having to carry out that balancing exercise.

The Relevant Law

Unfair Dismissal

The relevant legal test for liability

19. S.94 Employment Rights Act 1996 ("ERA") gives an employee a right not to be unfairly dismissed by their employer.

20. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or, if more than one, the principal reason) for dismissal is one of the potentially fair reasons set out in s.98(2) of ERA or some other substantial reason justifying dismissal. The respondent says the potentially fair reason in this case relates to the claimant's conduct (s.98(2)(b)).

21. If the respondent shows that there is a potentially fair reason for dismissal, the general test of fairness in section 98(4) will apply:

> **"98(4) Where the employer has fulfilled the requirements of sub-section (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".**

22. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303.** Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

23. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer genuinely believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

24. If a genuine belief is established, the band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.** The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

25. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: **A v B [2003] IRLR 405**.

26. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

27. Tribunals should not consider procedural fairness separately from other issues arising. They should consider the procedural issues together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss **Taylor v OCS Group Ltd [2006] IRLR 613.**

28. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee (instead of imposing a lesser sanction) was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

Remedy if a dismissal is found to be unfair

29. If a Tribunal finds that an employee has been unfairly dismissed, s.118(1) ERA says that:

> **"Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of —**
>
> **(a) a basic award (calculated in accordance with sections 119 to 122 and 126), and**
>
> **(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).**"

30. The basic award is calculated based on a week's pay, length of service and the age of the claimant.

31. The compensatory award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

32. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee could have been dismissed at a later date or if a proper procedure had been followed (the so-called **Polkey** reduction).

33. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA). To justify a reduction the action must be culpable or blameworthy conduct.

34. Where the Tribunal considers that any conduct of the claimant 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 (s122(2) ERA).

Wrongful dismissal

35. A claim for wrongful dismissal is a claim that the employee has been dismissed in breach of their contract of employment. The relevant law was summarised by the EAT in **Seyi Omooba v Michael Garrett Associates Ltd (T/A Global Artists), Leicester Theatre Trust Ltd [2024] EAT 30**. Where an employee has acted in repudiatory breach of contract, such that it would be open to the employer to accept that repudiation and terminate the employment summarily, that will provide a defence to a claim for damages wrongful dismissal (that is the case even where the employer was not aware of the repudiatory conduct at the time of the dismissal) (**Boston Deep Sea Fishing Co v Ansell (1988) 39 ChD 339**).

36. In **Briscoe v Lubrizol Ltd 2002 IRLR 607, CA**, the Court of Appeal approved the test set out in **Neary and anor v Dean of Westminster 1999 IRLR 288**, in which Lord Jauncey asserted that the conduct 'must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment'. The Court of Appeal in **Briscoe** stressed that the employee's conduct should be viewed objectively, and so an employee can repudiate the contract even without an intention to do so.

37. It is for the Tribunal to make its own determination whether objectively there has been such a breach. The "band of reasonable responses" test does not apply so the Tribunal may substitute its own view for that of the employer. Whether there has been a repudiatory breach is a question of fact for the Tribunal. It is highly context specific per Singh LJ paragraph 61 of **London Borough of Lambeth v Agoreyo [2019] EWCA Civ 322, [2019] ICR 1572)** citing **Tullett Prebon plc v BGC Brokers LP [2011] EWCA Civ 131**.

The definition of harassment in the Equality Act 2010.

38. This is not a case involving a complaint of harassment in breach of the Equality Act 2010 by the claimant. However, it was part of the claimant's case that he should not have been dismissed because his conduct did not meet the definition of harassment in s.26 of the Equality Act 2010. That definition is that:

> **(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 referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

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

(a) the perception of B;

(b) the other circumstances of the case;

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

39. The "relevant protected characteristics" in s.26(5) include "sex".

Findings of Facts

40. I set out below my findings of fact based on the evidence I heard and read. Where relevant I have referred to the submissions on the evidence made by Mr Downey and Mr Proffitt.

Background facts

41. The respondent is part of a large multi-national group of companies. It operates in the construction industry. It employs around 1000 employees in Great Britain.

42. The claimant was employed in the respondent's group of companies from 1 July 2016. From 1 August 2018 he was employed by the respondent as a Regional Manager in North-West England and North Wales. He was summarily dismissal for gross misconduct on 22 February 2023. That followed a disciplinary procedure which the respondent says was a fair one.

43. The incident which led to the disciplinary proceedings and, ultimately, to the claimant's dismissal, happened on 16 January 2023. It involved the claimant sending a message with a link to a YouTube video to a female account manager. I will refer

to that account manager as “the complainant”. She was part of a team who reported to the claimant.

44. The YouTube video is a parody video for a product for fixing dry walls. The voiceover and the title refer to “glory hole repair”. The video itself is one minute and 37 seconds long. The voiceover makes numerous references to male genitalia, makes one metaphorical allusion to oral sex and refers to a woman portrayed on the screen as a “slut”. There was no dispute that the claimant had sent that link to the complainant. He did so at the end of a 52-minute Teams meeting which they had held to prepare for a meeting with a client. As I have said, the link was sent on 16 January 2023. The complainant’s immediate response to the message was 2 laughing emojis.

45. I find that the complainant did tell the claimant that she was happy to be sent the link even though the claimant had said that some might find it crude. However, I also find that she would have had no idea what the video to which the link pointed contained when she gave that consent. The nature of its content and how (and in what way) it was “crude” was not obvious from the title of the video.

The respondent’s policies and workplace culture

46. The context for this case then is what the respondent says is an inappropriate video sent by the claimant to an area manager for whom he was the line manager.

47. The claimant in his witness statement said that there was a culture of risqué banter at the respondent. That was contradicted by the evidence given by the respondent’s witnesses, specifically Mr Henley and Mrs Lane. Their evidence on that point was not challenged in cross examination. Given the failure to challenge that evidence on cross examination, and the more limited weight I can give to the claimant's witness, I accept Mr Proffitt’s submission that there was no evidence to support a finding that the respondent allowed risqué banter in its workplace. To the contrary, I find based on its policies and the evidence I heard that it held high standards of required conduct of its employees. Those were reflected in a number of policies, in particular the respondent’s Code of Conduct, the Dignity and Respect at Work policy and its disciplinary procedure.

48. The disciplinary procedure included as examples of gross misconduct indecent, offensive or immoral behaviour; telephone, computer and email misuse (including personal usage); and [relevant to this case] access, downloading or transmission of any pornographic or discriminatory or otherwise offensive material.

49. The disciplinary procedure also included under the definition of gross misconduct “violations of the rules outlined in the corporate governance Code of Conduct”. That Code of Conduct, of relevance to this case. includes the statements that the respondent “do not use derogatory comments, slurs, inappropriate jokes, stereotypes and insults. We do not share pictures, cartoons or electronic messages that are degrading to a colleague or customer”.

50. The respondent also has a Dignity and Respect at Work policy. One of the issues raised in this case is whether the misconduct the claimant was alleged to have committed amounted to “harassment” and whether it needed to be for his

dismissal to be fair. The claimant argued that his conduct did not amount to "harassment". Of relevance to that, the Dignity and Respect at Work policy is expressed to "encompass[ing] Anti Bullying and Harassment". It includes sections headed "What is harassment?" and "What is bullying?". They are preceded by a section called "What is dignity and respect at work?".

51. The definition of "harassment" used in the section headed "What is Harassment" very closes mirrors that in the Equality Act 2010, placing a focus on conduct which is unwanted and conduct which, to adopt the terms used in relation to harassment under the Equality Act 2010, has a harassing purpose or harassing effect. It is made clear that harassment will almost certainly amount to a disciplinary offence, the expected penalty for which is dismissal for gross misconduct. The examples given include:

- Using e-mail, text, social media, or the internet for the purpose of bullying or making abusive or offensive remarks related to a person's race, age, gender, disability, sexual orientation etc. or to send pornography or inflammatory literature.

52. The section "What is bullying" says that "Bullying is offensive, intimidating, malicious or insulting behaviour involving the misuse of power that can make a person feel vulnerable, upset, humiliated, undermined or threatened."

<u>The complaint about the link</u>

53. The complainant did not raise a complaint about the link and the video which it led to on 16 January 2023. Her initial response was to send two "roll on the floor" laughing emojis. She did so 2 minutes after the video was sent to her. I did not hear evidence from the complainant. Her evidence to the investigating officer, Mr Chawla, was that she did not watch all of the video only the first few seconds before responding with emojis.

54. I find that the complainant did not raise an issue about the link until 6 February 2023. At that point I find she contacted an HR business partner to raise issues about the claimant's management of her generally. That included the way the claimant had managed her return to work after a period of sickness absence. It also included her concerns about the link. The complainant did not allege that she had been harassed by the claimant, but she did say that the video that she had been sent via the link crossed the line and was inappropriate.

55. The claimant says that the complainant's delay in raising concerns about the link is significant. He says it points to the reality of what was happening. In broad terms, the claimant says that the complainant had weaponised what was a jocular exchange between colleagues because the claimant was blocking the complainant's desired transfer and/or promotion to another role outside his team. By way of context, the claimant had managed the complainant since January 2022. I find the claimant did not rate the complainant's performance very highly and there had been other issues between them.

<u>The investigation process</u>

56. The complainant's complaint was dealt with as a grievance. Mr Chawla was appointed to carry out an investigation into the matters she had raised. His first step was to hold a call with the claimant on 8 February 2023 at which the claimant was suspended. Mr Chawla did that by following a script which had been provided to him by HR. That script explained that a complaint had been raised against the claimant; that the respondent could not share details at that point; that an investigation was needed and that the claimant would be suspended on full pay to allow the investigation to be carried out. The suspension was confirmed by letter emailed the same day. It emphasised that at this stage there was an investigation only and that the respondent aimed to send out a letter to the claimant in the next couple of days summarising the information the respondent wanted to discuss with him. The letter did make clear that one potential outcome of the investigation was a decision to convene a formal disciplinary hearing.

57. On 9 February 2023 Mr Chawla held a meeting with the complainant at which he discussed the broad range of issues which she had raised regarding the claimant's management of her. He was supported by Amy Everitt, an Employee Relations partner. They also met with 3 other members of the claimant's team over the next few days. They discussed not only the link but the wider concerns about the claimant's management of the team raised by the complainant.

58. On 14 February 2023 the claimant was invited to a meeting with Mr Chawla on the 16 February 2023. Attached to the letter was a summarised version of the complainant's complaint. The 3 topics for discussion were the claimant's approach to performance managing and developing team members; his handling of sick leave; and "sharing of inappropriate material via Company equipment". The latter heading referred to sharing the link on 16 January 2023 and included a copy of the link.

59. On 16 February 2023 Mr Chawla and Ms Everitt interviewed the claimant by Teams. The notes of that interview were in the bundle. At that meeting the claimant shared a PowerPoint which set out his response to numerous matters. When it comes to the incident leading to his dismissal, the claimant shared a PowerPoint slide with extracts from the definition of harassment with each of the protected characteristics struck through and each of the examples of kinds of harassment struck through. He did the same in relation to the definition of "bullying". I find that the claimant's position in essence was that he should only be subjected to disciplinary action if his conduct had harassed the complainant and he did not accept that the content of the video amounted to harassment as defined in the Dignity and Respect at Work policy. He also did not accept that the content of the video that he shared was offensive to the claimant because he did not regard it as "targeted" at her. I find that at that meeting he also raised his concerns that the complainant was not performing at the level expected and that the grievance process was being abused to secure a move away from his team.

60. On 16 February 2023 Mr Chawla prepared a report on his investigation. He concluded that the video/link was in breach of the respondent's Dignity and Respect at Work policy on multiple points and recommended that disciplinary action should be initiated against the claimant. He also concluded, having spoken to the claimant,

that the claimant had no appreciation of the essence and reason why the policy existed.

61. I find Mr Chawla's focus was on the claimant's behaviour in sending the link and his appreciation of the ramifications of doing so, not on the impact of sending the link on the complainant. He did not, in other words, focus on whether the link had a harassing effect on the complainant in the Equality Act 2010 sense. Mr Chawla accepted in his oral evidence that he did not re-interview the complainant. That was even though the claimant had raised concerns about her motivation for raising the issues which resulted in his being investigated more than 21 days after the link had been sent on 16 January.

The Disciplinary Hearing

62. Mr Chawla's recommendation resulted in a disciplinary hearing chaired by Mr Henley on 22 February 2023. The claimant was invited to it by a letter emailed to him by Mr Henley on 20 February 2023.

63. It is accepted that the claimant was not provided with a copy of the interview notes from the meeting which Mr Chawla carried out with the complainant. The explanation given for that was concerns about protecting the confidentiality of the complainant. I do find that the claimant was in no doubt about which incident the complaint was being brought about, and I do not find that there was any impediment to him responding to that complaint because of a failure to supply the notes of the interview conducted by Mr Chawla. I also find that it is clear that the claimant was aware who had raised the complaint against him, enabling him to raise his concerns about the complainant's motivation for making it.

64. I find that Mr Henley took the view that the video was completely inappropriate and not in accordance with the behaviour expected by the respondent from a manager. I find that was in his view particularly the case where a male manager was sending the video to a female line report.

65. For the claimant, Mr Downey criticised the actions of Mr Henley at that disciplinary hearing. Specifically, it was said on behalf of the claimant that he dismissed the suggestion that the complainant's motivation in bringing the complaint might be malicious, or at least motivated by her desire to obtain a promotion or move away from the claimant's team which the claimant assessment of her performance as unacceptable was blocking. Mr Henley dismissed that as a separate matter which was not relevant. I find he did so because in his view the fundamental issue he was deciding was whether the claimant's conduct in sending the video was gross misconduct.

66. I find that at the disciplinary hearing Mr Henley took the view that although the complainant had initially responded to the video by sending two laughing emojis, that did not preclude her from taking the view later that the video was inappropriate. The way that he expressed it to the claimant at the meeting was that people were entitled to change their mind. Mr Henley had seen the interview with the complainant during which she had explained that she had on reflection, and after sharing the video with others, taken the view that it was wholly inappropriate.

67. I find Mr Henley took the view he did not need to be satisfied that the conduct met the definition of harassment for it to amount to gross misconduct. That meant that his focus was on assessing the claimant's conduct, not the impact of the video on the complainant and whether, in particular, it had a harassing effect as defined in the Equality Act 2010 and/or the Dignity and Respect at Work policy.

The decision to dismiss

68. Mr Henley's decision was to dismiss the claimant. His reasons for doing so were set out in his letter of 22 February 2023.

69. The content of that letter is important because Mr Downey's submission was that dismissal in this case was unfair because the respondent had concluded that the claimant had harassed the complainant when it was not entitled to so conclude. Specifically, a finding of harassment required the respondent to be satisfied (absent a harassing purpose) that the conduct was unwanted and had a harassing effect. Evidence of the impact on the claimant was key. The respondent, he submitted, had reached the conclusion that there was harassment without Mr Henley hearing evidence at the disciplinary hearing from the complainant or giving the claimant an opportunity to see the evidence that the complainant had given during the investigation.

70. For the respondent, Mr Proffitt submitted that the dismissal did not rest on a conclusion that the claimant had harassed the complainant. The dismissal letter states that the gross misconduct identified was:

> "On 16 January 2023, you shared via Teams message, a link to a team member which contained offensive material, including references to the degradation of females and inappropriate language not conducive of a professional and respectful working environment".

71. There is in that primary finding no reference to harassment. However, Mr Henley's letter went on to summarise the basis of his finding in 3 bullet points. The first bullet point said that the claimant had "breached the HILTI Code of Conduct, the Dignity and Respect at Work policy and the disciplinary procedure by sending a video to a team member that was indecent, offensive, and amounted to harassment of an individual". The 2 further bullet points recorded that the claimant had shown a serious lack of emotional intelligence throughout the process, that during the meeting Mr Henley had given him several opportunities to reflect on his behaviour but he was unable to do that, and that the claimant had not shown any remorse or understanding of why the video in question could be considered offensive.

72. I find that Mr Henley's findings were consistent with the evidence including the notes of the disciplinary hearing. I find that throughout the disciplinary process the claimant did not appear to understand why the video was offensive. Neither did he say that he would not have done the same again. Instead, when he was asked by Mr Henley whether he would send the link/video again he in essence said that he would send it to those team members who could take a joke, i.e. not the complainant. I do find that the reference in his supporting bullet point to "harassing

an individual" did muddy the waters as to the basis for the dismissal, specifically whether it was for an act of harassment or for the conduct in sending the offensive material (regardless of its effect on the complainant).

The Appeal against dismissal

73. The claimant appealed against the dismissal on 24 February 2023. His appeal was heard by Mrs Lane at a hearing on 6 March 2023. She rejected the appeal and upheld the decision to dismiss by an appeal outcome letter dated 14 March 2023.

74. The claimant had set out his grounds for appeal in a lengthy document. I find his central point was that his sharing of the link did not meet the definition of harassment. He argued that since the use of the word "slut" in the video was directed towards the woman in the video, "Martha", it could not amount to sexual or sex-related harassment. That was, he argued, because the word was not directed at the claimant nor at "all women" but only at Martha. He said, more generally, that the video could not be harassment because it was not "targeted" at the claimant. He also argued that the claimant had consented to being sent the link. He made the point that the claimant's initial reaction was to send laughing emojis. He reiterated his argument that the claimant had only changed her mind because she wanted to use the grievance process to engineer a move away from his team.

75. Mr Downey's submission was that the appeal carried out by Mrs Lane was a rubberstamping exercise. Having considered the notes of the appeal hearing and the appeal outcome letter, I do not find that to be the case. I find that Mrs Lane did consider the points being put forward by the claimant and reached her own decision rather than simply "rubber stamping" the decision to dismiss.

76. I do find that, as with Mr Henley's decision letter, Mrs Lane's appeal outcome letter muddied the waters by saying that the respondent "does consider harassment to have taken place" but going on to say that the gross misconduct was:

- Indecent, offensive or immoral behaviour.
- Telephone, computer and e-mail misuse, including personal usage, hacking and/or the access, downloading or transmission of any pornographic or discriminatory or **otherwise offensive material** [Mrs Lane's highlighting in her letter].
- Violation of the rules outlined in the Corporate Governance Code of Conduct .

Conclusions

Unfair dismissal

77. Turning to the issues in the case and the decisions I need to make, when it comes to the unfair dismissal the first question is whether or not the respondent has shown the reason or principal reason for dismissal. The respondent relies on the claimant's misconduct. As Mr Proffitt submitted, that was not challenged during the hearing and I do find that the potentially fair reason in this case for dismissal was misconduct.

78. Turning to points 1.3.1 through to 1.3.5 in the List of Issues, the next question is whether, if the reason was misconduct, the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. When it comes to this it is important to clarify what the relevant misconduct is.

79. For the claimant, Mr Downey submitted that the misconduct was harassment of the complainant. Mr Proffitt submitted that this was a reinterpretation of the misconduct which had formed the basis for the claimant's dismissal. He pointed out (and I accept) that the invitation to the disciplinary meeting and the headline conclusion from Mr Henley's letter made clear that the misconduct was "sharing a link to a team member which contained offensive material, including references to the degradation of females and inappropriate language not conducive of a professional and respectful working environment". The focus was on the actions of the claimant i.e. his sending the video to the complainant, rather than on whether there was an act of harassment.

80. This is important because I accept Mr Downey's submission that if the allegation was that the claimant had harassed the complainant there would necessarily have to have been a focus on whether there was harassment as defined in the Dignity at Work policy. That in turn would mean a necessary focus on whether the conduct was unwanted and also whether it had a harassing effect. Had the misconduct which led to the dismissal been alleged to be harassing the claimant, I accept that there would have been fundamental flaws in the process. Specifically, as I have said in my findings, I find the focus in Mr Henley's decision was on the claimant's conduct in sharing the link. It does not seem to me that the impact on the complainant of the claimant sending the link to her (i.e. whether it had a harassing effect) was directly considered by Mr Henley at the disciplinary hearing.

81. I do find that the waters were muddied by the references in Mr Henley and Mrs Lane's decision to harassment. I accept that there is something in what Mr Downey says that the reasons for the dismissal did at times appear to conflate the misconduct in sending an inappropriate video with the claimant having harassed the complainant. In my view, however, on a fair reading of the letters, the misconduct for which the claimant was dismissed was the "sharing a video containing offensive material etc." which is the headline reason for dismissal in Mr Henley's letter. On balance I accept Mr Proffitt's submission that the respondent did not have to be satisfied that the claimant had harassed the claimant in order for the dismissal to be fair.

82. For the avoidance of doubt, I do not accept Mr Downey's submission that there was a difference between sending the link and sending the video – it seems to me that they were one and the same.

83. As I have said, my finding is that the relevant misconduct was the claimant's conduct in sending offensive material to a team member. It is the fairness of a dismissal for that reasons I need to assess. As to that I find, when it comes to Mr Henley's decision, that he did genuinely believe that the claimant had committed the misconduct. There was no dispute that the video itself had been sent. I find that there were reasonable grounds for his finding that the video was offensive and derogatory to women. I do not accept the claimant's submissions as set out in his

appeal against dismissal that because there was no specific reference to the complainant that the video was somehow not derogatory to her as a woman. It seems to me that that shows (as Mr Henley found) a distinct lack of emotional intelligence and understanding which could be expected of a manager.

84. I find that Mr Henley genuinely believed the claimant had committed gross misconduct and that there were reasonable grounds for that belief. I also find that the respondent had carried out a reasonable investigation. As I have said, I find that the misconduct in issue was the claimant's conduct in sending the link rather than an allegation of harassment. In those circumstances it seems to me that the investigation and subsequent disciplinary procedure carried out was well within the band of reasonable responses. There was no suggestion that the claimant did not know what misconduct he was being accused of and he had an opportunity (which he took) to respond to the allegations being made against him. Other than the failure to call the complainant or allow access to her evidence there was no suggestion from Mr Downey that there was an unfairness in the procedure followed, for example in terms of the timeline or the process followed at the various hearings.

85. There was a submission by Mr Downey that if there were two employees who were exchanging material then it was not for the employer to intervene and decide that conduct was misconduct. It does not seem to me that that can be the case. I accept Mr Proffitt's submission that an employer is entitled to set standards, which the respondent in this case had done via its Code of Conduct, and then to enforce them where it finds that those have been breached. It seems to me that that is distinct matter from whether there is a complaint about alleged misconduct. However the misconduct comes to light, an employer is entitled to enforce its disciplinary procedure and conduct.

86. In terms of the sanction imposed, Mr Downey submitted that the sanction was too harsh. In terms of arguments to support that, the primary one was that it could not be gross misconduct for an employee to share material which is in the public domain. I prefer Mr Proffitt's submission on that point. I accept that there is plenty of material in the public domain which it would be wholly inappropriate for employees to share in a work context. I accept the submission that that applies particularly to a male manager sharing material with a line report when the material alludes to sexual acts and refers to a female character in the video as a "slut". I am satisfied that in deciding the appropriate sanction Mr Henley had taken into account not only the conduct but also the claimant's lack of understanding or remorse for the behaviour. I find that it was entirely reasonable for Mr Henley to take the view that given the claimant's lack of insight the respondent could not be confident that the claimant would not act in a similar way and break its Code of Conduct again. As Mr Proffitt submitted, in addition to the requirement to uphold its own Code of Conduct, that caused a potential risk to the respondent that it could in future face a harassment claim from an employee in circumstances where it had been alerted to conduct by the claimant which might breach the Equality Act 2010 but had not taken action in relation to it.

87. In those circumstances my finding is that the decision to dismiss in this case was a fair decision which was within the band of reasonable responses, and that it followed a procedure which was itself within the band of reasonable responses.

88. The unfair dismissal claim therefore fails and is dismissed.

Unfair Dismissal – Polkey and Contribution

89. My decision that the unfair dismissal complaint fails means that I do not, strictly, need to deal with the issues of remedy arising including **Polkey** and contribution.

90. When it comes to those issues, had I found that the "muddying of the waters" (as I have referred to it) by references to harassment in decision letters had led to the procedure being unfair, the respondent would still in this case have been entitled to summarily dismiss at the same date. That is because it would have been entitled to dismiss for the headline reason set out in Mr Henley's dismissal letter for breach of the claimant's Code of Conduct and disciplinary procedure. That decision would take into account not only the context of the behaviour but also the lack of understanding by the claimant as to why the behaviour was inappropriate and his lack of remorse, as Mr Henley called it. I find that had the employer based its decision to dismiss solely on that without muddying the waters by references to harassment, it would have dismissed at the same time and therefore there would be no difference in the outcome.

91. If I am wrong about either of those, I find that in this case the claimant was guilty of culpable and blameworthy conduct. I accept Mr Proffitt's submission that there is no requirement that such conduct would necessarily be a breach of contract. I do find that a manager sending the video that was sent in this case to a female subordinate is clearly culpable and blameworthy conduct. Had I found the dismissal to be unfair I would have reduced the compensation by 100% both in relation to the compensatory award and in relation to the basic award.

Wrongful Dismissal

92. When it comes to the wrongful dismissal claim, I remind myself the test in **Neary** is whether the conduct so undermined the trust and confidence inherent in the particular contract of employment that the employer should no longer be required to retain the employee. In this case I find that the claimant's conduct did fall into that category. I say that for two reasons. First, I do find that objectively, the content of the video is clearly derogatory to women and inappropriate for a manager to send to a female (or indeed any) line report in a work context. A manager deciding it was appropriate to share with his line report would, I find, undermine the respondent's trust and confidence in that manager. Second, the evidence was that the claimant would do the same again and/or seemed unable to understand what the problem was. His indication when challenged was that he would do the same again (albeit next time he would send it to people who could take a joke). That was despite that behaviour being contrary to the respondent's Code of Conduct and expected standards of behaviour. I find that, viewed objectively, that would so undermine the employer's trust and confidence in that manager that it should no longer be required to retain that employee.

93. As I have said, in reaching that decision I have viewed the claimant's conduct objectively. I accept Mr Proffitt's submission that it is not necessary that the claimant

intended for his conduct to have the repudiatory effect identified in **Neary**. Viewed objectively, in the context of the actions of a male manager in relation to a female subordinate, I do find that the test in **Neary** is met and therefore the employer was entitled to summarily dismiss the claimant.

94. In those circumstances the claim of wrongful dismissal also fails and is dismissed.

Summary

95. All the claimant's complaints fail and are dismissed save for the holiday pay claim which is dismissed on withdrawal.

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Employment Judge McDonald

Date: 14 January 2025

REASONS SENT TO THE PARTIES ON
Date: 21 January 2025

.....
FOR THE TRIBUNAL OFFICE

Annex
List of Issues

1. Unfair dismissal

1.1 Has the respondent shown the reason or principal reason for dismissal? The respondent relies upon the claimant's misconduct.

1.2 Conduct is a potentially fair reason under section 98 Employment Rights Act 1996.

1.3 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

1.3.1 The respondent genuinely believed the claimant had committed misconduct;

1.3.2 there were reasonable grounds for that belief;

1.3.3 at the time the belief was formed the respondent had carried out a reasonable investigation;

1.3.4 the respondent followed a reasonably fair procedure;

1.3.5 dismissal was within the band of reasonable responses.

2. Remedy for unfair dismissal

2.1 Does the claimant wish to be reinstated to their previous employment?

2.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

2.5 What should the terms of the re-engagement order be?

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

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

2.8 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.8.1 What financial losses has the dismissal caused the claimant?

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

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

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

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

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

2.8.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?

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

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

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

2.8.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?

3. Holiday Pay (Working Time Regulations 1998)

3.1 What was the claimant's leave year?

3.2 How much of the leave year had passed when the claimant's employment ended?

3.3 How much leave had accrued for the year by that date?

3.4 How much paid leave had the claimant taken in the year?

3.5 Were any days carried over from previous holiday years?

3.6 How many days remain unpaid?

3.7 What is the relevant daily rate of pay?

4. Wrongful dismissal / Notice pay

4.1 What was the claimant's notice period?

4.2 Was the claimant paid for that notice period?

4.3 If not, can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice?