EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 8002162/2024

Hearing held in Glasgow on 18 and 19 June 2025

Employment Judge M Whitcombe

Mr O Nayfeh	**Claimant** **In person**
Barclays Bank UK PLC	**Respondent** **Represented by:** **Mr D Hay KC (Counsel)**

JUDGMENT

(1) The claimant was unfairly dismissed.

(2) It would be just and equitable to reduce both the basic award and the compensatory award by 15% to reflect the claimant's own contributory fault.

(3) The compensatory award is also reduced by 50% to reflect the chance that the respondent would have dismissed by the same date if it had acted fairly.

(4) All other issues of remedy are adjourned to give the parties time to agree them. If they cannot be agreed within 28 days of the date on which this judgment is sent to the parties, then the parties must apply for directions,

updating the Tribunal on the points agreed and the points remaining in dispute.

REASONS

Introduction and background

1. The sole complaint brought by a claim form received on 18 December 2024 was one of unfair dismissal.

2. The claimant was formerly employed by the respondent bank as a Financial Guide in its Mortgage Advice and Financial Guidance Team in Glasgow. The claimant originally worked for the respondent as an agency worker but commenced employment on 6 August 2015. He was dismissed without notice for gross misconduct on 22 July 2024. An unsuccessful appeal followed.

3. The alleged misconduct for which the claimant was dismissed was that on 21 November 2023 he made the following inappropriate comments of a sexual nature to a significantly younger female colleague known for the purposes of these proceedings as “colleague A”.

    a. “If I show you my willy, will that make us friends?”
    b. “Why don’t you buy yourself some sexy underwear” from Victoria’s Secret.
    c. After having asked A her age, “what’s the youngest a 40-year-old can go with?”

Further, the respondent also found that the claimant had said to a different female colleague B on another occasion:

    d. “I miss the days when we could hit women.”

Further, the respondent also found that the claimant had said to colleagues A and C on another occasion or occasions:

e. that he was surprised that he had not been reported to HR before.

4. Those remarks were found to be breaches of the respondent's Bullying and Harassment policy and "The Barclays Way", which is a code of conduct.

Issues

5. The claim form was drafted by the claimant without legal assistance. The hearing proceeded on the shared understanding that the standard issues derived from ***BHS v Burchell*** [1980] ICR 303 EAT would arise, as they would in almost any conduct dismissal. By the end of the hearing some additional issues had also emerged. As might be expected, Mr Hay KC was quite prepared to deal with them and did not object to them being raised. I am grateful to him for his realistic and flexible approach. It furthered the overriding objective.

6. It was agreed that the reason for dismissal was conduct, which is a potentially fair reason for dismissal by virtue of section 98(2)(b) of the Employment Rights Act 1996. That agreed fact also satisfies the first stage of the ***BHS v Burchell*** test.

7. By the end of the hearing the key issues of fairness for the purposes of the test in section 98(4) of the Employment Rights Act 1996 were as follows. Inevitably, there is some overlap between them.

a. Whether the respondent had reasonable grounds for a belief in guilt.
b. If so, whether that belief was formed after such investigation as would be reasonable in all the circumstances of the case.
c. Specifically, whether the respondent took reasonable steps to gather evidence regarding the relative credibility of the claimant and colleague A. The claimant expressed this point as a "he said, she said" issue in which the respondent had shown a "lack of curiosity" and a failure to seek "granular detail".

d. Generally, whether the procedure adopted by the respondent fell within the range of reasonable procedures.
e. Specifically, whether delays in the process leading to dismissal were sufficient to take it outside the reasonable range of procedures.
f. Whether any defects in the disciplinary process were rectified by the appeal.
g. Overall, whether the decision to dismiss fell within the range of reasonable responses.

8. It was agreed that I would make findings on fairness and, if appropriate, contributory fault and the chance that dismissal would have resulted from a fair procedure (i.e. a possible "***Polkey***" reduction), but that I would then seek further submissions from the parties on remedy if it could not be agreed.

Evidence

9. I was provided with a joint file of documents running to 488 pages. As is customary, some of it was not referred to at all and much of it was only referred to at a very general level. Some further documents were provided during the hearing. I am very grateful to those involved in obtaining them at short notice.

10. Redactions had been made by the respondent. No permission had been given for that and no case management direction had been sought. That is not best practice, because a dispute about the redactions could easily have arisen. Happily, the claimant was content that he could deduce what lay behind each redaction and did not feel disadvantaged, so no issue arose.

11. Witness statements were not used, evidence in chief was given orally and all witnesses were cross-examined. They gave their evidence on oath or affirmation. I heard from the following witnesses in the following order.

a. Kay Sedgwick, Operations Leader, who carried out the disciplinary investigation.

b. Joanne Dooley, Operations Leader, who took the decision to dismiss.
c. Ryan McGee, Vice President (Technical Manager for bereavement and delegated authority), but at the relevant time Assistant Vice President, who heard the claimant's appeal against dismissal.
d. Omar Nayfeh, the claimant.

12. This case turned more on the reasoning of the respondent's witnesses than on any significant disputes of fact. In several respects the reasoning of the respondent's witnesses was problematic, and I will deal with that below, but I did not think that any of them were dishonest or unreliable. I thought that all the respondent's witnesses were telling me the truth as they saw it.

13. The claimant also struck me as a generally credible witness. He was understandably animated at some points during the hearing, but that did not undermine his credibility. He was representing himself for the first time in an important hearing about the end of his career with the respondent. He was skilfully cross-examined. He engaged with the questions asked of him. His answers were relevant, consistent and generally plausible. I will indicate below the limited extent to which I did not find the claimant's answers plausible.

Relevant facts

Policies

14. The respondent's policies required high standards of personal conduct. The claimant was aware of those policies and their content. That was also his contractual obligation. The policies were the subject of regular annual training and testing. While the claimant suggested that he would sometimes simply do the quiz at the end of the training rather than the required reading, that was at his own risk. I find that the steps taken by the respondent to draw the principles to the attention of employees were more than reasonable and in any event the claimant did not suggest that he was unaware of any of the key points for present purposes.

15. "The Barclays Way – how we do business" is a code of conduct "setting the standards of behaviour we should all follow every day", with a foreword from the Group Chair and Group CEO. It emphasises that "Barclays takes the Values and Mindset behaviours, set out in The Barclays Way, very seriously", and that it was every colleague's responsibility to be aware of and to understand the code of conduct, to apply it and to act in line with it. Employees were warned that a failure to act in accordance with the Values and Mindset behaviours might result in disciplinary action, up to and including dismissal. As part of the "Individual Accountability Regime" the respondent expected all colleagues to comply with the requirements of the Values and Mindset behaviours. Similarly, the respondent publicised its Bullying and Harassment Policy and staff were expected to be familiar with it.

16. Some of the more important and repeated points in those documents were that:

    a. Employees must be seen to act with the highest standards of conduct and integrity.
    b. A "no-tolerance" approach would be taken to bias, bullying or harassment.
    c. The respondent and its employees must provide a safe working environment protecting the health, wellbeing and human rights of the workforce and others.
    d. Colleagues must act, and be seen to act, with the highest standards of conduct and integrity and in a way that promotes a diverse and inclusive culture. Colleagues are expected to apply sound judgment, common sense and professionalism to their standards of behaviour at all times, guided by the Barclays Values and Mindset.
    e. That included respecting and valuing people from all backgrounds. Again, the respondent would not tolerate discrimination, bullying or harassment in any form.
    f. Mirroring aspects of the Equality Act 2010 definition, when assessing whether bullying or harassment had occurred the respondent would

always consider whether a person, acting reasonably, would consider the conduct to be inappropriate or unacceptable. Bullying or harassment was unacceptable, even when it was not intended to cause harm or offence.

g. One example of bullying was "violation of the privacy of colleagues by asking personal questions irrelevant to their role."

h. The respondent applied a definition of harassment based on vexatious, demeaning, objectionable or unwelcome conduct, which had the purpose or effect of violating a person's dignity, putting them under duress, creating an intimidating, hostile, humiliating, degrading or offensive environment, or adversely affecting the colleague's health and safety.

i. Examples of sexual harassment included written or verbal comments of a sexual nature, including intrusive questions, suggestive remarks, offensive jokes and unwelcome physical, verbal or non-verbal conduct of a sexual nature.

j. Something which did not entirely align with the Values and Mindset which was out of character was unlikely to amount to bullying or harassment unless it was a repeated pattern of behaviour.

17. Guidance to managers carrying out disciplinary hearings required them (among other things) to ensure the following things.

a. That the letter inviting the employee to the hearing included full details of the allegations.

b. That the allegations were explained in detail at the hearing.

c. That if there needed to be further investigation the meeting should be adjourned, further investigations conducted and the meeting reconvened at another date.

Incident

18. The comments giving rise to disciplinary proceedings allegedly occurred on 22 November 2023. The claimant was 'hot-desking' on the fourth floor of the

respondent's Tradescroft Building and talked to colleague A while he did so. Colleague A was significantly younger than the claimant and female.

Initial fact-finding meeting

19. A "fact find" meeting was conducted by Margaret Brown, the claimant's Team Leader, on 27 November 2023. The allegations at that stage were that the claimant had made colleague A feel uncomfortable by making the following three comments of a sexual nature.

    a. "If I show you my willy, will that make us friends?"
    b. "Why don't you buy yourself some sexy underwear?"
    c. After having asked colleague A her age, asking her "what's the youngest a 40-year-old can go with?"

20. The claimant accepted making the third of those remarks, explaining that he thought it was a fair question asked in a context where colleague A had been talking about her own partner. In relation to the other alleged comments the claimant said, "nothing else was discussed" and "that is way too far I wouldn't say that."

21. At the end of the meeting the claimant was suspended on full pay pending the completion of the investigation. The suspension was confirmed in a letter dated 28 November 2023.

Formal investigation

22. The investigation was conducted by Kay Sedgwick. The claimant was interviewed on 22 December 2023 via MS Teams. It was established that the claimant and colleague A were the only witnesses. Once again, the claimant admitted making the third remark but maintained his denial of having made the first or second remark. He said that he would never make the first remark as it was "ridiculous". The claimant observed that if he really had made the alleged remarks then it would be surprising that A should continue to sit with

him throughout the day. He also said that if he had realised that A was made uncomfortable by anything that he had said then he would have apologised.

23. Kay Sedgwick also interviewed colleague A on 22 December 2023. A said that she was 24 and that the claimant had been making a lot of inappropriate comments. The context of the first remark was said to be that A had explained that she did tarot readings, but only for her friends. The claimant asked if he was her friend and A said that he was not, in response to which the claimant allegedly said, "would you be my friend if I showed you my willy?" A said that she ignored that remark, but that the claimant then said it again. When the claimant said it for the third time, A claimed to have said "I don't think my boyfriend would appreciate that", in response to which the claimant said, "but if I showed you my willy that would mean you would have to be my friend." A said that the comments made her feel ill, but that she laughed it off to get out of the situation. A added that there were lots of sexual comments throughout the day, including references to "bumming".

24. A had a medical condition which was redacted, but she explained that her concentration could sometimes suffer and that she "zoned in and out" of the conversation. She nevertheless recalled inappropriate comments about "up the arse". She tried to steer the conversation away from that by talking about the presents she planned to buy her boyfriend for Christmas, in response to which the claimant said that she should go Victoria's Secret to buy some sexy underwear. She felt vulnerable and later spoke to a manager because she did not want another female colleague to be subjected to that behaviour.

25. A said that the claimant had previously said "this is why women don't rule the world", after having helped her to operate a printer, which she thought was misogynistic. She also said that the claimant had said to another colleague "C" that he was surprised that he had never been reported to HR for the things he said, and that he said it was because he chose the audience to which he made the comments.

26. A was told that the claimant had no "recollection" of making the first two

alleged remarks about his willy or sexy underwear and asked why she continued to sit with him if he had. A's answer referred to taking a private call in a private room, and that she would have left for the day if she had not been going to see a friend at lunchtime. There was no clear answer to the gist of the question, which was why A did not leave the desk where she had been sitting, and why she returned to it.

27. A raised the matter with her own team leader the following day, who undertook to raise it with the claimant's team leader. The latter manager made it a formal process.

28. Kay Sedgwick interviewed the claimant's Team Leader, Maggie Brown, on 29 December 2023. She confirmed that the claimant had said to her that he had "worked here 10 years and was surprised he had not been referred to HR beforehand". She also said that the claimant had made inappropriate remarks about tax evasion and comparing some food to "good heroin". She had not heard any comments of a sexual nature. She had never felt disrespected or treated differently by the claimant because she was a woman. Kay Sedgwick asked whether Maggie Brown had noticed whether the claimant often sat next to young girls in the office. She said that she hadn't noticed that, that he would sit at the first desk that was free, and that he liked a window seat.

29. Finally, also on 29 December 2023, Kay Sedgwick interviewed "colleague B", who was 23. Colleague A had named colleague B as someone who had heard the claimant make inappropriate remarks. B confirmed that the claimant said things that were close to the line and that while she hadn't taken offence, she could see how other people would. She had built a relationship with the claimant in which he felt comfortable saying things that were probably not appropriate in a work environment. One example was the claimant saying that he, "missed the days that we could hit women" in the context of her refusing to make a coffee for him. She did not recall the claimant ever making comments to her of a sexual nature. She was asked whether she had heard a comment about the "oldest person he would go for being a 40 year old man" (which misrepresents the alleged remark) and gave an equivocal answer that

it might have been when he was talking about dating apps.

30. On 2 January 2024 colleague A emailed to add to the account she had given at interview. In relation to not having moved away from the desk next to the claimant she said that, "I didn't feel comfortable permanently moving desks away from Omar as he is a strong personality and quite argumentative so I didn't want to risk making the situation even more uncomfortable as I felt he would have a problem/take offence to that. I didn't know anyone else on our floor that day to sit with them or know if I was able to sit anywhere like another floor as everyone has a set bank of desks they are allocated. At the time I just wanted to get through the day with as little fuss as possible, as I was on my own with him and was overwhelmed with what the right action to take was at the time."

31. Colleague C was interviewed on 3 January 2024. She had not heard the claimant make any sexual remarks. She did recall the claimant saying, "I am surprised I haven't been reported to HR in the last 10 years."

32. Colleague A's line manager was interviewed on 12 January 2024. Her recollection of the way in which A had described the claimant's comments to her was consistent with A's account when interviewed as part of the formal investigation. She was not aware that anyone else had ever experienced similar remarks.

33. Kay Sedgwick completed her investigation and prepared a report dated 31 January 2024. She found that, "it is likely that [the claimant] did make the alleged comments to [A], and therefore I believe this incident should progress to a hearing." The report highlighted key parts of the evidence and attached the interview notes and A's further email as appendices. It also attached a copy of the policies, "The Barclays Way" and "Bullying and Harassment".

Invitation to disciplinary hearing

34. The claimant was invited to a disciplinary hearing by a letter dated 26 February 2024. It warned that dismissal was a possible outcome and

described the allegations as follows. “On 21st November 2023 you allegedly made inappropriate comments of a sexual nature while working in the office to a female colleague which made them feel uncomfortable, suggestions saying ‘would you be my friend if I showed you my willy’; also talked about ‘bumming’ and stories about ‘up the arse’ and stating to her that she should go to Victoria Secrets [sic] to buy some sexy underwear.”

35. The second of those three charges is a departure from those considered by the investigation report.

36. It was alleged that those remarks breached both “The Barclays Way” and the Bullying and Harassment policy.

Disciplinary hearing 1 March 2024

37. A disciplinary hearing took place on 1 March 2024, conducted by Joanne Dooley. The claimant was accompanied by Lisa Sherry, Senior Unite Representative. The notes record Joanne Dooley stating at the beginning of the meeting, “the purpose of today’s meeting is to consider the allegations set out in the letter to you dated 23 February 2023” and identified three charges. However, they are not the same as those set out in the invitation letter.

    a. “If I showed you my willy will that make us friends?”
    b. “Why don’t you buy yourself some sexy underwear?”
    c. “What is the youngest a 40-year-old can go with?”

38. Effectively, the third of those charges replaced the reference in the invitation letter to “also talked about ‘bumming’ and stories about ‘up the arse’”. Given that change, the summary adopted at the start of the disciplinary hearing was consistent with the earlier stages of the investigation, if not the invitation letter. I find that the claimant understood the three charges to be as set out in the initial discussion at the disciplinary hearing and the investigation report, and

not as set out in the invitation letter. However, I will refer to some other anomalies below. The hearing concluded with Joanne Dooley saying that she anticipated making her decision within two weeks, i.e. by mid-March 2024.

39. Joanne Dooley did not interview any other witnesses or carry out any other investigations. Her decision was based on her meeting with the claimant and the collection of documents attached to the investigation report.

40. Some extraordinary delay followed. Although I was shown a log of contact between Joanne Dooley and HR, I was unable to discern any sufficient explanation for the delay of more than 4 months before the outcome of the disciplinary hearing was notified to the claimant in a letter dated 22 July 2024. No additional investigations were carried out during that period. Joanne Dooley had anticipated that her decision would be delivered within 2 weeks. She said in her oral evidence that that, "I had come to a conclusion, 100%" by 28 March 2024. If so, then it is difficult to see why it should take almost 4 further months to express it in writing.

41. The different fonts and pitches used throughout the document suggest that it was assembled from several different sources or edited on several different occasions, but it should not have taken anything like that long to take advice, refine drafts and issue a letter summarising the outcome. The outcome letter is not always easy to follow.

42. The outcome letter upheld five charges, which was clearly an expansion of the three summarised at the start of the hearing and the different three set out in the letter inviting the claimant to the disciplinary hearing. The five charges which the respondent found proved concerned inappropriate comments made to female colleagues as follows:

a. "If I showed you my willy will that make us friends?"
b. "Why don't you buy yourself some sexy underwear?"
c. "What is the youngest a 40-year-old can go with?"
d. "I miss the days when you we could hit women." [sic]

e. That the claimant was surprised he had not been reported to HR before.

43. Ms Dooley explained in her oral evidence that all five allegations combined to form the reason for the claimant's dismissal. She agreed that the claimant would not have known that he was at risk of dismissal for all five matters until he received the outcome letter. On that basis, she initially agreed that it was not fair for the charges to expand from 3 to 5 without prior notice. She did not say at any point during the meeting that she was considering two additional matters as disciplinary charges.

44. She nevertheless thought that the dismissal was fair because all 5 matters were discussed at the hearing, and that she had not exceeded her remit. Ms Dooley had not heard of the ACAS Code of Practice on Disciplinary and Grievance Procedures, but she took HR advice and sought to apply the respondent's policies. She did not draw the attention of HR to the fact that she proposed to uphold more charges than had been identified in the invitation letter, nor did HR spot that fact, the typos, or the fact that the charges in the invitation letter were not consistent with those in the investigation report and the initial discussion of the issues.

45. The claimant's comments were found to be a breach of the Bullying and Harassment policy and "The Barclays Way". The first three were described as "could are deemed, by me, to be of a sexual nature and are vexatious demeaning comments [sic]."

46. There were only two witnesses to the key incident: the claimant and colleague A. Joanne Dooley heard from the claimant at the disciplinary hearing, but did not hear direct evidence from colleague A, and has not met her to this day. Joanne Dooley did not hear direct evidence from any of the other witnesses either.

47. Ms Dooley said that she "did not form a view" of colleague A's credibility. She

had considered interviewing A and the notes of the disciplinary hearing record her saying, “I think I might interview her”. However, she did not. She claimed to have been told by HR that it was “not part of the process” and was either told not to or told that she did not need to. That is impossible to reconcile with the document titled “Roles and Responsibilities – Disciplinary” which expressly envisages adjournments for further investigations followed by a reconvened meeting. Ms Dooley felt that the interview notes were sufficient and that she could assess A’s demeanour from those notes. I do not accept that much of value can be learned about the demeanour of a witness from reading the notes of an interview conducted by someone else.

48. In oral evidence, Joanne Dooley explained her decision to disbelieve the claimant and to prefer evidence in the form of notes of interviews with other witnesses in the following way: the claimant had said that he could not remember key details but had not firmly denied them. The fact that the claimant was not “adamant”, and was not denying the allegations “1000%” made her suspicious. The claimant had appeared “defensive” and became irritated at points. That appeared suspicious to Joanne Dooley.

49. However, I accept the claimant’s explanation for times when he might have appeared defensive or irritated. He referred to a “trick question” because he had already denied that allegation on several previous occasions. He referred to not being “Mystic Meg” when asked why A would make up the allegation. That is a colloquial way of saying that he could not speculate as to someone else’s motivation or thought process. By that point the claimant had been asked several times “why would she make it up”, or similar expressions, so some irritation might be understandable. In cross-examination the claimant asked Ms Dooley how many times he would have to deny an allegation for her to accept that answer, and whether 6 or 7 would be enough. Ms Dooley replied that she “could not put a figure on it”.

50. I find that Ms Dooley was wrong to suggest that the claimant had failed to deny the “If I showed you my willy will that make us friends?” remark. A clear denial of that suggestion appears immediately in the relevant section of the

notes of the disciplinary hearing, and there is a further firm denial later in the notes. It should also be remembered that at the investigatory stage the claimant had denied the allegation, said that he would never say that, and described it as "ridiculous". That is also a firm denial.

51. Ms Dooley was also wrong to suggest that the claimant admitted saying "Why don't you buy yourself some sexy underwear?". In cross-examination she said to the claimant, wrongly, "you confirmed you did say it". In fact, the claimant had said two things about that allegation that were not inconsistent. He had said that he didn't remember saying it, but that if he had done it was not with a "sleazy intention". In any event, he denied making the remark. Those responses appear in two different sections of the notes because the questioning was repetitive. Ms Dooley said that the claimant's answer that "if" he had made the remark it was not with a sleazy intention gave her a "reasonable doubt", because there was no place for comments of that sort in the workplace.

Appeal hearing 3 September 2024

52. The claimant appealed by means of an email dated 24 July 2024. It raised 8 grounds of appeal, including an argument that the investigation had not been conducted correctly, that the "case for the dismissal is based on probability and not fact", and that he had raised points which had not been answered.

53. Mr McGee was asked to hear the claimant's appeal against dismissal. In a letter dated 28 August 2024 he invited the claimant to an appeal hearing to be held by MS Teams on 3 September 2024.

54. Mr McGee saw his role as being to "impartially review" the decision and appreciated that he could conduct further interviews if he considered it appropriate to do so. He considered all the documents previously generated by the investigation and the disciplinary hearing.

55. Mr McGee summarised his reasoning in the following way: "The points raised

felt challenging, however based on the outcome there didn't feel personally to me that there was a clear defence or a clear rationale for maybe why some of it had occurred." His reason for interviewing the claimant was said to be, "I was looking to understand more around his rationale for the specific points, and what he wanted to happen, and also meet him personally to begin to try to begin a person I had only met on the page to certain scenarios that had been referenced in the evidence I had previously reviewed." Mr McGee's oral evidence was not especially clear as to precisely what he thought the claimant had said, if anything, to colleague A or why he reached that conclusion. Mr McGee described the claimant's demeanour in the meeting as "very measured", and "there was nothing irrational in there".

56. Mr McGee thought it was important to interview colleague A, given the severity of the potential outcome for the claimant. The interview took place on 18 September 2024. He did that because, "I was looking to see her personality, how she came across, whether potentially the comment was made flippantly and also going back to the first comment, one that I saw as extremely severe, how her delivery was of that or recollection of that." The interview took place using MS Teams, and Mr McGee thought that A had not had enough notice of the meeting to have rehearsed her evidence. Mr McGee found her to be "a very nice individual", "professional in her delivery in terms of language", whose account was "clearly brought forward from the front of her mind rather than a memory that had degraded."

57. Mr McGee did not carry out any other investigations into A's background, or her personnel file. He did not explore her admitted tendency to "zone out" of conversations, and the effect it might have had on the accuracy of her recollection.

58. Mr McGee also spoke to Ms Dooley on 18 September 2024 to understand her decision-making process. He accepted that he had not asked her why the charges had expanded from 3 in the disciplinary hearing invitation letter to 5 in the outcome letter. He did not regard the delay as "necessarily alarming to me given my experience of previous cases." He did not think that Ms Dooley

had misled him and had not appreciated that some of her assertions about points the claimant had admitted were incorrect (for example, that the claimant had admitted making the 'sexy underwear' comment).

59. Mr McGee did not think it was unfair that the charges had expanded without warning, saying, "It remains fair because the underlying theme is all comments which contradict the standards" and the charges upheld were all similar.

60. Mr McGee did not inform the claimant or his trade union representative that he planned to interview colleague A and Ms Dooley. He did not share the results of those interviews with the claimant or his representative either. He said that he was not aware that those notes should be shared.

61. The claimant was informed that his appeal had been unsuccessful at a MS Teams meeting on 5 December 2024 and in a letter of the same date. Briefly summarised, Mr McGee's conclusions on the ten grounds of appeal were as follows.

a. The way in which the investigation had interviewed witnesses and summarised the minutes was acceptable, and all witnesses who came forward had been interviewed. It was coincidental that they had been women and there had not been any decision to interview only women.
b. Joanne Dooley had weighed the evidence appropriately and had considered the claimant's account. She had applied the disciplinary policy.
c. While the claimant had asked for his line manager Maggie Brown to be re-interviewed at the appeal stage that had not been possible because she was away from work on long-term absence. However, the notes of her previous evidence had been reviewed and appeared to give a balanced view of the claimant's character.
d. The claimant's conduct had been reviewed as a whole, and it did not matter that some of the allegations were not as recent as others.
e. It had not been unnecessary to introduce allegations of things said to

colleague C.

f. The way in which witnesses had been questioned when interviewed seem to be appropriate.

g. Joanne Dooley had considered the claimant's argument that his comments were 'jovial' but had rightly also considered them against the Bullying and Harassment policy, which focused on the interpretation of comments buy the recipient.

h. The claimant had been dismissed for the comments that he had made. He was not dismissed for anything in his disciplinary record, which was otherwise clean. However, the penalty of dismissal was nevertheless justified.

Legal principles

The reason for dismissal

62. The respondent has the burden of proving a potentially fair reason for dismissal. In this case it is agreed between the parties that the reason for dismissal related to the conduct of the claimant and therefore fell within section 98(2)(b) ERA 1996.

Fairness – general principles

63. Where the employer has proved a potentially fair reason for dismissal, the test of fairness and reasonableness derives from s.98(4) ERA 1996:

…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.

64. Prior to a change effected by the Employment Act 1980, the employer also had the burden of proving fairness, and some of the older authorities must be read with that in mind. The test of fairness now contained in s.98(4) ERA 1996 does not impose any burden of proof on either party.

65. Whether the employer acted reasonably is a question of fact, not law, and tribunals have a wide discretion to base their decisions on the facts of the case before them and on good industrial relations practice, without regard to a lawyer's technicalities (***UCATT v Brain*** [1981] ICR 542, CA). The reference to "*equity and the substantial merits of the case*" shows that the word "*reasonably*" is to be construed widely (Lord Simon in ***Devis v Atkins*** [1977] ICR 662, HL).

66. It is well-established at Court of Appeal, Court of Session and EAT level that a tribunal must not substitute its own view for that of the hypothetical reasonable employer. The law recognises that different reasonable employers might respond in a range of reasonable ways to a given situation. The correct approach is for the tribunal to assess the reasonableness of the decision to dismiss by reference to a band, or range, of reasonable responses (see e.g. ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17, endorsed in many cases including ***Foley v Post Office*** [2000] ICR 1283, CA, which ended a brief but important challenge to the previous orthodoxy).

67. The process must always be conducted by reference to the objective standards of the hypothetical reasonable employer (Mummery LJ in ***Foley*** at 1293 B). If *no* reasonable employer would have dismissed, then the dismissal is unfair. If *some* reasonable employers would have dismissed, then the dismissal is fair.

68. The "range of reasonable responses" test applies not only to the selection of sanction or the ultimate decision to dismiss, but also to the procedure by which that decision was reached (***J Sainsbury plc v Hitt*** [2003] ICR 111, CA).

69. Reasonableness is assessed on the basis of facts or beliefs known to the employer at the time of dismissal, which for these purposes will normally include any internal appeal process (***O'Brien v Bolton St Catherine's Academy*** [2017] ICR 737, CA, ***West Midlands Co-operative Society Ltd v Tipton*** [1986] ICR 192, HL).

70. Compliance with an employer's own procedures will be an important indicator of fairness, and the converse is also true. However, compliance with or breach of internal procedures is certainly not *determinative* of fairness (see ***Fuller v Lloyd's Bank plc*** [1991] IRLR 336, EAT, ***Sharkey v Lloyds Bank plc*** [2015] All ER (D) 199 (Dec) and ***NHS 24 v Pillar*** UKEAT/0005/16)). The tribunal must assess the overall gravity of any procedural shortcoming.

Principles of fairness in dismissals for misconduct

71. The classic test in ***British Home Stores v Burchell*** [1980] ICR 303, EAT remains good law, if allowance is made for the change in the burden of proof since then (see above). The three-part test raises the following issues:
    a. whether the employer did have a belief in guilt (in practice, this is little different from the need to prove a potentially fair reason for dismissal);
    b. whether the employer had reasonable grounds on which to sustain that belief;
    c. whether the employer carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

72. There is no hard and fast rule as to the level of inquiry the employer should conduct to satisfy the ***Burchell*** test. Much will depend on the circumstances, including but not limited to the nature and gravity of the case, the state of the

evidence and the potential consequences of an adverse finding to the employee. The more serious the allegations against the employee and the more serious the potential effect on them, the more thorough the investigation conducted by the employer ought to be (***A v B*** [2003] IRLR 405, EAT), so an investigation leading to a warning need not be as rigorous as one likely to lead to dismissal. The fact that an employee, if dismissed, might never again be able to work in their chosen field is a relevant factor. Serious criminal allegations must always be carefully investigated, and the investigator should put as much focus on evidence that may point towards innocence as on that which points towards guilt. That is especially so when the employee is suspended and cannot communicate with witnesses. The point was developed by the CA in ***Salford Royal NHS Foundation Trust v Roldan*** [2010] ICR 1457. If found guilty the employee in that case faced criminal charges and a risk of deportation. That reinforced the ET's finding that procedural errors rendered the dismissal unfair.

73. The ACAS Code of Practice on Disciplinary and Grievance Procedures sets out some of the basic practical requirements of fairness that will be applicable in most conduct cases. It is not legally binding but it is admissible in evidence and I must take its provisions into account where they are relevant.

Delay

74. Investigations should be carried out without unreasonable delay. The ACAS Code emphasises the importance of establishing facts and putting allegations to the employee promptly before recollections fade (see paragraphs 4, 5 and 11). For example, in ***RSPCA v Cruden*** [1986] ICR 205, EAT a delay of 7 months before commencing disciplinary proceedings made the dismissal unfair, even though the employee suffered no prejudice. However, in ***Christou v London Borough of Haringey*** [2012] IRLR 622, the EAT upheld a decision that dismissals were fair despite an 18 month delay between the alleged misconduct and the relevant disciplinary proceedings. The Court of Appeal upheld that decision on other grounds without referring to the delay

point. Those decisions demonstrate that the effect of delay on fairness is fact sensitive and will vary from case to case.

75. The ACAS Code of Practice also suggests that suspensions with pay should be "as brief as possible" and should be kept under review (paragraph 8).

Appeals

76. Paragraphs 26 to 29 of the ACAS Code of Practice recommend that employees should be provided with an opportunity to appeal disciplinary action taken against them. Fair appeals are an integral part of procedural fairness and while unfairness in an appeal will not inevitably lead to a finding of unfair dismissal, it will be a relevant matter. Appeals can be relevant in another way too: defects in pre-dismissal procedures or in a disciplinary hearing might be rectified by a suitable appeal. In those circumstances the tribunal's task is to assess the fairness of the whole disciplinary process, including the appeal (***Taylor v OCS Group Ltd*** [2006] ICR 1602, CA). The procedural fairness, thoroughness and impartiality of the appeal stage will all be important, but it is not helpful to resolve the question by a crude categorisation of the appeal as being either a "review" or a "rehearing".

Contributory fault

77. There are two relevant statutory provisions.

a. Section 122(2) ERA 1996 provides that 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.

b. Section 123(6) ERA 1996 provides that 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 amount of the *compensatory award* by such proportion as it considers just and equitable having regard to that finding.

78. The language of section 122(2) is therefore less restrictive than that of section 123(6), which requires causation before any reduction can be made. When applying section 122(2), the tribunal must identify the conduct which is said to give rise to possible contributory fault, decide whether that conduct is culpable or blameworthy and decide whether it is just and equitable to reduce the amount of the basic award to any extent (***Steen v ASP Packaging Ltd*** [2014] ICR 56, EAT).

79. Reductions in the compensatory award depend on findings that the conduct was culpable or blameworthy, that the conduct caused or contributed to the dismissal, and that it would be just and equitable to reduce the award by the proportion specified (***Nelson v BBC (No.2)*** [1980] ICR 110, CA). Any reduction must be based on my own findings and view of the conduct concerned, so there is no deference to the respondent's view or to any hypothetical reasonable range of views on those questions (***London Ambulance Service NHS Trust v Small*** [2009] IRLR 563, CA).

"***Polkey***" reductions

80. The question whether a fair and reasonable procedure would have made any difference to the outcome is reflected in compensation rather than the finding of fairness or unfairness under s.98(4) ERA 1996 (***Polkey v AE Dayton Services Ltd*** [1988] ICR 142, HL).

81. Importantly, the issue is what the respondent would have done, and not what a hypothetical fair employer would have done (***Hill v Governing Body of Great Tey Primary School*** [2013] ICR 691, EAT).

82. The tribunal must draw on its industrial experience and construct, from evidence rather than speculation, a working hypothesis about what would have occurred if the employer had behaved differently and fairly (***Gover v Propertycare Ltd*** [2006] ICR 1073, CA, Buxton LJ, approving the analysis of HHJ McMullen QC in the EAT). However, any assessment of future loss is by way of prediction and therefore involves a speculative element, so tribunals are neither expected nor allowed to opt out of their duty merely because the task is difficult and may involve some speculation (***Thornett v Scope*** [2007] ICR 236, CA).

83. In ***Software 2000 Ltd v Andrews*** [2007] ICR 825, EAT, Elias P reconciled the authorities in the following way.

a. There will be circumstances in which the nature of the evidence is so unreliable that a tribunal might reasonably decide that no sensible prediction can properly be made, and that the attempt to reconstruct "what might have been" is riddled with too much uncertainty.
b. However, the tribunal must have regard to any material and reliable evidence even if there are limits to the extent to which the tribunal can confidently predict what might have been. A degree of uncertainty is an inevitable feature of the exercise and an element of speculation is not a reason for refusing to have regard to that evidence.
c. Put another way, the issue is not whether the jigsaw can be completed, but rather whether there are sufficient pieces for some conclusions to be drawn.

84. Similarly, in ***Contract Bottling Ltd v Cave*** [2015] ICR 146, EAT, Langstaff P emphasised that the exercise would necessarily involve imponderables, but that did not mean that the tribunal should not grapple with the issues as far as it could.

Submissions

85. The parties made their submissions concisely and orally, chiefly addressing

the key points in the ***BHS v Burchell*** test. It would only add length to these reasons to set them out here. Instead, I will deal with the main points as part of my reasoning below.

Reasoning and conclusions

The fairness of the dismissal

86. Since it is common ground that the respondent's reason for dismissal was the potentially fair reason of conduct, I will move directly to the test of fairness in section 98(4), having regard to that reason.

87. In my judgment, the disciplinary hearing and decision making leading to dismissal were so seriously flawed that the respondent failed to satisfy the second and third elements of the ***BHS v Burchell*** test and the procedure fell well outside the range of reasonable procedures.

88. The stakes for the claimant were extremely high and amounted to the potential loss of a profession and not just a job. The claimant had worked in financial services for 24 years and would have had almost no chance of continuing that career if he were to be dismissed by the respondent for these allegations. On that basis I find that the principles in ***A v B*** applied, and that the respondent was obliged to investigate potentially exculpatory factors just as diligently as those which might point towards guilt. While that might lead to the uncomfortable need to explore and test the cogency of the evidence of a person who said that she had been made uncomfortable by comments of a sexual nature, that was what the situation required. The respondent is a large and sophisticated employer with considerable resources. It was equipped to carry out a process with the necessary care.

89. There were only two witnesses to the central incident – the claimant and colleague A. The core of the respondent's task was therefore to assess the relative credibility of the claimant and A. The respondent adopted a flawed approach to that task.

a. At the disciplinary hearing Joanne Dooley heard directly from the claimant and made some adverse findings about his credibility. However, she was content to rely on notes of an interview carried out with colleague A by someone else. That rather asymmetrical approach was unfair to the claimant, whose evidence was tested more rigorously than that of colleague A. Joanne Dooley seemed at one point to recognise a potential need to interview A herself but ultimately failed to do so.

b. Joanne Dooley's approach to demeanour was highly unusual and, in my assessment, unfair. She seemed to overlook some of the claimant's denials while at the same time criticising the claimant for not having denied the allegations firmly enough. She had been looking for hyperbole like a denial of the allegations "1000%". She also seemed to regard the claimant as being guilty if she had a "reasonable doubt" that he was telling the truth. That is a significant departure from proper fact finding based on simple probability, which put the claimant at a serious procedural disadvantage.

c. While I accept that the claimant was asked whether he could think of a reason why A would make the allegations up and he could not, that is insufficient to amount to a reasonable investigation of A's motivation. A reasonable investigation would have sought to investigate whether A might have any motive to lie, but that cannot be reasonably be done by relying solely on the notes of an interview carried out by someone else.

d. The issue is not just truth telling. It is also the potential for exaggeration, misperception or (as the claimant put it) over-sensitivity. The likelihood that A's evidence might also have been tainted by one or more of those factors was something that all reasonable investigations would have addressed.

e. The respondent interviewed additional witnesses on matters not directly connected to the (original) allegations of misconduct, because that evidence had a bearing on the claimant's propensity to make inappropriate remarks and accordingly the likelihood that he had made the alleged remarks. There was no correlative attempt to assess objectively A's propensity, for example, to make unwarranted complaints, to misremember events, to forget important contextual facts or to misconstrue remarks.

f. It was unreasonable to find the claimant guilty of charges that had not been identified prior to the disciplinary hearing. I put the point in that way because although the invitation letter failed accurately to reflect the charges investigated, that error was corrected in the initial discussion at the hearing. The short point is that the disciplinary process was based on 3 charges but 5 were ultimately upheld. Both the respondent's own procedures and paragraph 9 of the ACAS Code of Practice require proper and accurate notice of the charges that are being considered, and which might lead to a disciplinary penalty if upheld. It is also a basic principle of procedural fairness and natural justice. The claimant was not given that notice in relation to the additional charges. The respondent accepted that the claimant would not have known that he was at risk of being found guilty of all 5 charges identified in the dismissal letter until he received that letter. While it would in principle be open to a respondent to expand the scope of the charges during the disciplinary hearing, the claimant would require clear notice of that, and probably an adjournment of the disciplinary hearing to prepare an expanded case. It is not an answer to say that all matters were discussed during the hearing because there is an important difference between discussing an issue thought to be a matter of background and defending a central charge upon which continued employment might turn.

g. Ms Dooley was wrong to think that the claimant admitted certain

comments when he had denied making them. She was similarly wrong to tell Mr McGee that those admissions or concessions had been made. A reasonable employer would have considered the interview notes as a whole. No reasonable employer would have regarded several firm denials as an admission. A reasonable employer would not think it was necessarily inconsistent, still less an admission, for the claimant to say in effect, "I did not do that, but even if I had it would not have been for a bad reason."

h. The disciplinary outcome was unnecessarily and unfairly delayed. It amounted to 4 months and 3 weeks in which the claimant faced the stress and uncertainty of waiting for and worrying about the outcome. It is no answer to say that the claimant was being paid throughout. He might not have suffered a loss of earnings, but he suffered time out of the workplace, the loss of the chance to exercise his skills and interact with colleagues, and the loss of all the non-financial benefits that work brings. Additionally, I do not accept Joanne Dooley's evidence that she had made her decision very quickly by the end of March 2024 and that the delay was caused by the need to perfect the drafting and gain HR approval. The drafting is far from perfect, and she also said that "I never rush a decision", which is inconsistent. I find that the decision is likely to have been made much later, and that the fading of memories and impressions caused by delay also compromised fairness.

90. I have considered whether the appeal was sufficient to correct those deficiencies. I find that it was not.

a. Mr McGee had not thought about the expansion of the 3 charges to 5 in the disciplinary outcome letter and did not consider the fairness of that development. At this hearing first he said, "I would want to understand why", then "I would not welcome it", before finally indicating that he was untroubled by it due to the similarity of the 5 charges. I do not find that logic persuasive. While in fairness to him that was not one

of the claimant's grounds of appeal, the issue for present purposes is whether the appeal corrected the earlier defect, and not whether the appeal itself had a similar flaw. The damage done at the disciplinary stage was not corrected at the appeal stage, because Mr McGee was not live to the issue and did not take the steps necessary to roll the process back to the stage at which charges were investigated, formulated, notified and determined.

b. Mr McGee very sensibly interviewed colleague A, but I find that he did not sufficiently explore the ways in which her evidence might not have been reliable. He made no enquiries as to her background, propensity to misconstrue, forget, exaggerate or otherwise misrepresent events.

c. Mr McGee had not appreciated that Ms Dooley had misled him regarding certain admissions made by the claimant. His starting point incorporated those errors.

d. Although Mr McGee obtained further evidence from colleague A, he did not share that additional evidence with the claimant and allow an opportunity for the claimant to comment on it. In a case where there were only two witnesses it was a serious procedural defect to deny the claimant the chance to comment on additional evidence from his accuser.

e. While there was no significant delay in the appeal stage itself, it was unable to correct the unfairness resulting from the delay which had already occurred at the disciplinary stage. The appeal outcome was announced more than a year after the relevant incident.

91. Given the shortcomings in the above process taken as a whole, I find that the respondent failed to carry out such investigation as would have been reasonable in all the circumstances. It fell outside a reasonable range of investigations.

92. I also find that in the absence of a more thorough examination of the cogency of the evidence of colleague A, the respondent did not have reasonable grounds for a belief in the claimant's guilt. There had been too great a focus on potentially incriminating evidence and not enough on potentially exculpatory evidence to establish *reasonable* grounds.

93. I also find that the procedure leading to dismissal fell outside the reasonable range of procedures for the reasons set out in more detail above.

94. Overall, no reasonable employer could have dismissed in those circumstances.

Contributory fault

95. Importantly, on behalf of the respondent Mr Hay KC said that he did not rely on the fourth or fifth charges for the purposes of submissions on contributory fault or "***Polkey***" reductions.

96. On this issue I make my own findings of fact, but I do so in a partial evidential vacuum because colleague A was not called to give evidence at this hearing and I had no opportunity to assess her credibility myself. I am therefore left with the respondent's own enquiries and summaries of her evidence which I have found to be inadequate, outside the reasonable range and insufficient to form reasonable grounds for a belief in guilt. Mr Hay KC's position means that I can ignore charges 4 and 5 for these purposes.

97. I find on the balance of probabilities as follows.

a. The claimant did say something along the lines of "what's the youngest a 40-year-old could go with". That was admitted. I find that by November 2023 the colloquial or slang phrase "go with" was normally used in a sense which implied sexual relations and that it was used in that sense in this case. I do not accept on the balance of probabilities

the claimant's evidence that he thought it simply meant "dating" and that he had meant it in that way. Even if he had, it was liable to be understood in a different way by anyone who heard it.

b. I do not accept on the balance of probabilities that the claimant made the other two remarks alleged in the original disciplinary charges. In the absence of a careful examination of colleague A's credibility and reliability, I do not find them proved. I give less weight to A's written evidence because it has not been properly tested. I prefer the claimant's denial that he made the remarks concerned.

98. I therefore find on the balance of probabilities that the claimant did make a remark which formed one of the three original charges, but not the other two. Importantly, I understood everyone involved in this hearing to think that the first charge was the most serious. That is certainly my view, but I have not found it proved on the balance of probabilities.

99. The claimant was certainly culpable, and the remarks certainly contributed to his dismissal. In my own assessment (which for these purposes does not defer either to this employer's view or to a reasonable range of views) the claimant's remark was reckless and inappropriate. It was inconsistent with well publicised policies in which the claimant was also trained. He was an experienced employee who should have known better. The remark was liable to make people uncomfortable, especially younger female employees such as A. It was of a sexual nature, though far from explicit. That is why the claimant was culpable. That said, I have found that he made only one of the three inappropriate remarks contained in the original charges, and that it was not the most serious of them.

100. For that single remark, I have concluded that it would be just and equitable to reduce both the basic award and the compensatory award by 15% having regard to the factors listed above.

"Polkey" reductions

101. At the risk of repetition, the issue is what *this* employer would have done, on the hypothesis that it had acted fairly. There are, as always, several "imponderables", such as what the respondent might have learned if it had made reasonable enquiries and undertaken a robust assessment of relative credibility. There is also an element of speculation regarding the view the respondent would have taken of the seriousness of each charge upheld if it had gathered and analysed the evidence in fair way and assessed the full context.

102. However, I do not think that there are so many "imponderables" that I am unable to make fair findings at all. I think that it is possible to engage with the correct question and to make a finding which acknowledges the uncertainty, but which nevertheless amounts to a fair and evidence-based prediction of what probably would have happened. I recognise that if a fair investigation had been carried out then more cogent evidence of the claimant's guilt might have emerged, as well as more cogent evidence of innocence. Both are possibilities. I also recognise that the respondent might well have concluded that there had been gross misconduct even if it had concluded that fewer than 3 charges were proved. The respondent might well have come to the same conclusion if it had dealt with the matter fairly, but I do not think it was at all inevitable. "Zero tolerance" of harassment does not imply that summary dismissal for a first offence is the only possible sanction. The respondent might have considered other disciplinary penalties sufficient to mark the seriousness of the misconduct and to give effect to a principle of "zero tolerance", but which allowed the claimant to remain in employment.

103. Having weighed all those matters, recognising that it is not a precise predictive exercise, I find that a "***Polkey***" reduction of the compensatory award by 50% does justice between the parties. That reflects the likelihood that the respondent would have dismissed at around the same time if it had acted fairly. There was so much delay in the process that I do not think that a fair procedure would have taken any longer. On the contrary, I think it would

have taken much less time.

104. As I indicated during the hearing, that is the limit of my judgment at this stage, but I will hear further submissions on remedy if the parties are unable to resolve it by discussion and agreement within 28 days of the date on which these reasons are sent to them.

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