EMPLOYMENT TRIBUNALS

Claimant: Mr J Barker

Respondent: Icon Aerospace Technology Ltd

Heard at: Nottingham **On:** 29 & 30 September 2025

Before: Employment Judge New

REPRESENTATION:
Claimant: Ms Mallick, Counsel
Respondent: Mr Webster, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

Unfair Dismissal

1. The complaint of unfair dismissal is well-founded. The Claimant was unfairly dismissed.

2. There is a 50% chance that the Claimant would have been fairly dismissed in any event.

3. The respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 and it is just and equitable to increase the compensatory award payable to the Claimant by 10% in accordance with s 207A Trade Union & Labour Relations (Consolidation) Act 1992.

4. The claimant caused or contributed to the dismissal by blameworthy conduct and it is just and equitable to reduce the compensatory award payable to the claimant by 10%.

5. It is just and equitable to reduce the basic award payable to the claimant by 10 % because of the claimant's conduct before the dismissal.

REASONS

Introduction

6. The Claimant, Mr Barker, was employed by the Respondent, Icon Aerospace Technology Ltd, as a Cell Leader until his dismissal without notice on 26 February 2025.

7. The Claimant claims that his dismissal was unfair within Part X of the Employment Rights Act 1996. The Claimant denies the conduct alleged and claims that his dismissal was unfair. He says the investigation and the procedure was flawed and there was no reasonable basis to conclude he was guilty of misconduct and that the dismissal was outside of the range of reasonable responses.

8. The Respondent contests the claim. It says that it had a fair reason for dismissing the Claimant, namely relating to harassment or sexual harassment of a female colleague which it says constitutes a conduct related reason. In the alternative it relies on 'some other substantial reason', namely a breakdown in trust and confidence/ working relationship.

The Hearing

9. I heard this case on 29 and 30 September 2025. Both parties were represented by Counsel. Ms Mallick represented the Claimant, having been recently instructed on a direct access basis. Mr Webster represented the respondent.

10. I heard sworn evidence from the Claimant, Mr Wilson who conducted the investigation, Mr Jackson who conducted the disciplinary and Mr Metcalfe who considered the appeal. Mr Roper's witness statement was also admitted in evidence in support of the Claimant, although he was asked no questions by Mr Webster or the Tribunal. Although Mr Roper's witness evidence has been taken into consideration in this judgment, his evidence added little to the evidence of the Claimant.

11. At the start of the hearing, we spent some time clarifying the issues as described below.

12. It was agreed that I would hear evidence on liability, to include contributory conduct, Polkey and compliance with the ACAS Code, but not remedy. That was partly due to the number of witnesses to be heard in the 2-day listing, but also

because Ms Mallick confirmed on behalf of the Claimant that he did seek re-instatement despite the Claimant having previously indicated in correspondence with the respondent's solicitors (as a litigant in person) that he was not going to pursue such a remedy. Accordingly, the respondent was not prepared to address the question of remedy.

Issues for the Tribunal to determine

1. What was the reason or principal reason for dismissal? Was it a potentially fair reason? The Respondent says the fair reason is 'conduct' or 'some other substantial reason', namely a breakdown in trust and working relationships. The Claimant says this was not the true reason and that Mr Taylor and other management did not like him.

2. Did the Respondent genuinely believe the Claimant had committed misconduct?

3. Were there reasonable grounds for that belief?

4. At the time the belief was formed, had the Respondent carried out a reasonable investigation and had the Respondent otherwise acted in a procedurally fair manner. The Claimant alleges the investigation, and procedure was unfair because:

    a. At the investigation and disciplinary stage there was inadequate exploration of the evidence

    b. Failure to interview witnesses/explore evidence to support Claimant's explanations

    c. The disciplinary charge was not articulated clearly so the Claimant did not know the allegation(s) he faced. The allegations were never framed in writing to the Claimant

    d. The Claimant was not provided with the complainant's letter of complaint prior to his dismissal

    e. There was no detail in the dismissal letter about how the conclusions were reached about the reasons for dismissal

    f. The decision to dismiss took into account an expired warning/letter of concern

    g. Failure to consider mitigation including length of service and clear conduct record

    h. Confused and inadequate appeal process

i. Pre-determined appeal outcome unfairly influenced by complainant's view about impact of Claimant returning to work.

5. Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

6. Did dismissal fall within the range of reasonable responses?

Findings of Fact

7. I make the following findings of fact. These findings were reached on the balance of probabilities having considered the witness evidence, including documents referred to in that evidence, and my assessment of that evidence.

8. I have only made findings relevant to the issues. I do not need to determine every fact in dispute. Where I do not refer to a particular document, that does not mean that it has not been considered if it was referred to in evidence.

9. I had no concerns about the credibility of any of the witnesses who gave evidence at the hearing.

Background

10. The Respondent is a manufacturer of air and spacecraft and related machinery, specialising in highly engineered aerospace components, based in Nottinghamshire. It has a turnover of around £30 million and employs approximately 225 employees. It is therefore a medium-sized employer.

11. The Claimant has been employed by the Respondent since 10 October 2016. Originally, he was employed as Production Operative. Since 1 September 2023, he held the role of Cell Leader. That is a supervisory role overseeing a team of approximately 12 production operatives (of whom approximately 4 or 5 are women) fabricating seals using hand tolls, moulds and machinery: a factory environment. I understood that the Claimant's team was the 'Finishing' team, whereas another team is known as the 'Build' team.

12. Cell Leaders report to Team Leaders. The Claimant reports to Team Leader, Kyle Taylor.

13. Cell Leaders and Production Operatives work on shifts. The Claimant accepts that when he regularly works the 2pm-10pm shift, he is often the most senior person on site after around 4pm when more senior managers (who work core hours) have left, such that other staff look to him for direction.

14. Ms Robinson, whose complaint is the basis of the alleged misconduct, is one of the four or five females working in the Claimant's team.

Policies

15. The Respondent operates a Harassment and Bullying Policy in its company Handbook. This sets out that the Respondent is committed to providing a working environment free from harassment and bullying, and the right of all employees to be treated with respect.

16. That policy sets out that managers and supervisors are expected to act towards colleagues with Managers and supervisors are expected to act towards colleagues with whom they interface with respect. They should ensure that their staff act in a similar way and should deal with any unacceptable behaviour promptly.

17. That policy defines harassment including sexual harassment. It defines sexual harassment as unwanted conduct of a sexual nature which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.

18. As examples of sexual harassment, it lists the following of potential relevance to this case: ‘sexual comments or jokes, which may be referred to as banter’, ‘suggestive looks’, ‘staring or leering’, ‘propositions and sexual advances’,’ sexual gestures’, ‘intrusive questions about a person’s private or sex life or a person discussing their own sex life’, ‘unwelcome touching, hugging, massaging or kissing’.

19. Examples given in the policy of ‘Personal Harassment’ includes ‘unwelcome advances, attention, invitations or propositions’, ‘suggestive and unwelcome comments or attitudes’, ‘insulting behaviour’ ‘offensive language or jokes’ ‘non-cooperation at work”. The same policy provides that ‘serious bullying or harassment will be treated as gross misconduct’.

20. The Respondent’s disciplinary procedure provides a non-exhaustive list of examples of gross misconduct including, as potentially relevant to this case, ‘unlawful discrimination or harassment of any kind’

21. The Respondent does not have a policy which prevents employees from having personal relationships with colleagues at work.

Past Conduct History

22. The Claimant has no formal disciplinary warnings on his record.

23. The Respondent has a practice of issuing a ‘Letter of Concern’ which it accepts does not constitute a formal warning under its Disciplinary Procedure. I accept Mr Wilson’s evidence that it is often used as a first informal step, before any formal warning might later be issued for repeated misconduct.

24. On 5 March 2024 the Claimant was issued with a Letter of Concern from Tony Bussey, the Respondent's Manufacturing Manager, about crude and inappropriate communication at work. This related to alleged comments towards a female colleague, Kirsty Durham. The Claimant disputes that he made crude sexual references to Ms Durham (and maintains that Ms Durham made crude and sexual comments to him), but he accepts he received the Letter of Concern. The Letter of Concern warned him that if there was any repeat of this conduct, he might be subject to formal disciplinary action. The letter made clear it was not a formal disciplinary warning.

25. Mr Wilson's evidence, which I accept, is that despite it not being a formal warning, a Letter of Concern has a shelf life, after which it should be considered spent or should be disregarded, in the same way as would apply for a formal disciplinary warning. He explains this is usually 6-12 months but would ordinarily be stated on the letter itself. The letter of 5 March 2024 did not specify any date after which it would be disregarded.

Harassment Training

26. The Respondent was mindful of and had been advised about what it understood to be a heightened legal duty to prevent harassment in the workplace from October 2024. Accordingly, it arranged harassment training for its employees.

27. The Claimant attended a 'toolbox talk' on 27 November 2024 which included training on harassment, including sexual harassment. It made clear that harassment of any kind will not be tolerated and encouraged staff to report it immediately. The training gave examples of sexual harassment including (of potential relevance to this case) 'remarks of a sexual nature about a person's clothing, behaviour, or body', 'sexually explicit statements, questions, jokes or anecdotes', 'requesting sexual favours or dates' and 'excessive and unwelcomed flirting', 'frequently following or standing too close to a person on purpose'.

28. The Claimant completed further online training relating to sexual harassment involving watching a video and an assessment in February 2025.

29. I accept the Claimant's evidence that both occasions of the training had an impact on him, and that it was a topic of some discussion amongst colleagues. The Claimant clearly understood there was a significant element of subjectivity in deciding whether someone was harassed. His evidence was that he therefore felt quite scared about continuing what he described as the 'work culture'. I inferred that he was talking about a degree of banter amongst colleagues (including himself) on the factory shop floor which he evidently recognised could be problematic.

Claimant's relationship with Ms Robinson

30. The Claimant's evidence is that from early on in Ms Robinson's employment with the Respondent (from approximately 8 months before she submitted her

complaint in February 2025, so approximately June 2024), he interacted socially with Ms Robinson outside of work. He explains they were not in a committed relationship, but the clear inference from his evidence was that their relationship was, at least periodically, more than just platonic. The Respondent did not dispute that was the case.

31. At the start of the hearing, it was agreed that WhatsApp messages between the Claimant and Ms Robinson should be admitted into evidence. The Respondent had not previously seen those messages as they had not been produced by the Claimant during the internal disciplinary or appeal process nor were they produced during the disclosure stages of these proceedings. The primary relevance of my findings in relation to those messages are as regards my conclusions on Polkey.

32. The Claimant's evidence is that, at various points in time over the period since Ms Robinson had joined the Respondent's employment, he was in the habit of having personal WhatsApp message exchanges with Ms Robinson. He said that Ms Robinson would send him a lot of explicit messages. He also mentioned naked photos. The implication was that Ms Robinson either instigated those messages or was at least participant in them as part of their relationship outside of work. The WhatsApp messages produced in evidence did not include messages of that nature, but I accept the Claimant's explanation that this was because those messages had been sent with a "disappearing messages" setting, meaning that they are not stored. I can make no finding therefore about the specific nature of those messages, who instigated them nor the dates and times of those messages, but as I found the Claimant a generally credible witness, I accept his evidence to the extent that there had, periodically, been exchanges between him and Ms Robinson of a personal and intimate nature.

33. I accept that the WhatsApp messages evidence and support the Claimant's witness evidence that he and Ms Robinson went on a date to a Weatherspoon's pub on 31 October 2024 and that she was happy to be collected by the Claimant from her house on that date. I observe that Ms Robinson refers to the Claimant, apparently affectionately, as "nob head" in the exchanges on that date. That date is relevant as it falls within a period when Ms Robinson later said that she had been harassed by the Claimant at work over approximately a six-month period until February 2025.

34. The Claimant's evidence is that he stopped messaging Ms Robinson socially and stopped the exchange of personal/inappropriate messages after he had received the harassment training (toolbox talk) on 27 November 2024, realising then that he ought to be putting a boundary around their interactions, having understood more about harassment. The Claimant says his having stopped communication with Ms Robinson was a possible motivation for Ms Robinson later raising a harassment complaint against him by way of personal grudge. Whilst I can see that exchanges between them after the 31 October 2024 are purely work related, and the messages do not contradict the Claimant's account, I find there is no

clear evidence in those messages of any change in behaviour post-dating 27 November 2024 specifically. We do not have a complete history of messages and all of the messages produced appear to be work-related apart from the exchanges about going on a date on 31 October 2024. Accordingly, I can make no specific finding about if or when the Claimant may have stopped or changed the nature of his interactions with Ms Robinson.

Formal Complaint

35. On 3 February 2025, Ms Robinson submitted a formal complaint about the Claimant's behaviour which she said over the last few months had made her feel very uncomfortable and that she was beginning to dread coming to work.

36. Ms Robinson alleged that Mr Barker 'constantly talks in a rude manner making rude comments in conversation in a sexual manner/context'. She elaborated by referencing him 'talking about personal things like weight' and 'how he thinks he's really good looking and every woman wants him'. Ms Robinson explained that this made her feel embarrassed and uncomfortable.

37. Ms Robinson also alleged that Mr Barker 'spent a lot of time hanging around her at work', to the extent that other colleagues were remarking about Mr Barker following her around. The implication from the allegation was that Mr Barker was paying her an unwanted amount of attention at work.

38. Ms Robinson described that she found it mentally draining to work with Mr Barker and that she was anxious about coming to work as a result.

39. A further aspect of the allegations against the Claimant (relating to being non-cooperative or ignoring requests for help on a particular occasion) formed part of the reasons for dismissal but was subsequently overturned on appeal. I therefore make no findings about the investigation or evidence as regards that allegation as it is not necessary to do so.

Formal Disciplinary Investigation

40. Ms Robinson's complaint was handed to Mr Taylor who took it to Mr Jackson, Manufacturing Manager for the Respondent.

41. Mr Jackson read Ms Robinson's written complaint and decided to initiate an investigation into the allegations. He did not consider informal routes because his understanding was that if the employee had chosen to raise matters formally, there should be a formal investigation.

42. Mr Wilson, Team Leader for the Respondent (a peer of Mr Taylor), was appointed to conduct the investigation. Mr Wilson had experience in conducting investigations, but this experience was mostly related to issues such as timekeeping or absence management. He had never previously dealt with an investigation into allegations of harassment.

43. Ms Robinson was interviewed by Mr Wilson on 6 February 2025. Mr Taylor, the Claimant's Team manager was present to take notes. Mr Wilson explains that it is commonplace for team managers to note take in meetings for other Team managers. At the time, Mr Wilson had not envisaged that Mr Taylor might have relevant information for the investigation and had not foreseen therefore that he might not be a suitable note-taker.

44. The meeting with Ms Robinson was brief. Mr Wilson went through each of the points in Ms Robinson's letter asking for more detail. When Ms Robinson gave her answer, Mr Wilson did not ask for any further detail or explore her answer with her at all.

45. Ms Robinson was asked to give some examples of the rude comments she alleged the Claimant had made. In response, she said that the Claimant would 'talk about going to the gym to lose weight so he could look sexy for the girls, and that he talks about wearing tighter clothing to make himself look bigger'. She explained this made her feel self-conscious.

46. Mr Wilson accepts that he did not ask Ms Robinson when this comment was made, or whether the comment was directed at her (rather than in general conversation or to other colleagues), or why it made her feel self-conscious. Neither did he ask whether this comment was witnessed by anyone.

47. Mr Wilson did not ask for any other examples of the rude comments.

48. When asked about her allegation of unwanted attention from the Claimant at work and whether it was correct that the Claimant spent a lot of time around her, Ms Robinson responded in rather equivocal terms: "not so much but still does at times". She said that since she had recently moved to the Build team (which Mr Wilson knew to be only shortly prior to her formal complaint), she felt the Claimant seemed to be spending more time in the Build team. Presumably the inference was that she felt he was doing so as part of continuing the unwanted attention, but that was not explored through any questioning by Mr Wilson.

49. There was no further discussion about Ms Robinson's allegation that the Claimant was 'hanging around her at work'. Mr Wilson did not explore what the Claimant was doing at the time, and why she thought he ought to have been doing something else, and whether she was simply alleging he was inattentive to his job responsibilities.

50. Despite Ms Robinson's complaint mentioning that she was sick of getting comments from colleagues about the Claimant following her around, Mr Wilson did not ask who those comments were made by, or when this had happened.

51. Also, in the context of unwanted attention, Ms Robinson told Mr Wilson that the Claimant had 'previously' asked to have film nights with her. She was not asked any follow-up questions in relation to that suggestion. Mr Wilson did not ask when this invitation took place, whether it was a verbal or text invitation or

anything about the context of how that proposition was made or how it was received by her. This is despite the fact that Mr Wilson admits that he knew from 'factory talk' that Mr Barker and Ms Robinson had been in a relationship outside of work at some earlier point in Ms Robinson's 7 months employment, and he also knew they were no longer in a relationship. He did not ask any questions about the nature of their relationship.

First Fact Finding Interview with Claimant

52. The Claimant was invited to an investigation meeting with Mr Wilson on 10 February 2025. The invitation did not explain the purpose of the meeting other than in very general terms, and I accept therefore that the Claimant had absolutely no idea what the meeting was about. The Claimant attended the meeting accompanied by Luke Roper. Mr Taylor attended to take notes.

53. Mr Wilson had in front of him on the desk the letter of complaint from Ms Robinson. He did not provide a copy of it to the Claimant. He did not read it out but referred to it at various points. He explained to the Claimant that Ms Robinson had raised a complaint and that he wanted to hear what the Claimant had to say.

54. According to the notes of the meeting, Mr Wilson only put to the Claimant part of the allegation about rude comments. The Claimant was asked "Gabbie has spoken about how you talk about going to the gym to look fit for the girls. Do you recall having these conversations". That was an inaccurate description of the allegation which was "to look for sexy for the girls". Mr Wilson admits he made this error and given that the words 'fit' and 'sexy' in this context are not entirely dissimilar, I accept his evidence that he did so inadvertently just as his way of putting across the sentiment of what was alleged. I do not accept the Claimant's contention that Mr Wilson deliberately changed the word 'sexy' to 'fit' to make it sound more like something the Claimant would say.

55. In response, the Claimant accepted that he mentioned going to the gym but denied that he had said 'to look fit for the girls'. Mr Wilson did not follow up with any questions to explore what kind of comments he did make about going to the gym, or any other wider context.

56. It is apparent from the notes of the investigation meeting that Mr Wilson did not put to the Claimant the allegation that he talks a lot about 'how he thinks he is really good looking and every woman wants him'. Neither did Mr Wilson articulate to the Claimant that it was alleged he had 'referred to tight clothing to make himself look bigger'.

57. When asked whether he could think of anything he had said that might have upset Ms Robinson, the Claimant commented to Mr Wilson that Ms Robinson was 'easily upset and very fragile'. Mr Wilson did not explore this comment any further to understand why Mr Barker thought that was the case.

58. The Claimant was asked by Mr Wilson whether he had asked Ms Robinson to go for a movie night. The Claimant said he could not recall doing so. As Mr Wilson had not sought clarity from Ms Robinson, his question to the Claimant contained no indication of when it was alleged he had done so. The Claimant did not mention that he had been dating Ms Robinson or otherwise that he'd had a relationship with her outside of work.

59. As to the allegation about hanging around Ms Robinson at work and paying her unwanted attention, Mr Wilson only asked Mr Barker how he split his time between Build and Finishing and put to him Ms Robinson's impression that he was spending more time in Build since she had moved to that shift. It was not explained to the Claimant that Ms Robinson was alleging he was in the habit more generally of hanging around her at work. The Claimant explained he was spending more time in Build because of his performance improvement plan (PIP) which required him to manage the Builders more closely. Mr Wilson did not explore that any further by asking which parts of his PIP required him to do so.

60. When asked whether there was anything else he wanted to say, the Claimant explained to Mr Wilson that when Ms Robinson had first started in her role, she was sending him inappropriate photos out of working hours. The Claimant suggested that when he then stopped messaging Ms Robinson, that may have upset her. I accept the Claimant's evidence that it ought to have been obvious that he was telling Mr Wilson these facts because he felt it might be relevant context about why the complaint was being raised by Ms Robinson – i.e. that she had some personal grudge against him or had decided to put in a malicious or fabricated complaint because she was upset the Claimant was no longer corresponding with her outside of work. Mr Wilson did not ask the Claimant for copies of these messages, or ask when he had stopped messaging with Ms Robinson, or explore anything more about their relationship and interactions outside of work.

61. Mr Wilson did not interview Ms Robinson again to explore any of the explanations offered by the Claimant. Mr Wilson felt it would not have been productive to have interviewed Ms Robinson again because he already had her account. In relation to the suggestion that Ms Robinson had been sending inappropriate photographs, Mr Wilson's perspective was that the Claimant had not reported this at the time, which he felt was a personal risk for the Claimant. Mr Wilson had not appreciated or recognised (even under cross examination) that the nature of any message exchanges as between Ms Robinson and the Claimant was potentially relevant context to the assessment of whether the Claimant's behaviour towards her genuinely unwelcome and/or reasonably constituted harassment.

Interview Ms Poturala

62. Mr Wilson then held an interview with Magdalena Poturala on 10 February 2025. Again, Mr Taylor was in attendance to take notes. Ms Poturala was another team member working in the Claimant's team, with Ms Robinson.

63. Mr Wilson identified Ms Poturala as a witness because she had been referenced by Ms Robinson in relation to the allegations that were dismissed on appeal.

64. Mr Wilson did ask an open question of Ms Poturala about whether she had witnessed anything on shift that was inappropriate. The only thing that Mr Poturala raised was that Mr Barker seemed to spend a lot of time with Ms Robinson until about 2-3 weeks ago, when it stopped. She remarked that this might have been because training had stopped at that point. Mr Wilson accepts that what Ms Poturala was saying was that although the Claimant seemed to be spending a lot of time with Ms Robinson up until 2-3 weeks ago, this might have been entirely legitimate considering the fact he was training Ms Robinson, which was a normal part of the Claimant's work.

65. Mr Wilson did not explore whether Ms Poturala was already aware of Ms Robinson's complaint and whether they had discussed it. His evidence was that he had not thought to do so.

66. Despite the fact they worked on the same shift together with the Claimant, Mr Wilson did not ask Ms Poturala about the rude comments Ms Robinson had alleged the Claimant made.

Interview – Kyle Taylor

67. On 17 February 2025, Mr Wilson decided it was appropriate to interview Mr Taylor in his capacity as the Claimant's Team Leader. Mr Wilson told the Tribunal that he wanted to know whether Mr Taylor had any other information that was relevant, particularly about whether "anything had gone off" on the shift as between the Claimant and Ms Robinson.

68. I accept Mr Wilson's evidence that it had not occurred to him at the time that treating Mr Taylor as a witness, when Mr Taylor had been a note-taker for the previous investigation meetings, might be problematic in terms of a fair process. He accepts now that Mr Taylor had the benefit of having heard all that Ms Robinson, Ms Poturala and the Claimant had to say and consequently that this was not ideal.

69. During this investigation meeting, Mr Taylor referred to three previous occasions when he said he'd had to intervene or speak with the Claimant about inappropriate language or behaviour towards female colleagues. Those three occasions were as follows.

70. Firstly, that a Production Operator, Janneke had complained to Mr Taylor that the Claimant was spending a lot of time on shift with her, and that she felt uneasy about it. Mr Taylor said that he'd spoken with the Claimant about it informally,

hoping that would resolve the matter, but after a few weeks it was still happening and Janneke had to be moved to the other shift.

71. Secondly, that Tony Bussey had investigated alleged crude comments made by the Claimant to Kirsty, which had resulted in a Letter of Concern.

72. Thirdly, that Freya, a new female employee had complained she felt uncomfortable with the excessive time the Claimant had spent with her when he was working on her shift (during a period of overtime). Mr Taylor described that she had complained about him talking quite often about the gym, on occasion flexing his muscles. He also referred to an occasion when the Claimant had asked another female colleague, Jess, for a cuddle (apparently without issue) and the Claimant then said to Freya that there was 'room for one more'. Freya had walked away. Mr Taylor reported that when he heard about the incident and enquired with Freya whether she was ok, she confirmed that she was, did not wish to raise it formally and reported to Mr Taylor that she had showed the Claimant her wedding ring, hoping this would be enough to get him to leave her alone.

73. Mr Wilson did not ask for a copy of the Letter of Concern or enquire about its date. He did not seek to interview Freya, Kirsty or Jess who were still employed at that time. It did not occur to Mr Wilson to do so. Mr Wilson's reason for not interviewing Freya was that he'd understood she did not want to make a big deal about it and had not raised a formal complaint, failing to appreciate that she could still be a relevant witness as regards Ms Robinson's complaint. Neither did Mr Wilson make enquiries of Mr Taylor about whether the Claimant had any legitimate reason to be spending time with those female colleagues, such as for training.

Second Fact Finding Investigation Meeting with Claimant

74. Mr Wilson conducted a second fact finding meeting with the Claimant on 19 February 2025. Mr Wilson raised the previous instances relating to Kirsty and Janneka. Notably, Mr Wilson did not raise the third example, Freya.

75. The Claimant told Mr Wilson that he was not aware of any complaint in relation to Janneka and that he was surprised to hear what was being suggested. He said he had given Janneka more support because of her relationship with her team. He also pointed to the fact he had sat in meetings with her as her companion, inferring that she would not have selected him to do so if she had been uncomfortable around him.

76. In relation to the allegations against Kirsty, he suggested that the investigation resulted in an informal resolution because both parties spoke to each other in the same way. He accepted that on this occasion Kirsty had been offended. The Claimant explained to Mr Wilson that they now interacted well with each other.

77. Mr Wilson did not conduct any interviews with other team members who might have witnessed the Claimant's behaviour towards Ms Robinson. Neither did he ask either Ms Robinson or the Claimant whether there were people he ought to interview as witnesses. Mr Wilson said in his evidence that his focus was on the letter Ms Robinson had submitted and the points she had made. I infer that as she had not suggested there were witnesses, Mr Wilson was not prompted to consider if there might have been any.

Investigation findings

78. Mr Wilson did not draw the evidence together into an investigation report. He did not seek to analyse it or even summarise the evidence that he had gathered. He simply collated the pack of handwritten interview notes, together with Ms Robinson's complaint for Mr Jackson. Mr Wilson's evidence was that he did not consider it his role to analyse the evidence, or to make findings of fact. He felt this was for Mr Jackson.

79. In a frank admission, Mr Wilson accepted under cross examination that in his view none of the evidence in the investigation was a basis for a disciplinary charge of harassment, let alone sexual harassment.

Invitation to Disciplinary Hearing

80. The disciplinary hearing stage was dealt with by Mr Jackson. He had dealt with various disciplinary matters previously, but this was the first time he had dealt with an allegation of harassment.

81. Mr Jackson reviewed the details set out in the investigation against the definition of harassment and sexual harassment in the Respondent's policies. He took a different view to Mr Wilson and concluded that there was a basis for a disciplinary charge of gross misconduct.

82. The Claimant was invited to a disciplinary hearing on 24 February 2025 in a letter dated 20 February 2025. Although the invitation letter stated that all the relevant evidence was attached, I find that the letter from Ms Robinson setting out her complaint was not attached. That was the Claimant's evidence and Mr Jackson accepts it is possible it was not attached. During the disciplinary hearing, the Claimant also points to the fact Mr Wilson appears to have been asking leading questions of Ms Robinson in the meeting which I accept would appear to be the case from the notes of the meeting until you understand Mr Wilson was reading from the complaint letter when putting questions to Ms Robinson. That factor strongly suggests he had not seen it. The interview notes with Ms Robinson, the Claimant and Mr Taylor were attached to the invitation letter.

83. In the letter inviting the Claimant to the disciplinary hearing the grounds for disciplinary action were stated to be potential gross misconduct in relation to "Harassment of employees". The letter did not set out any detail about what specifically was alleged to constitute harassment. The basis for the disciplinary

charge was not clear. The letter did not identify the precise matters of concern, namely unwanted advances (in the form of asking Ms Robinson to movie nights and hanging around her at work) and rude comments in a sexual context (the comments about looking sexy for the girls, that every woman wanted him and that he thought he was good looking).

84. Although 'harassment of employees' was expressed to be in the plural (i.e. employees rather than one employee), Mr Jackson's evidence was that he meant 'harassment of one of our employees' in a general sense, and that the disciplinary charge only related to the alleged behaviour towards Ms Robinson. My finding is that Mr Jackson had not considered in any detail at the time he wrote that letter exactly what the disciplinary charge related to, other than the totality of what he considered to be an apparent unacceptable pattern of behaviour. There was a lack of clarity throughout the Respondent's witness evidence in this case about the relevance of the allegations relating to Freya, Kirsty and Janneka and at times their own witness statements were contradictory.

85. Even considering the documents attached with the invitation letter, I find that the Claimant reasonably did not understand that the charge only related to Ms Robinson. Given that the investigation interview notes included the meeting with Mr Taylor raising allegations about the Claimant's conduct towards Janneka, Kirsty and Freya, and those allegations had been (partially) put to him in investigation meetings, he reasonably understood that he was being charged with his conduct towards Ms Robinson and those three other women.

86. Nor could the Claimant reasonably ascertain with any clarity what exactly he was being charged with. The Claimant accepts that he had read the interview notes attached to the disciplinary invitation letter from which he was then able to try and prepare for the disciplinary meeting by trying to respond to everything that had been stated in the investigation interviews, but I accept his evidence that he could only guess at exactly which parts of the investigation meetings were said to form part of the disciplinary charge. As Ms Robinson's complaint letter was not included in the pack, and he had never been asked about key aspects of her complaint, he could not have deduced the totality of what was being alleged. Mr Jackson admits on cross examination that the letter could have been clearer.

87. Although Mr Jackson's witness evidence was that he felt the allegations would relate to 'sexual advances', 'propositions and sexual advances' and 'isolation or non-cooperation at work', none of those phrases were referenced in the letter inviting the Claimant to a disciplinary hearing.

88. Mr Barker was offered the right to be accompanied and was warned that a potential outcome of the meeting was the termination of his employment

Disciplinary Hearing

89. The Claimant attended the disciplinary hearing on 24 February 2025. He was accompanied by Mr Roper.

90. The disciplinary hearing was chaired by Mr Jackson, who did not know the Claimant or other colleagues particularly well as he had been working at a sister company of the Respondent until early February 2025. I accept therefore that he came to consider the allegations with minimal preconceptions.

91. Mr Jackson started the hearing by saying that the complaints included sexual harassment and isolating an individual and that there had been 3 more complaints which was very concerning to the Respondent (this was a reference to allegations by Kirsty, Janeka, Freya). In doing so, Mr Jackson gave every impression that the meeting was to discuss sexual harassment against all four women.

92. The disciplinary hearing lasted approximately 80 minutes. The notes of the meeting are not a complete record of what was discussed because the Claimant was reading from and referring to a statement he had prepared in advance and which he then sent to Mr Jackson at the end of the meeting. Taken together, the Claimant accepts that those documents represent almost a complete record of what was discussed.

93. In relation to the various aspects of the allegations made by Ms Robinson, the Claimant's position was as follows.

94. The Claimant denied the 'look sexy for the girls' allegation. He maintained the word sexy was not something a man would say. He said that 'sexy' is a word women use. He inferred therefore that this suggested the allegation was made up by Ms Robinson. The Claimant accepted that he talks about going to the gym and that this is something lots of people discuss. He said that Ms Robinson asks him regularly about going to the gym and that how she would like to go but doesn't know how to use the machines. He said that Ms Robinson had hinted she wanted to go with someone to the gym and had posted about that on social media. The inference in what the Claimant was saying was that Ms Robinson was actively participant in conversations about going to the gym or had instigated them herself.

95. He also stated that he talked about the gym because he is asked about it on a regular basis including by Mr Taylor and another Team Leader, Liam. He suggests that Mr Taylor and Liam had on my occasions laughed at him and made comments in front of colleagues about it not looking like he did go to the gym.

96. As to the comment about going to the gym to lose weight and wearing tight clothes to make himself look bigger, the Claimant said this seemed made up. He pointed to the apparent contradiction in suggesting he was trying to lose weight, but also simultaneously to make himself look bigger.

97. As to the inviting her to movie nights allegation was concerned, the Claimant said that it was the Claimant who started messaging him and sending him inappropriate photos after work and that she was the one messaging him to see him outside of work or to watch films. The Claimant did not offer copies of the messages but neither did Mr Jackson request to see them.

98. The Claimant also said that Ms Robinson would also talk in a rude and sexual manner including talking about threesomes.

99. The Claimant denied that he was paying Ms Robinson an unwanted amount of attention at work. The Claimant pointed to the inconsistency in Ms Robinson's interview where on the one hand she was complaining about the Claimant ignoring her requests for help (the allegation that was subsequently overturned on appeal) but also complaining that the Claimant was hanging around her too much. He also explained that he was only spending more time in Build due to his performance improvement plan targets which needed him to focus more on overseeing the team there. He maintained that time spent with the Claimant was to train her or supervise her work. He points to Ms Poturala's comment in the investigation interview where she suggests the reason the Claimant may have stopped spending more time 2 or 3 weeks ago was because training Ms Robinson had finished, which the Claimant argued supported his position. The Claimant also suggested that Mr Jackson should check the CCTV footage to show his movements

100. The Claimant suggested that Ms Robinson had made these allegations up. He speculated that she might be doing so because he had stopped engaging with her outside of work, and she had fallen out with him as a result. He felt this was a personal grudge by Ms Robinson. He offered another possible explanation as to why Ms Robinson might have made allegations up, namely that she wanted to change shifts and that she was prepared to say anything to make that happen.

101. The Claimant said he felt this disciplinary process was a witch hunt against him and that he was not being treated consistently with everyone else. The Claimant said that he had complained about Liam's conduct towards him in the past and nothing had happened about it. He felt it was likely Liam had encouraged Ms Robinson to submit a complaint because he did not like the Claimant. The Claimant said he had witnesses who had seen Liam telling Kirsty to submit a complaint against him.

102. Mr Jackson tried to clarify what the Claimant meant about his own complaints having been ignored. I do not accept Mr Jackson's contention that the Claimant contradicted himself when he said in the disciplinary meeting 'I made a complaint' and then later said 'I haven't put a complaint in as I've had bad experiences'. That Mr Jackson saw this to be a contradiction is because Mr Jackson does not regard it to be a 'complaint' until it is formally submitted in writing. It was a theme across the Respondent's witness evidence that there was an understanding amongst managers that they did not have to pay any attention

to complaints which were not formalised in writing, and that they had no relevance or weight. I accept the Claimant's evidence that he was saying he had complained (verbally) about Liam but had not submitted it in writing because of past experiences of that not being productive. No doubt he could have articulated that more clearly, but I find it ought to have been reasonably apparent to Mr Jackson or that the contradiction could have been explored if he intended to rely on it as a reason to prefer Ms Robinson's account.

103. The Claimant explained to Mr Jackson that it was commonplace for employees to be making inappropriate jokes and comments about each other. To illustrate that point, he gave examples of Mr Taylor flirting with a particular colleague Karolina and that Karolina had come to the Claimant saying she felt uncomfortable about that. The Claimant said he'd had to speak with Mr Taylor about this. He gave another example of Kirsty having made a joke about how the Claimant should swallow cum as that always helped her with a sore throat. The Claimant said this comment had led to Kirsty receiving a letter of concern at the same time as he had received his letter of concern.

104. In relation to Janneka, the Claimant accepted that Mr Taylor had spoken to him about spending too much time with Janneka. The Claimant said he had complied with that request. The Claimant said he did not believe Janneka was the source of this complaint. He said he was not aware of any complaint from Janneka and that they were still friends outside of work. The Claimant explained that he knew from Janneka that Mr Taylor had slept with Janneka, promised her promotional opportunities whilst doing so, and had been bragging about that with colleagues at work, which had caused Janneka to be uncomfortable around Mr Taylor and caused her to want to change shifts. The implication was that it was Mr Taylor and not the Claimant that had caused Janneka to be uncomfortable and change shifts at work, and that Mr Taylor's evidence was therefore unreliable. It was also implicit that the Claimant was arguing that Mr Taylor's conduct towards female members of staff was far more serious than was being alleged against the Claimant and hence he was being treated inconsistently. The Claimant gave other examples about inappropriate sexual comments and behaviour that Mr Taylor made at work.

105. In relation to Freya, the Claimant points to the fact that there is no information in Mr Taylor's interview about the source of any complaints from Freya and no other evidence of her raising concerns. He denies that he had to be shown her ring to know she was married, as he knew this already.

Dismissal

106. After the disciplinary hearing, Mr Jackson did not conduct any further investigations except to clarify with Mr Wilson why Mr Taylor had been a note-taker and a witness and to understand that Mr Wilson was reading from the letter of complaint and not leading Ms Robinson when he interviewed her.

107. He did take advice from the Respondent's external HR advisors, Clear Risk Management. His evidence was that he went through with them the evidence and took their advice about his decision-making. The advice included that if it was a case of one person's word against another, ultimately Mr Jackson was entitled to find one account more likely than the other, and that it was about what his reasonable belief was about what had happened.

108. Mr Jackson then arranged to meet with the Claimant again the following day, 25 February 2025.

109. At the start of the meeting on 25 February 2025 the notes record a discussion about whether the Claimant had asked Mr Wilson to see a copy of Ms Robinson's complaint. I infer that he asked the question because the Claimant had referred in his email statement to there being no formal complaints. The Claimant said he had not asked Mr Wilson for it and Mr Jackson told the Claimant that the complaint did not have to be shared at the investigation stage. I accept the Claimant's evidence, which was robustly maintained under cross examination, that he was not offered the opportunity by Mr Jackson to see Ms Robinson's complaint at this meeting on 25 February 2025 (i.e. prior to the decision to dismiss being communicated to him). That is because Mr Jackson was labouring under the misapprehension that the Claimant had now been sent the complaint with the papers sent prior to the disciplinary hearing even if he had not originally been shown it by Mr Wilson. That was the position set out in Mr Jackson's witness statement too until Mr Jackson amended it immediately prior to the statement being admitted in evidence, having belatedly realised that the Claimant's position might be correct.

110. Mr Jackson then went on to explain to the Claimant that his decision was to dismiss for gross misconduct. Brief reasons were given in the meeting.

111. A letter confirming the Claimant's dismissal was dated 26 February 2025. That listed three matters which had been upheld, namely (1) making rude comments in a sexual context, (2) being non-cooperative at work and (3) made unwanted advances. The decision to dismiss with immediate effect on grounds of gross misconduct for harassment and sexual harassment was confirmed. The letter contained no further detail on the reasons for dismissal. It contained no analysis of the evidence, nor any recognition of the points that the Claimant had advanced in his defence.

112. Given the limited contemporaneous evidence, I am heavily reliant on the witness evidence of Mr Jackson to make findings about the reasons for dismissal and his decision making rationale.

113. Mr Jackson concluded that the evidence supported a finding of harassment and sexual harassment towards Ms Robinson. I accept his evidence that the matters which he considered to be sexual harassment were those about 'going to the gym to look sexy for the girls' (and the related comments about wearing tight

clothing to make himself look big), ‘every woman wanted him and he thought he was good looking’ and the unwanted advances to Mr Robinson in the form of asking her on movie nights. That is consistent with the three bullet points in his dismissal letter. Mr Jackson’s evidence is that he took those comments as just examples of comments which Ms Robinson had said had been going on for several months. His view was that the harassment comments were not always significant ones, and that he understood from the Harassment policy and training that harassment could be a build-up of small comments. I understood from Mr Jackson’s evidence that his conclusion was that there must have been other comments or behaviours towards Ms Robinson beyond the specific alleged comments, without Mr Jackson knowing what those might have been.

114. Mr Jackson took into account that Ms Robinson was a subordinate of the Claimant. He said that talking about looking sexy for the girls and wearing tight clothing to look bigger were just not acceptable things to be saying to a subordinate. Mr Jackson concluded that it was similarly inappropriate to be inviting subordinates on movie nights at work.

115. Mr Jackson took into account that the Claimant had attended training in October 2024 about harassment. He relied on the words ‘over the last few months’ in Ms Robinson’s complaint (which was dated February 2025) as evidence that the Claimant’s conduct post-dated the harassment training. On cross examination however Mr Jackson accepted that Ms Robinson was not asked about dates and that he could not therefore be certain when the conduct happened.

116. Mr Jackson also took into account the advice he had received about the change in the law which meant that from October 2024 an employer had a higher pro-active duty to take steps to prevent harassment. He explained that this made him feel he could not risk keeping the Claimant in the business given the risk he potentially posed to other employees in the future.

117. Mr Jackson accepted on cross examination that there was no witness to the comments Ms Robinson had alleged were made. He also accepted that the Claimant had denied the allegations. Mr Jackson explained that he had preferred the evidence of Ms Robinson because of the evidence of the Claimant being the subject of previous similar misconduct concerns. He was therefore taking into account the Letter of Concern relating to inappropriate conduct towards Kirsty and Mr Taylor’s evidence about concerns raised by Freya and Janneka. Mr Jackson also felt that the points made by the Claimant amounted to little more than opinion rather than evidence. In finding Ms Robinson the more credible account, Mr Jackson said he took into account that the Claimant would say one thing and then backtrack and say something contradictory. To illustrate that point, he pointed to the line in the disciplinary hearing where the Claimant had said he had raised a complaint and then that he had not.

118. Mr Jackson accepts now that the various aspects of the Claimant’s defence were not looked into by him, or by Mr Wilson. Mr Jackson said he did not think at the

time he made his decision that he needed to do that. He said he didn't feel he needed to go back round it again. He felt he had enough to make him believe that what Ms Robinson said was verified. As to the suggestion that Ms Robinson had been sending the Claimant inappropriate messages, Mr Jackson's rationale at the time for not looking into it was that it wasn't part of the allegations against the Claimant and that he had not understood the Claimant to be suggesting it was something that should be investigated in the context of the disciplinary allegations against him. Mr Jackson accepted on cross examination however that he now accepted it was potentially relevant as evidence of Ms Robinson's motivation for bringing the complaint. He also accepted on cross examination that he should have interviewed Ms Robinson in relation to his understanding that the specific comments were only examples of other comments that would also have been made.

119. As to the suggestion by the Claimant that other managers were having relationships with subordinates and that this might be relevant to the assessment of the allegations against the Claimant, Mr Jackson felt at the time that it was not relevant and simply an attempt to distract away from allegations against the Claimant.

120. In deciding that dismissal was the appropriate outcome, Mr Jackson's evidence during cross examination is that he did consider the Claimant's length of service and that he did consider other sanctions. It is notable however that neither of these parts of his decision making was included in his witness statement, despite it being prepared with the benefit of legal representation. On balance however, I found Mr Jackson to be a credible and honest witness, particularly as he was prepared to accept some inadequacies in the investigation and decision-making as outlined above. I accept his evidence therefore that he did consider alternative sanctions and did consider the Claimant's length of service but concluded that sexual harassment was a serious matter such that summary dismissal was appropriate.

Appeal Hearing

121. The Claimant raised an appeal against his dismissal.

122. In advance of the appeal meeting, the Claimant submitted two documents outlining his grounds of appeal. In summary, his arguments were:

    a. The lack of evidence supporting the alleged comments and behaviour

    b. The absence of formal complaints from those directly involved

    c. The context of his personal relationship with Ms Robinson and possible motivation behind her accusations not being taken into account

    d. His consistent history of helping colleagues and his performance improvement plan putting constraints on him

e. The failure to consult the broader shop floor team, who could provide a more accurate reflection of his character and conduct.

123. The Claimant also submitted four statements from female colleagues who each stated that they did not feel uncomfortable around the Claimant and found him to be professional and supportive. The Claimant accepts that these four colleagues did not work immediate alongside him in the same room, but as his job involves supervising different areas of the operation, he has regular/daily interactions with them.

124. Mr Metcalfe, Operations Director for the Respondent, was appointed to hear the appeal.

125. An appeal hearing took place on 13 March 2025. The Claimant attended accompanied by Mr Roper.

126. During the appeal hearing, the Claimant pointed to flaws in the investigation and the lack of evidence. The Claimant argued that Janneka and Freya should have been interviewed. Mr Metcalfe explained that as Janneka had left the business it would not be possible to interview her.

127. The Claimant argued that Mr Taylor's evidence was biased and that there was a conflict because he had previously been a note-taker in the earlier investigation meetings. He pointed again to Mr Taylor's relationship with Janneka and that Janneka had raised concerns about Mr Taylor with Mr Chambers, Health & Safety Manager.

128. The Claimant suggested that the concerns raised by Ms Robinson had been blown out of proportion, that the wording wasn't what he would say and that it didn't seem to be of a 'sexual' nature. He pointed again to the fact he felt Ms Robinson was choosing to raise things she alleged had happened in the past because of what was happening between them currently. He explained that he'd had a previous relationship with Ms Robinson, initiated by Ms Robinson and that this complaint only arose once the Claimant had started to distance himself from her outside of work.

129. The Claimant argued that he felt harassment could not be a 'one time thing' and it would be to multiple people with multiple examples, which were not present here. He pointed to the lack of formal complaints from Janneka and Freya. He argued that the examples given did not constitute harassment.

130. There was a discussion during the appeal hearing about the Claimant having not received a copy of Ms Robinson's complaint. The Claimant accepts that Mr Metcalfe then offered him the opportunity to be shown a copy of that complaint, but he declined on the basis that "it wasn't worth it as the decision to dismiss him had already been made".

131. After the appeal hearing, Mr Metcalfe carried out some further investigations.

132. Firstly, he made enquiries with Mr Bussey about the complaints that Freya had allegedly made about the Claimant. He spoke verbally to Mr Bussey who told Mr Metcalfe something had happened in June 2024, and he'd had reason to speak to the Claimant about it. Mr Metcalfe now accepts he should have conducted a noted interview with Mr Bussey, but instead he asked Mr Bussey to send an email setting out the detail of what had happened. Mr Bussey subsequently did so, confirming that only about a week after Freya had started her employment in June 2024, Mr Taylor had reported that the Claimant had been "at it again", "trying to get off with Freya" and that Freya was not happy about, even having to show her wedding ring to the Claimant to put him off. Mr Bussey went on to explain that he then spoken 'off the record' to the Claimant to "read him the riot act" warning him that pushing himself onto, trying to get off with and generally being a nuisance to other employees whilst at work was completely unacceptable and that he needed to stop immediately. Mr Bussey reported in his email that the Claimant seemed to be shocked by the curtness and had little to say. Mr Bussey indicated that he had told the Claimant that as a Cell Leader he needed to be a role model. In cross examination during the hearing, the Claimant accepts this conversation did take place with Mr Bussey, but he suggests he was spoken <u>at</u> and that Mr Bussey did not allow the Claimant to respond or offer his own version of events.

133. Mr Metcalfe interviewed Freya who explained that she had not requested to move shift because of the Claimant, as Mr Taylor had suggested. Rather, she had remarked to Mr Taylor that she was happy about the move because she hadn't felt comfortable around the Claimant. She described that there were lots of little things about the Claimant that felt a bit "creepy". She explained that there was an occasion when she had to remind the Claimant that she was married, that his comments were inappropriate and to stop. She told Mr Metcalfe that you could see in the Claimant's eyes and mannerisms that he felt he had the 'green light' for new female starters. When asked for examples, Freya said the Claimant would ask women to smell him or his new deodorant, asked women to feel his muscles as he had been to the gym. She also recounted an occasion when she had witnessed the Claimant cuddling Jess Waite at work. Freya explained that Jess had suggested that Freya join the cuddle as the Claimant was a good cuddler. Freya declined this invitation but explained she was apprehensive that the Claimant might then try and cuddle her at work.

134. Mr Metcalfe also arranged an interview with Ms Robinson and sought to explore her allegations in a little more detail. She explained that the conduct had been ongoing for roughly 6 months. She gave some further examples of the Claimant's behaviour including talking about himself, what clothes size he was wearing now, rolling up his sleeves to show off his muscles. Mr Metcalfe also explored with Ms Robinson the nature of her relationship with the Claimant outside of work. Ms Robinson confirmed that she had seen the Claimant once outside of work around 7-8 months ago but had decided it wasn't going to work, and that it didn't go any further. She explained that the Claimant's harassment of her at work started after she had called off the relationship and that he did not know where to draw the

line between outside and inside of work. She described that when the Claimant became aware she was seeing someone else romantically, the Claimant had then ignored her for several days requiring another colleague to intervene. She explained the harassment from the Claimant had resumed as soon as he found out that her other relationship had ended.

135. Mr Metcalfe also interviewed Mr Chambers to explore the suggestion that Janneka had raised concerns with him about Mr Taylor's conduct. Mr Chambers confirmed that Janneka had approached him, explaining that she and Mr Taylor had been in a relationship outside of work. She was concerned that she had been moved shifts because of that relationship. Mr Chambers explained to Mr Metcalfe that he had told Janneka it was because of the need to balance the labour between the shifts and not related to the situation with Mr Taylor.

136. Mr Metcalfe read and considered the statements from the four females, but he did not consider their evidence particularly relevant as he felt they were character statements and did not witness the events in question. Mr Metcalfe did not seek to interview those four females as he had not understood that the Claimant was asking him to do so. Mr Metcalfe felt he could understand their evidence from their statements.

137. The Claimant complained in his first appeal document that there had been a failure to consult the broader shop floor team to provide a more accurate reflection of his character and conduct. Mr Metcalfe felt he had addressed that point by interviewing Ms Robinson and Freya as those were the steps he had agreed with the Claimant he would take in response to his appeal. I reject Mr Metcalfe's evidence that these steps had been agreed with the Claimant in the sense that these were the only steps Mr Metcalfe should take to properly consider his appeal. Nothing to that effect is included in the notes and it is wholly improbable that the Claimant would have agreed that no further investigations should be undertaken in light of the many points he had set out in writing.

138. Mr Metcalfe decided to overturn the 'non-cooperation at work' allegation, but he upheld the dismissal on the other two grounds. Mr Metcalfe felt that the evidence provided by Freya, including some more specific details of the types of behaviour displayed by the Claimant, were corroborative of Ms Robinson's complaint. He also concluded that there was evidence to suggest that three separate complaints (even if not all formal complaints) of harassment had been raised by Kirsty, Freya and Ms Robinson within a 12-month period. Mr Metcalfe felt this was as pattern of behaviour which led him to conclude that there was a reasonable basis to uphold the allegations made by Ms Robinson of sexual harassment.

139. Mr Metcalfe did not share the notes of his further investigations with the Claimant prior to making his decision and therefore did not invite his comment on them.

140. Mr Metcalfe wrote to the Claimant on 20 March 2025 confirming that he was overturning the 'non-cooperative at work' allegation but upholding the other aspects of the decision to dismiss. Mr Metcalfe alluded in his letter to having interviewed other employees and considered information from Mr Bussey regarding the Claimant's behaviour and unwanted advances made to another unnamed employee.

The Law

141. Section 94 of the Employment Rights Act 1996 ("ERA") sets out the right of an employee not to be unfairly dismissed.

142. If there has been a dismissal the first issue is whether the respondent has shown that the reason or principal reason for dismissal was a potentially fair one within the meaning of section 98(2) of the ERA. In this case the respondent alleged the reason for dismissal was conduct (or some other substantial reason in the alternative).

143. The second question is whether the decision to dismiss was fair or unfair in all the circumstances. When it comes to making that decision there is a neutral burden of proof i.e. it is not for the employer to prove that it acted fairly.

144. As this is a misconduct dismissal, the Burchell test applies (British Homes Stores v Burchell [1980] ICR 303). In deciding whether the dismissal was fair or unfair I need to ask the following questions: (a) Did the respondent have a genuine belief that the Claimant was guilty of the misconduct for which he was dismissed? (b) At the time that belief was formed, did the respondent have reasonable grounds for it? (c) Had the respondent carried out as much investigation as was reasonable in the circumstances? (d) Did the respondent follow a reasonably fair procedure? (e) Was dismissal within the band of reasonable responses.

145. The question is whether the decision of the respondent in dismissing the Claimant fell within "the band of reasonable responses". It is not whether I would have reached the same conclusion as the respondent did but whether the respondent acted within the range of reasonable responses to the employee's conduct in deciding to dismiss the Claimant. Iceland Frozen Foods v Jones (1982) IRLR 430 and Post Office v Foley (2000) IRLR 827

146. The same approach applies to considering the respondent's conduct of the investigation and whether the investigation was within the range of reasonable responses which a reasonable employer might have adopted (J Sainsbury PLC V Hitt [2003] ICR 111 Court of Appeal).

147. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Unions 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. Relevant parts of that ACAS Code are as follows:

a. Employers should carry out any necessary investigations, to establish the facts of the case (Point 5)

b. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct…and its possible consequences to enable the employee to prepare to answer the case at the disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification. (Point 9)

148. The ACAS Guide which accompanies the ACAS Code also provides that the nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against. The case of A v B [2003] IRLR 405, EAT held that 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 out to be.

149. Fair appeals are an integral part of procedural fairness. 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).

Contributory Fault

150. Section 122(2) ERA 1996 provides that where the tribunal considers that any conduct of the Claimant before the dismissal 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. 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. 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.

151. 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).

152. 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

153. 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).

154. 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).

155. 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 5 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).

156. 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.

157. Similarly, in Contract Bottling Ltd v Cave [2015] ICR 146, EAT, Langstaff P emphasized 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.

Conclusions

158. I have applied the law to the relevant facts, and my conclusions are as follows. I am grateful to the submissions on behalf of both parties. I do not rehearse those submissions here but address the key arguments advanced in my conclusions below. Similarly, I have read and taken into consideration all the case law cited by both parties, even if not expressly referenced below.

What was the reason for dismissal?

159. The Respondent argues that the reason for dismissal was the Claimant's misconduct. In the alternative, it is argued that the reason for dismissal was that trust and confidence had broken down. That latter reason was not pursued with any vigour by the Respondent and in my judgment was plainly not the reason for dismissal.

160. The Claimant argues, although not strongly, that the reason for dismissal was for some other motive, namely that various managers did not like him.

161. I am satisfied that the Respondent's reason for dismissal was a reason relating to the Claimant's conduct and that the Respondent's witnesses held a genuine belief in the Claimant's guilt.

162. Mr Jackson and Mr Metcalfe gave evidence and held their position under cross examination that the reason for dismissal was their genuine belief that the Claimant had spoken and behaved in a manner towards his female subordinate colleague Mr Robinson which the Respondent concluded constituted sexual harassment. More specifically, the Respondent believed that it was more likely than not that the Claimant had made comments about going to the gym to lose weight and look sexy for the girls, that every woman wanted him and that he thought he was good looking, and in doing so was conducing himself in a way which made Ms Robinson feel uncomfortable at work. The Respondent also believed that the Claimant had been paying Ms Robinson unwanted attention at work including inviting her on movie nights. That reason for dismissal is also supported by the fact there had been a written formal complaint by Ms Robinson which led to an investigation about those matters with a disciplinary and appeal hearing which also considered those matters. Although the dismissal letter did not contain much detail, it did make clear that these were the reasons for dismissal.

163. The Claimant did not produce any convincing evidence of any other reason for dismissal sufficient to override the wealth of contemporaneous documentary evidence about misconduct being the reason.

164. It was argued on behalf of the Claimant that the alleged conduct did not satisfy the definition of harassment or sexual harassment in that there was no evidence that the comments were of a sexual nature or that the advances were unwanted. It was further argued that the alleged conduct did not meet the definition of gross misconduct, because it did not involve deliberate wrongdoing or negligence (Sandwell and West Birmingham Hospitals NHS Trust v Westward EAT/0032/09/LA). I will address the question of evidence below when considering the investigation and whether the Respondent had a reasonable belief, but by way of framing my findings I will explain at the outset that I am satisfied that in principle at least, a male supervisor who persistently engages in behaviours towards a subordinate female colleague which are designed to draw attention to his physical appearance, repeating comments about his clothing, physique and attractiveness to women, particularly when framed in a manner that implies sexual desirability or availability, may be engaging in conduct that is capable of constituting harassment or sexual harassment particularly when combined with unwanted romantic advances being made at work. I will also address below whether the decision to dismiss the Claimant fell within the band of reasonable responses open to an employer, but there is no issue in principle with sexual harassment being capable of amounting to gross misconduct even if the Claimant did not intend to have that effect.

165. I am satisfied therefore that the reason for dismissal was a reason relating to the Claimant's conduct which is therefore a potentially fair reason under section 98(2)(b) ERA.

Did the Respondent have reasonable grounds for believing the Claimant had committed misconduct, based on a reasonable investigation?

166. Whether the Respondent had reasonable grounds for its belief in the Claimant's misconduct must be considered in light of whether there had been a reasonable investigation.

Was there a reasonable investigation?

167. In my judgment, the investigation at and prior to the dismissal stage was wholly inadequate by reference to what a reasonable employer might have adopted, and particularly poor considering the considerable size and resources of the Respondent. Whilst the Respondent is not a very large employer, it is large enough and with sufficient resources to have engaged the services of an external HR advisor.

168. Mr Wilson had an extremely narrow and rather formulaic understanding of his role as an investigator. He essentially saw his role as requiring him to interview the complainant to ask for some more detail about her written complaint, and then to interview the Claimant, as the alleged perpetrator, to see what he said in response. With the single exception of Mr Taylor, he only interviewed witnesses where they were obviously named by the complainant and did not consider it his

role to apply any analysis to what was being said, or to probe beyond what was being put to him.

169. Mr Wilson's experience was in dealing with disciplinary matters such as lateness and attendance, which in my judgment were likely to be much more straightforward or routine in nature. Whilst this formulaic and non-inquisitorial approach might be sufficient in a case of lateness for work (where there is for example no dispute that the colleague arrived late, and there just needs to be an assessment of the reasons for it), that type of approach is grossly inadequate in the case of alleged sexual harassment which was strongly disputed by the Claimant.

170. The most significant deficiencies in the investigation were as follows:

Insufficient questioning of complainant

171. Mr Wilson failed to question the complainant to a sufficient extent to clarify the detail of what she was alleging and the basis for it. He did go through her written letter of complaint and asked for further details, but there was no attempt to probe or understand more about the rather limited answers she gave or to explore the context at all with her. He simply wrote down what she said and moved on.

172. Mr Wilson admits that he did not ask Ms Robinson anything about the dates of the alleged comments or explore for how long the alleged conduct had been going on. The dates were likely to be relevant at least by reference to when the Claimant had undertaken harassment training, and so that the Claimant could have a clear understanding of the time period in question. Neither did Mr Wilson ask when the alleged comment about 'looking sexy for the girls' was made, or even if the comment was addressed towards Ms Robinson specifically or more generally to others but in her vicinity.

173. Mr Wilson did not ask for any further examples of the Claimant's alleged comments or behaviours that Ms Robinson found unwelcome beyond those few that she offered, despite the suggestion in her letter that this had been ongoing for many months.

174. He made no attempt to discuss with Ms Robinson why or in what respect she found the alleged comments embarrassing or uncomfortable. There was no discussion about why she felt the comments were sexual in nature.

175. When Ms Robinson gave a somewhat equivocal answer ("not so much but still does at times") about whether the Claimant was hanging around her a lot at work, Mr Wilson did not explore that any further. Given that the unwanted attention and advances were in my judgment the most serious parts of the alleged conduct, there ought to have been greater exploration of whether and to what extent she had received unwanted attention from the Claimant at work.

176. When Ms Robinson disclosed that the Claimant had invited her for a movie night, there was no discussion about when this had happened or indeed whether it was unwelcome by Ms Robinson, despite Mr Wilson already being aware that Ms Robinson and the Claimant had, at some stage, been in a relationship of some kind outside of work.

177. In my judgment all those matters were particularly important in this case where the comments alleged were not necessarily overtly sexual in nature or examples of particularly serious harassment. The allegations were of a nature where the conduct was potentially capable of constituting harassment depending significantly on the context, which was not explored from Ms Robinson's perspective to any meaningful extent.

Failure to put the whole allegation to the Claimant

178. It is a basic principle of natural justice and a fair investigation that the allegations should be put to the Claimant so that he has an opportunity to respond. Whilst it was not necessary for Mr Wilson to have shared Ms Robinson's complaint letter with the Claimant in advance of the investigation meeting, at a minimum he needed to understand and have the opportunity to respond to the totality of what was alleged.

179. The most significant oversight was not explaining to the Claimant that it was being alleged that he was generally paying Ms Robinson an unwanted amount of attention at work, of which spending too much time in Build was apparently only one example.

180. It was also a significant oversight not to put to the Claimant that Ms Robinson alleged that he talks about himself a lot about 'how he thinks he is really good looking, and every woman wants him' or that he was alleged to have referred to 'wearing tight clothing to make himself look bigger'. Without that added alleged context to the alleged 'looking sexy for the girls' comment, the Claimant naturally could not appreciate the alleged seriousness of what he believed to be one isolated comment.

Inadequate investigation of exculpatory evidence

181. Given that the Claimant strongly denied the allegations made by Ms Robinson, it was incumbent on Mr Wilson to carry out reasonable investigations to explore any evidence which supported Ms Robinson's version of events and any evidence supporting the Claimant's version of events. In my judgment, and for the reasons set out in the paragraphs below, there were insufficient efforts by Mr Wilson to explore exculpatory evidence.

182. Despite there being at least 3 other women and approximately 6 or 7 other men who worked on the same shift and in the same physical vicinity with the Claimant and Ms Robinson, Mr Wilson made no attempt to interview any of them (aside from Ms Poturala) to see what they had to say about the way the Claimant

conducts himself at work, and any comments they might have witnessed towards Ms Robinson or anyone else. Even when interviewing Ms Poturala, who did work in that team, Mr Wilson did not explore to any depth how the Claimant conducted himself either generally, or towards Ms Robinson particularly. Mr Wilson accepts he could have interviewed other colleagues, and, in my judgment, a reasonable employer would have sought to interview at least a selection of those colleagues, notwithstanding the sensitivity of the allegations. These were not apparently comments alleged to have been made privately to Ms Robinson on one occasion (indeed that had not even been clarified). What seems to have been alleged is that the Claimant was in the habit generally, over several months, of making comments such as those alleged and to have been paying Ms Robinson unwanted attention on more than one isolated occasion. That being the case, it was highly likely that the behaviour would have been witnessed by others in the shop floor environment.

183. Whilst Mr Taylor, who had managerial oversight of the Claimant's team, was certainly a relevant witness in that context, it was not reasonable to rely solely on his evidence about the Claimant's behaviour towards colleagues. Mr Taylor had prior knowledge of the complaint, having been the original recipient, and had also acted as note-taker during earlier interviews. These factors created a clear risk that his evidence might be influenced, consciously or otherwise, by what he had already seen and heard. In those circumstances, his evidence could not be considered independent or neutral, and greater care should have been taken to corroborate it with other sources or to seek alternative perspectives.

184. Mr Wilson made no attempt to investigate the Claimant's evidence in his defence about Ms Robinson being in the habit of sending him inappropriate messages outside of work (the WhatsApp messages), or that she may have reason to make up allegations against him when he had stopped messaging her back, or his later suggestion that it was Ms Robinson who had been the one suggesting movie nights and that she too would talk about sexual matters such as threesomes at work. Those were potentially relevant matters in assessing the veracity of Ms Robinson's evidence and the context of the alleged harassment. Whilst the subjective effect of the conduct on Ms Robinson was certainly relevant, there is much about the context of such conduct which will be relevant in deciding whether it was reasonable for the alleged conduct to have had that effect on her (and therefore whether it constituted sexual harassment). If the Claimant's alleged misconduct was taking place over a period when Ms Robinson and the Claimant had been in a relationship or when Ms Robinson had been sending him messages or images which reasonably led him to believe that his attention was welcomed by her, or at least welcomed outside of work, then that may have put the complaint in an entirely different light. If Ms Robinson was in the habit of using sexual language at work, that too may have put the complaint in a different light.

185. Mr Wilson had not appreciated any of that relevance at the time and insofar as the messages were concerned focused solely on the fact that the Claimant ought

to have raised a complaint about the messages from Ms Robinson at the time for his own protection. The Claimant's failure to raise a complaint about it previously did not prevent Mr Wilson from asking the Claimant to elaborate about the messages, why he said they were relevant, when he alleged he had stopped responding and why he thought that might cause Ms Robinson to be motivated to raise a malicious complaint, to request copies of the messages and then to explore that alleged context with Ms Robinson to investigate its veracity. He did none of those things. Whilst the Claimant certainly could have made his point and its relevance clearer and could have offered further details about the messages, I accept that he was entirely unfamiliar with the expectations of a disciplinary investigation, and it was incumbent on Mr Wilson to facilitate exploration of this potentially exculpatory and certainly contextually relevant evidence. A reasonable employer would have done so.

186. Then there was the evidence from Mr Taylor about the Claimant's alleged behaviour towards three other female colleagues, about which no further enquiries were made by Mr Wilson. Whilst Mr Wilson's focus was understandably on the conduct alleged towards Ms Robinson, the Claimant's conduct towards other females in the past was clearly potentially relevant and Mr Wilson made no attempt to verify the accuracy of that evidence, even in circumstances where some of what Mr Taylor was outlining was his third hand report of events and where the Claimant subsequently denied much of what was being reported by Mr Taylor. There were obvious new witnesses that ought to have been interviewed at this point, namely Freya, Kirsty and Jess. Mr Wilson ought to have obtained a copy of the Letter of Complaint on the Claimant's file. Mr Wilson did seek the Claimant's account of the matters raised by Mr Taylor, but not in relation to the allegations about his conduct towards Freya.

187. Those deficiencies in the investigation are somewhat more understandable where Mr Wilson's evidence was that he did not regard any of the information he had gathered in the investigation as being a basis for a complaint of harassment or sexual harassment. If he had assumed the matter would be dropped or was not warranting formal disciplinary charges, that would explain why he took no further action.

188. In my judgment it is immaterial that Mr Wilson did not prepare a report of his findings or come to any conclusions about the facts. That is not an essential requirement of an investigation, and the analysis of the evidence does not need to be undertaken by the investigator specifically. In this case, Mr Jackson was acting as the decision-maker and he took the view, based on the evidence gathered by Mr Wilson, that there was a disciplinary case to answer. I accept that he was entitled to take a different view of the evidence to Mr Wilson. It was however incumbent on Mr Jackson to satisfy himself that a reasonable investigation had been carried out. The deficiencies in the investigation identified above could have been addressed by Mr Jackson (either by conducting further investigations himself, or requesting that Mr Wilson do so) but save in very limited respects, were not addressed by him.

189. Indeed, there were further potentially exculpatory matters raised by the Claimant in his defence at the disciplinary hearing which were not investigated by Mr Jackson. There was no investigation of the suggestion made by the Claimant that Ms Robinson was herself participant in or had instigated conversations about going to the gym at work, or that the Claimant's superiors (Mr Taylor and Liam) were also in the habit of teasing the Claimant about his physique. Those were potentially relevant lines of enquiry which might, if substantiated, have tended to suggest either that Ms Robinson did not find the alleged conduct unwelcome, or at least that she had not found it unwelcome at some previous point, or that the Claimant's superiors had invited, incited or even themselves been participant in the alleged misconduct.

190. In assessing the flaws in the Respondent's investigation, the Respondent invites me to consider Santamera v Express Cargo Forwarding (t/a IEC Ltd) 2003 IRLR 273, EAT and particularly that although a fair investigation was required, a quasi-judicial procedure was not. I was also referred to Shrestha v Genesis Housing Association Ltd [2015] IRLR 299, CA which held that to say each line of defence had to be investigated unless it was manifestly false, or unarguable was to adopt too narrow an approach and to add an unwarranted gloss to the test in *Burchell.*

191. Even taking those principles into account, my finding is that the investigation was one that no reasonable employer would have carried out. The flaws highlighted above were significant. This was a situation where the basic facts of what was alleged were in dispute and consequently the Respondent ought to have taken reasonable steps to investigate the veracity of what was being alleged, and to explore exculpatory evidence. The Respondent's investigation gave every impression of being biased towards finding evidence in favour of the allegations.

Did Mr Jackson have reasonable grounds to believe the Claimant guilty of misconduct?

192. In my judgment, it follows that Mr Jackson did not have reasonable grounds to conclude that the Claimant was guilty of misconduct.

193. Mr Jackson was not entitled to treat the situation as a case of having to decide whether he preferred the Claimant's evidence over Ms Robinson's evidence. Where an employer is faced with a situation where there are genuinely no other witnesses to the alleged misconduct and no other evidence and it comes down to one person's word over another, it may decide to prefer one person's account if there are good reasons to do so. However, in this case I find Mr Jackson was not entitled to prefer Ms Robinson's account over the Claimant's in circumstances where the Respondent had made insufficient efforts to explore whether there might be other corroborative or contradictory witness evidence relevant to assessing either the direct incidents alleged.

194. He had not explored whether there might be wider witness evidence about the Claimant's conduct towards Ms Robinson or other female colleagues more

generally, or about matters of context (such as their relationship outside of work or any other motivation for Ms Robinson to raise a complaint) from which inferences could have been drawn.

195. In my judgment, he did not have reasonable grounds to conclude either that the specific alleged comments had taken place, nor that those were just examples and that there were other such comments that had been made.

Procedural deficiencies

196. These matters were further compounded by significant deficiencies in the disciplinary procedure adopted by the Respondent.

197. First, the Respondent did not set out for the Claimant sufficient information about the alleged misconduct in the letter inviting him to a disciplinary hearing, even when the documents enclosed with the letter are taken into consideration.

198. The vague disciplinary charge of 'harassment of employees' together with the fact that the enclosed evidence referenced the allegations of alleged similar behaviour towards the three other women, implied wrongly that the disciplinary charge was in relation to alleged conduct towards Freya, Kirsty and Janneka as well as Ms Robinson.

199. Furthermore, even in relation to just Ms Robinson, the Claimant could not reasonably understand the exact conduct he was being charged with and could only guess at which parts of what had been discussed in the investigation interviews was said to constitute harassment or sexual harassment. That put him to a very distinct disadvantage in terms of being able to defend himself at the disciplinary hearing. The Claimant could not take a focused and forensic approach to the allegations; he had to attempt to address everything that had been mentioned during the investigation.

200. That first procedural matter was further compounded by the second procedural deficiency. The failure to send the Claimant a copy of Ms Robinson's written complaint in advance of the disciplinary hearing was a significant oversight as that was a central piece of evidence that formed the basis for the Respondent's concerns about his conduct. Whilst the Claimant was able to infer something of what that complaint may have said from the questions that were put to him and Ms Robinson in the interview notes, that he had been sent, he should not have been left to draw inferences at all. Furthermore, those inferences would have been incomplete given that Mr Wilson had not addressed all of the content of the written complaint either with Ms Robinson or with the Claimant.

Expired warning

201. The Claimant's representative invites me to conclude that the dismissal was also procedurally unfair on grounds that the Respondent took into account an expired

disciplinary warning. I was referred to the case of Diosynth Ltd v Thomson [2006] IRLR 284.

202. The Respondent did consider the Letter of Concern dated 5 March 2024 as part of the factual matrix which led to the Claimant's dismissal. It is not clear however that the Letter of Concern had necessarily expired. Although it is accepted by the Respondent that such letters do have an expiry date, the expiry state was not stated in the Letter of Concern and Mr Wilson accepted that they could last up to 12 months. If it had been intended to have lasted 12 months, that would mean that the Letter of Concern was not expired when Ms Robinson raised her complaint in February 2025.

203. The Claimant did not face a disciplinary charge which only justified a charge of gross misconduct because of any previous warning. This was not a situation commonly referred to as a 'totting up' dismissal scenario, where the misconduct was not on its own sufficient to justify dismissal. I accept the Respondent's submission, referring to the case of Airbus UK ltd v Webb 2008 ICR 561 which held that Diosynth was not authority for a broad proposition that an expired warning must be ignored for all purposes. I am satisfied that the Respondent was entitled to take the informal warning into account as one of a number of possible reasons to prefer the evidence of Ms Robinson about the alleged conduct, in circumstances where the Claimant had disputed the allegations. The fact that concerns had been raised in the past about the Claimant's conduct towards a female employee which had led to a Letter of Concern being placed on the Claimant's file, even if now potentially expired, was a relevant factor when weighing up whether it had reasonable grounds to conclude the Claimant was guilty.

Appeal

204. I have considered the extent to which the above deficiencies in the investigation and the disciplinary procedure were addressed and corrected on appeal and whether by the conclusion of the appeal stage the Respondent had reasonable grounds to conclude the Claimant was guilty of misconduct.

205. Mr Metcalfe's actions during the appeal did not remedy the procedural failure to set out clearly for the Claimant the precise nature of the disciplinary charge and the basis for the harassment or sexual harassment alleged. It ought to have been apparent to Mr Metcalfe from the documents submitted by the Claimant for his appeal (and particularly his focus on raising points about his conduct towards the women other than Ms Robinson) that the Claimant still did not understand with a sufficient degree of clarity what conduct had led to him being dismissed.

206. Neither did the appeal stage remedy the earlier procedural error of failing to provide the Claimant with a copy of Ms Robinson's complaint letter. Mr Metcalfe did offer the Claimant a copy during the appeal hearing, but when the Claimant declined saying he thought it was not worth it because he thought the decision

had already been made, Mr Metcalfe did not insist that the relevant evidence was shared. It was incumbent on Mr Metcalfe to ensure that a fair procedure had been followed and having identified that key evidence had not been shared with the Claimant, he ought to have ensured it was sent to the Claimant prior to a decision on the appeal being made.

207. So far as whether the appeal adequately addressed the previous failures in the investigation to explore exculpatory evidence is concerned, Mr Metcalfe did explore to some extent (through interviews with the Claimant and Ms Robinson) the fact that there was or had been some degree of a personal relationship between the Claimant and Ms Robinson outside of work. Ms Robinson accepted that she had seen the Claimant outside of work on one occasion 7-8 months ago but maintained that she had made it clear it was not going to work and that the Claimant's harassment extended over a six month period thereafter where he was not able to draw the line between what was acceptable inside and outside of work.

208. It is understandable that Mr Metcalfe felt that the existence of a personal relationship outside of work did not preclude or excuse alleged inappropriate behaviour between them at work. Yet this did not, in my judgment, adequately address or explore the points the Claimant had made in his defence – namely (a) that Ms Robinson may have had reason to fabricate allegations of harassment against him by way of personal grudge - due to his contention that *he* had been the one to cease contact with her in relation to their interactions outside of work, (b) that interactions at work (such as inviting her on movie nights) couldn't reasonably be seen as harassment during any period when she had herself been instigating the relationship and was in the habit of sending him inappropriate messages in pursuance of that relationship and (c) had herself been inviting him on movie nights.

209. Despite re-interviewing Ms Robinson, the Claimant's points of defence in the above respects were not put to Ms Robinson at all, and Mr Metcalfe therefore could not weigh up the competing perspectives about the relevance of their relationship outside of work and her possible motivations for making allegations of harassment. Mr Metcalfe had not established a clear understanding of when the Claimant said their personal relationship had taken place, nor when he said he had stopped contact with Ms Robinson outside of work, or why he might have done that. Neither had he requested further details from the Claimant about the inappropriate messages he alleged that Ms Robinson had been sending or sought to clarify with the Claimant the nature of those messages or the alleged relevance at all.

210. In my judgment, a reasonable employer would have made further efforts to investigate those matters notwithstanding the new evidence from Freya which tended to corroborate Ms Robinson's version of events.

211. Mr Metcalfe did seek to explore further the veracity of the evidence presented by Mr Taylor about the Claimant's conduct towards the three other employees, which the Claimant had disputed. Whilst this was not the focus of the allegations against the Claimant, those matters were clearly relevant - to the extent that conduct towards others might reasonably influence the assessment and credibility of Ms Robinson's evidence. He obtained information from Mr Bussey about the circumstances of Freya raising concerns about the Claimant's conduct and about Mr Bussey's communications with the Claimant about it. Significantly, he also interviewed Freya about the Claimant's behaviour and obtained from her a reasonable level of specific detail about examples of the types of conduct she complained of.

212. In terms of failing to interview other members of the team about what they had observed about the Claimant's interactions with Ms Robinson; Mr Metcalfe had partially addressed this deficiency by interviewing Freya, but he did not go on to interview either the four individuals whose statements were presented by the Claimant or any broader selection of colleagues from the shop floor. I reject the contention pursued by Mr Webster that the height of the evidence those four witnesses could have given if interviewed by Mr Metcalfe is that they had not seen anything inappropriate in relation to the Claimant's conduct, and therefore that they couldn't add anything helpful to the assessment of the incidents in question. It was clear in the Claimant's responses to Mr Webster on cross examination that the Claimant had not asked those four individuals to comment on specific allegations, only that they should confirm they had never seen anything inappropriate. As the specifics of the allegations had not been clearly set out to the Claimant, it is not surprising that the Claimant should not have addressed those specifics with the four witnesses. Without interviewing them, Mr Metcalfe could not have known whether those individuals had witnessed the Claimant making advances towards Ms Robinson or others, whether he was in the habit of showing his muscles, talking about going to the gym, talking about his appearance in a sexual context towards Ms Robinson or generally. It would have been highly pertinent information to know whether they, or a broader selection of colleagues who worked on the shop floor with the Claimant, had witnessed such behaviour but did not regard it as offensive or unacceptable, or alternatively that they had never witnessed the Claimant behaving in that way at all - which would have supported the Claimant's position.

213. I recognise that Freya's evidence was persuasive, and that the existence of two subordinate females complaining about similar behaviour tended to corroborate Ms Robinson's account and undermine the Claimant's account that Ms Robinson had fabricated the allegations by way of personal grudge. In those circumstances I accept that it was tempting to consider that there was less of an imperative to seek a broader cross section of evidence about the Claimant's behaviour.

214. However, in this case I find that a reasonable employer would have interviewed a broader selection of the Claimant's colleagues. I make that finding because the nature of the conduct alleged was towards the lower end of what might

reasonably be regarded as sexual harassment. This was not sexual harassment in the sense of inappropriate touching or physical contact. It follows that there was likely to be much about the wider context of the working environment and the Claimant's interactions with colleagues that would be relevant to the fair assessment of whether his actions were in fact harassment, and also to the severity of any sanction that might reasonably follow. Interviewing other colleagues would have enabled Mr Metcalfe to properly explore the Claimant's contention that Mr Taylor and others were also in the habit of teasing him about his physique and that Ms Robinson would often instigate conversations about the gym – those were all relevant contextual factors necessary to take a considered view of the evidence.

215. Even reminding myself again of the case law cited above about the investigation not being a quasi-judicial process, I conclude that the additional investigations which were undertaken at the appeal stage did not go far enough and the investigation overall was one that no reasonable employer would have carried out.

Further procedural deficiency at appeal

216. Sadly, even the attempts that Mr Metcalfe had made at the appeal stage to conduct further investigations, which went some way to remedying the inadequacies of the investigation at the disciplinary stage as outlined above, was significantly undermined by not then sending the outputs of his further investigations to the Claimant or invite his comments on them (either at a further meeting or through correspondence). The Claimant therefore had no opportunity to understand the additional evidence collated during the appeal (the evidence of Mr Bussey, Freya and Ms Robinson) or to offer any response or further evidence about it.

217. In my judgment this is not a case of minor procedural imperfections which did not materially impact on the fairness of the dismissal overall. In the absence of the Claimant having a clear understanding of the disciplinary charges against him or a copy of the key complaint document setting out the basis of the complaint against him and being offered no opportunity to see and comment on significant new evidence obtained at the appeal stage are together fatal to the fairness of the dismissal.

218. The deficiencies in the disciplinary procedure cause this to be an unfair dismissal.

Reasonable grounds for Respondent's belief in misconduct (post-appeal)

219. Considering the significant deficiencies in the investigation and the disciplinary procedure outlined above, I am not satisfied that even after the appeal the Respondent had reasonable grounds for its belief that the Claimant was guilty of misconduct, namely sexual harassment.

220. Firstly, I should clarify the burden of proof for the Claimant's benefit. The Claimant suggested in his evidence that the Respondent was required to prove the allegations 'beyond reasonable doubt'. That is the standard that applies to criminal matters. It is not the correct standard of proof for employers in relation to matters of misconduct. The standard of proof that the Respondent was entitled to apply was 'on a balance of probabilities' – i.e. whether it was more likely than not, that it had happened. Even on that lower standard, I am not satisfied that the Respondent had reasonable grounds for its belief in the Claimant's guilt.

221. I am invited by Mr Webster to accept that the complaint and evidence in two investigation meetings from Ms Robinson, the evidence from Freya and the previous Letter of Concern were sufficient grounds to find the allegations upheld despite the Claimant's denial. In examining the Claimant's denial of the allegation, Mr Webster also points to what he argues on behalf of the Respondent is a material change in the Claimant's position between the investigation meeting (when the Claimant said he did not recall or could not remember saying what was alleged) and the disciplinary hearing (when the Claimant denied the allegations flatly, said they were a fabrication and suggested it was Ms Robinson who had invited him to movie nights).

222. In my judgment the Respondent's failure to properly investigate exculpatory evidence, and all the aspects of the wider context and the Claimant's points of defence as set out above, fundamentally undermines any reasonable basis for concluding the Claimant was guilty of misconduct. The Letter of Concern gives rise to some inference of previous concerns about the Claimant's conduct, but it had not been the subject of a full investigation where the Claimant had the opportunity to defend himself. Freya's apparently corroborative evidence was important, but without inviting the Claimant's comment on it, a counter-perspective was not even entertained. The context of a previous relationship between the Claimant and Ms Robinson and the possibility of a personal grudge had not been adequately explored and there was inadequate investigation into whether other colleagues, Mr Taylor and Ms Robinson included, were equally participant in or had encouraged or instigated the alleged behaviour.

223. For completeness, I find that whilst I accept there is a degree of shifting in the Claimant's position (as between the investigation and disciplinary hearing stages), I do not agree that, in context, it was a reasonable basis for the Respondent to prefer Ms Robinson's account or to infer the Claimant's guilt. That is particularly as he'd had no warning about the nature of the fact-finding meeting and there was no timeframe offered to the Claimant about the allegations when they were put to him (particularly relevant considering their relationship outside of work).

Was dismissal within the range of reasonable responses

224. As I have concluded that the Respondent did not have reasonable grounds for its belief in the Claimant's misconduct, and that it was based on a deficient

investigation and inadequate disciplinary procedure, it follows that dismissal cannot be within the range of reasonable responses.

225. The Claimant's complaint of unfair dismissal therefore succeeds. The Claimant was unfairly dismissed.

226. As I agreed with the parties that I would do, I go on to make findings in relation to Polkey, ACAS procedures and contributory fault as those are relevant to the question of remedy and what compensation, if any, is due to the Claimant.

"Polkey" – What would have happened if there had been a fair investigation and fair procedure

227. I have concluded that the dismissal was unfair. There was a fair reason for dismissal, namely conduct, but there were such deficiencies in the investigation and procedure that the Respondent did not have reasonable grounds for its belief in misconduct and accordingly dismissal was not within the range of reasonable responses.

228. In assessing whether a Polkey deduction should be made, I must consider the counterfactual or hypothetical scenario of what would have happened if the Respondent had acted fairly.

229. The counterfactual is easier to assess where there are purely procedural errors. In this case I have concluded that the dismissal was substantively unfair in the sense that there were no reasonable grounds for the Respondent's belief in misconduct. The basis for the substantive unfairness however is rooted in a failure to investigate certain matters. It is certainly harder to assess the counter-factual where there are multi-factorial aspects of what should have been done, and where the evidence is inevitably incomplete about what would likely have happened as a result, but I do not consider this is a case where no sensible prediction can properly be made.

What difference would clarified disciplinary allegations have made?

230. The Claimant accepted on cross examination that he understood enough about the disciplinary charges and the basis of the alleged misconduct to 'make a guess' about what he was being accused of. In my judgment, it is unlikely therefore that being clearer with the Claimant about the disciplinary charges and providing a copy of Ms Robinson's complaint prior to the disciplinary hearing would have caused the Claimant to make fundamentally different points in his defence. I accept his evidence that if he had understood the allegations better, he would have been strongly likely to have taken a more focused and forensic approach to the defence he presented and the evidence he produced.

231. If the allegations had been clearly set out, with Ms Robinson's complaint included in the pack of documentation, I find that the Claimant would have understood with much greater clarity why the alleged comments were said to constitute sexual harassment. It was clear from his evidence and the documentation that the Claimant had never understood why talking about his own physical appearance or going to the gym was such a serious concern. He had not understood that it was being alleged that talking about those things (his appearance, his physique, his sexual desirability or availability) was implicitly sexual in nature because it was being received by Ms Robinson as part of his romantic or flirtatious advances towards her at work which were unwelcomed by her. If he had understood that context of the allegations, I find he would have been better placed to focus what he said in his defence.

232. In my judgment there are good reasons to conclude that a more focused defence may have impacted the likelihood that the Claimant would have been dismissed in any event in the ways I describe below.

233. If the Claimant had understood from clarified disciplinary charges that it was alleged that he was paying Ms Robinson an unwanted amount of attention generally (and not just when she had moved to Build), I consider it likely that the Claimant would have made a more compelling case that the Respondent view the CCTV to examine whether he had in fact spent a disproportionate amount of time around Ms Robinson and if so whether there were good reasons for having done so. Although I heard no evidence about the coverage or availability of CCTV evidence, I consider it unlikely the Respondent would have acceded to that request given that it would have involved watching months of footage over large areas of the workplace; a disproportionate task in the circumstances particularly as it was unlikely on its own to be conclusive in any event.

234. I find that if he had understood that was what was being alleged, and that the charge was focused on Ms Robinson, he would likely have done more to set out details of his relationship with Ms Robinson outside of work and the timescale of their relationship and how it related to the training he had received. He would likely have described in greater detail to the Respondent, as he did during his evidence, that his relationship with Ms Robinson outside of work was more than just platonic, and therefore that he would reasonably assume Ms Robinson welcomed his advances. Although he had made that point in general terms during the disciplinary hearing, I find it likely he would have focused on it in much greater detail if the allegations were made clear to him.

235. I find that the Claimant would have more clearly made the point to the Respondent that he made during the Tribunal hearing that after receiving the harassment training in November 2024, he had taken on board that training and realised that his communications with Ms Robinson on WhatsApp, which he described included explicit photos and messages, might be inappropriate in a work context and might make things at work awkward. He would have pointed, as he did in the Tribunal hearing, to what he said was evidence that after 10

November 2024 his WhatsApp messages with Ms Robinson were purely work related and that he deliberately stopped their explicit message interactions. He would likely have articulated much better than he did during the disciplinary process that he believed Ms Robinson was motivated to complain of harassment by her hurt at his having ceased those communications with her.

What difference would the WhatsApp messages have made?

236. As I had the opportunity to consider the WhatsApp messages in the hearing, I can make reasonable inferences about to what extent they may have made a difference to the balance of evidence being considered by the Respondent.

237. So far as the intimate or explicit messages that the Claimant suggested Ms Robinson was in the habit of sending is concerned, the WhatsApp messages would not have assisted him, as no such messages were shown. Furthermore, I consider it likely that if Ms Robinson had been asked about explicit messages, she'd either have denied them, or reiterated she'd only done so during an earlier period when they had been seeing each other outside of work, and that in any event it was the Claimant's conduct at work, and not outside of work that was the issue. On that point, the evidence would not have been significantly different.

238. Similarly, and considering the overall thrust of her evidence to Mr Wilson and Mr Metcalfe, I consider it very likely that Ms Robinson would have denied any personal grudge arising from the Claimant having ceased contact with her outside of work. As the Claimant's WhatsApp messages do not in any event clearly evidence any marked shift in his communications with Ms Robinson in the way he suggests, the balance of evidence would not have fundamentally altered on that point.

239. The WhatsApp messages would however have evidenced that Ms Robinson and the Claimant were dating outside of work on 31 October 2024, during the 6 month period when she alleged he was harassing her at work, which appears to be contrary to the evidence she gave Mr Metcalfe about having briefly dated the Claimant months previously and then made clear to him that it was not going to work and spurned his advances thereafter.

240. If that discrepancy had been put to Ms Robinson, I consider it likely that Ms Robinson would have accepted they had been on a date on 31 October 2024 (the WhatsApp messages leave little room for doubt about that). I consider it likely that she would have reiterated again that it was the Claimant's conduct at work and not outside of work that was in question.

241. In those circumstances (i.e. where the Claimant and Ms Robinson were dating during the period of alleged harassment), in my judgment it is more likely than not that the Respondent would have viewed allegations about the Claimant inviting Ms Robinson on movie nights and the possibility that the Claimant was making somewhat suggestive references about his appearance and physique

towards her at work, in a rather different light. Whilst clearly it would have been preferable for the Claimant to have kept such conversations wholly outside of work, the balance of evidence does shift away from the idea that the Claimant was persistently making unwanted advances towards Ms Robinson. I consider it more likely than not that the Respondent would have regarded the Claimant's conduct as less serious in that context.

What difference would further interviews with colleagues have made?

242. The hardest aspect of the counter-factual to assess is what might have changed if the Respondent had interviewed a broader cross section of the Claimant's colleagues (including female colleagues working more immediately proximate locations) and asked them about the specific allegations and whether the Claimant was in the habit of making sexual comments, talking about his physique, showing his muscles, talking about looking sexy for the girls, or making advances towards Ms Robinson or other female colleagues or hanging around them without good reason.

243. It is also difficult to say what those same witnesses might have said about Ms Robinson's conduct at work including towards the Claimant, and whether she was in the habit of making sexual references, how she interacted with the Claimant and whether she instigated conversations about going to the gym or about the Claimant's physique.

244. Similarly, it is difficult to say what those witnesses might have said about the Claimant's suggestion that Mr Taylor and other managers were equally complicit in making sexual comments, conducting or pursuing relationships with subordinate staff and whether those managers may have encouraged or incited the Claimant to talk about whether his physique looked like he worked out in the gym.

245. Assessing the totality of the evidence I consider it at least 50% likely that other witnesses might have described a working environment where conversations about going the gym, personal physique and sexual jokes and language was not uncommon, even amongst managers and subordinates, and that other managers including Mr Taylor had brought aspects of their relationship with subordinates outside of work into the workplace. I make that finding given that this is a factory floor environment where a coarseness in language is often more prevalent, backed up by some specific examples the Claimant gave in evidence about crude comments he alleged were made by Kirsty and others and the evidence that Mr Taylor had dated Janneka, his subordinate. Similarly, I consider it at least 50% likely that witnesses may have attested to Ms Robinson being participant in such language.

What difference would sending the appeal evidence to the Claimant have made?

246. As to the procedural deficiency at the appeal stage of not sending the Claimant the new evidence gathered by Mr Metcalfe and inviting his comment on it, I consider that I can infer reasonably well from the Claimant's evidence what new points the Claimant would likely have made in response to Mr Metcalfe.

247. In relation to the email from Mr Bussey, the Claimant would not have disputed that he had received the dressing down by Mr Bussey described in the email, but he would have made the point that he'd not had the opportunity to have his say about what Mr Bussey was alleging and that he denied any wrongdoing or inappropriate behaviour towards Freya. That was his evidence in the hearing.

248. In relation to the interview with Freya, the Claimant would have denied that he'd acted inappropriately towards Freya. He would likely have pointed to the fact Freya's allegations (e.g. "creepy") were very vague and that the more specific aspects about showing his muscles and smelling him were only a matter of subjective impression, and that Freya had not specified who the Claimant was alleged to have directed this conduct towards. He would also likely have pointed again to the fact that her evidence was contradicted by the four statements from female colleagues who'd never found his behaviour unacceptable.

249. The Claimant would also have alleged, as he did during cross examination, that Freya was only saying these things now for the first time, after he'd been dismissed and that she'd never put in a complaint at the time. He would have argued that Freya had been influenced in her evidence by others, including Ms Robinson, knowing by then that the Claimant had been dismissed. I inferred from the Claimant's evidence that he was saying that she'd been encouraged by other colleagues (perhaps Ms Robinson or Mr Taylor) to elaborate or say things that were not true to ensure the Claimant was not brought back to work on appeal.

250. The Claimant would also have pointed to the fact Freya's evidence about the hugging incident contradicted Mr Taylor's evidence, in that Freya confirms it was Jess and not the Claimant who had invited Freya to join the hug.

251. Taking those matters together, I find that it is more likely than not, that the Respondent would not have conducted any further investigations at this point and would instead have assessed the relative weight of what the Claimant had to say against the other evidence gathered.

What difference overall?

252. Taking my Polkey findings overall, I must consider how the Respondent would have assessed the evidence overall.

253. In my judgment, if the Respondent had understood the Claimant and Ms Robinson had been on a date outside of work during the relevant period of alleged harassment, and if other colleagues had been interviewed and described a working environment where conversations about going the gym, personal physique and sexual jokes and language was not uncommon, even amongst

managers and subordinates, and/or that Ms Robinson was sometimes participant in such language, then in my judgment the Respondent would have viewed the Claimant's actions as being rather less serious. The Respondent would likely have decided to issue a sanction less than dismissal – perhaps a written or final written warning. Mr Metcalfe sensibly admitted that the Claimant would not have been dismissed in relation to his conduct towards Freya or Kirsty alone as that was too long ago to be actionable.

254. I accept however that there is an approximately equally likely chance that other witnesses would not have produced evidence in support of the Claimant's contention in the way I describe above. In the face of Freya's evidence which was still corroborative of Ms Robinson's account, the Respondent would likely have taken the same decision to dismiss, even if it knew that the Claimant and Ms Robinson had dated on one occasion during that period, pointing again to the importance of keeping conduct inside work separate to outside work.

255. As I have found that that the chances of dismissal in the event of a fair investigation & procedure are equally as likely as a sanction short of dismissal, I conclude that a **50% reduction** to the compensatory award is appropriate.

Breach of ACAS Code of Practice

256. I must also consider the extent to which there has been a failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. That Code of Practice certainly applies to this misconduct disciplinary situation.

257. Considering my findings above about deficiencies in the investigation and the disciplinary procedure, I find that there was a breach of paragraph 5 of the code (employers should carry out any necessary investigations, to establish the facts of the case) and point 9 (if it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct…and its possible consequences to enable the employee to prepare to answer the case at the disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification).

258. It also follows from the findings above that I have concluded that the failures were unreasonable ones.

259. Section 207A Trade Union Labour Relations (Consolidation) Act 1992 provides that I may increase the amount of the compensatory award that would otherwise have been payable by no more than 25% if I consider it just and equitable to do so. As to the amount of any uplift, I have a wide discretion, but I must consider all the circumstances. Relevant factors may include whether the procedures were applied to some extent or ignored altogether, whether the failures were deliberate

or inadvertent and whether there were circumstances that mitigated the blameworthiness of the failure to comply (Lawless v Print Plus EAT 0333/09). The size and resources of the employer may also be a relevant consideration.

260. This was not a case where there was no attempt to follow a fair procedure. There was an investigation, the Claimant was invited to a disciplinary hearing and given the opportunity to present evidence in his defence. The interviews carried out at the investigation stage were shared with the Claimant. There was an appeal, even if new evidence gathered at that stage was not shared with the Claimant. The procedural errors must therefore be seen in the context of a wider attempt by the Respondent to follow a fair procedure.

261. The failures in the procedure were not deliberate ones by the Respondent. The inadequacies were the result of inexperience or a failure to take sufficient advice about all the relevant aspects of the procedure. I accept that Mr Jackson genuinely believed that all the relevant evidence had been attached for the Claimant and that the omission was an inadvertent oversight.

262. For all those reasons, I conclude that the maximum 25% uplift is not appropriate.

263. Neither were the failures minor or trivial. This was a medium sized employer with the benefit of external HR advice with sufficient resources to ensure that a proper procedure was followed. Accordingly, this is not a case where no uplift should be made.

264. In all the circumstances, I consider it is just and equitable to increase the Compensatory Award by **10%** to reflect breaches of the ACAS Code.

Contributory Fault

265. The final question is whether there was any culpable or blameworthy conduct on the Claimant's which can properly be said to have contributed to his dismissal.

266. On the question of contributory fault, it is my own assessment of the evidence that is relevant. I have the benefit of more evidence than the Respondent had at hand when it considered the matter as there was detailed cross examination of the Claimant during the hearing about the matters of misconduct. It is from that evidence, together with the documentary evidence, that I form my own findings as to what occurred.

267. The standard of proof remains one of a balance of probabilities; whether it is more likely than not that the conduct occurred.

268. Applying the four questions set out in Steen v ASP Packaging Ltd UKEAT/23/13 for any reduction to the compensatory award, the first step is that I must identify the conduct which is said to give rise to possible contributory fault. The second step is to decide whether that conduct was blameworthy, irrespective of the employer's view on the matter. The third step is to decide whether the

blameworthy conduct caused or contributed to dismissal. The final step is to decide to what extent the award should be reduced and to what extent it would be just and equitable to reduce it.

269. Mr Webster invites me to conclude that the Claimant was guilty of sexually harassing Ms Robinson in all the specific respects that he was accused of by her and that formed the basis of the disciplinary charges against him.

270. In my judgment, it is more likely than not that the Claimant was in the habit at work of making comments to female colleagues, including Ms Robinson and other subordinate colleagues, about his clothing, appearance and physique and framing those comments in a context of implying his sexual desirability or availability (for example about the fact he was wearing tight clothing to make himself look sexy for the girls), as well as showing his muscles. The balance of the evidence suggests that, at least prior to the harassment training he received, the Claimant considered it was 'fair game' to make advances and approaches to female subordinates that he found attractive, with a view to pursuing a relationship outside of work with them. I consider it more likely than not that he invited Ms Robinson to movie nights at work.

271. I make those findings taking together the evidence of Ms Robinson and Freya (at both disciplinary and appeal stages), the fact that the Claimant did not dispute that Mr Bussey had spoken to him about his conduct towards Freya in March 2025 and the Letter of Concern about his conduct towards Kirsty. Although the Claimant continued to deny he had behaved in this way when cross examined, my observation is that the focus of any elaboration about his denials were about whether what had taken place could really be seen as harassment, or to point to others that acted in the same way, or to suggest that it was not unwelcomed by Ms Robinson. By focusing his answers on those aspects of his defence, with apparent reticence to focus on the specifics of his conduct, I did not find his denials to be entirely believable. On the Claimant's account, he was in the habit of having explicit message exchanges with Ms Robinson outside of work, at least prior to the harassment training. If that was the case, it seems very likely that would have impacted his interactions with Ms Robinson at work, making it more likely he would have been flirtatious towards her at work. The Claimant did not give any evidence which suggested he understood clearly the need for a complete distinction in his behaviour at work and outside of work.

272. Whilst there are potentially conflicting indications in the evidence about whether and to what extent that conduct was unwanted by Ms Robinson and caused her to feel embarrassed, self-conscious and uncomfortable as a result, on a balance of probabilities I conclude that it did. It seems unlikely that Ms Robinson would have submitted a formal complaint if she did not feel that way, and the Claimant did not present a convincing account under cross examination about why such an account would be fabricated by her. His account of having stopped or changed the nature of his interactions with Ms Robinson on WhatsApp was not evidenced by the messages he produced in the hearing, and it does not seem

likely to me that this would have motivated her to submit a complaint. It seems more likely to me that it was the recent harassment training that had alerted her to the fact that his conduct towards her was unacceptable in a workplace and triggered her to submit a complaint.

273. Turning then to whether that conduct was blameworthy, I conclude that it was. A supervisor ought not behave towards a female colleague in that manner at work, particularly a subordinate colleague and particularly where the Claimant was sometimes the most senior person on site. Whilst at the lower end of the scale of sexual harassment, it was not appropriate in the workplace and was clearly contrary to the Respondent's policies.

274. The blameworthy conduct clearly did contribute towards his dismissal, as that was the stated reason for his dismissal.

275. However, it was certainly not the only, or even the main contributing factor in my judgment. I conclude that the Respondent's procedural errors and failures in relation to the quality of its investigation also contributed significantly to the dismissal as those failures impacted the proper assessment of the severity of the Claimant's misconduct, the level of his culpability and therefore the level of penalty that was warranted. I take into account that insufficient consideration was given by the Respondent in this case of the fact that the Claimant had only recently attended harassment training, the second phase of which took place in February 2024, the same month that the Claimant lodged her complaint.

276. As the Respondent's errors contributed significantly, and in my judgment the Claimant's conduct was at the lower end of conduct which could reasonably be regarded as sexual harassment, I consider that it is just and equitable to make a reduction at the lower end of the scale of possible reductions (i.e. closer to zero than 100%). As I have also made a Polkey reduction, I must also ensure there is no element of double-counting and that the award overall is a just and equitable one.

277. Taking all those matters into account, I conclude that it is just and equitable to make a reduction to the basic and compensatory award, but only by **10%**.

278. A remedy hearing has already been listed in this matter. Case management orders in relation to that hearing will be sent out separately.

Approved by:

Employment Judge New

14 November 2025

Sent to the parties on

...04 December 2025.....

For the Employment Tribunal

.....

Public access to employment tribunal decisions
Judgments (apart from judgments under rule 51) and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and respondent(s) in a case.