EMPLOYMENT TRIBUNALS

Claimant: **W**

Respondent: **Leicester City Council**

Heard at: **Leicester via Cloud Video Platform (CVP)**

On: **28 - 30 April 2021,**
4 - 7 May
10 - 11 May 2021

Before: **Employment Judge Ahmed**
Members: **Mrs F Betts**
Mr K Rose

Representation
Claimant: **Mr Raoul Downey of Counsel (instructed under the Direct Access Scheme)**
Respondent: **Mr Paul Livingston of Counsel (instructed by Leicester City Council)**

Corrected JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaints of sex discrimination and disability discrimination are dismissed;

2. The complaint of wrongful dismissal (breach of contract) is dismissed.

3. The Claimant was unfairly dismissed but contributed to his dismissal. It is just and equitable to reduce his basic award by 75%.

4. Having regard to the decision in **Polkey v AE Dayton Services Ltd** [1987] IRLR 50, there is no compensatory award.

5. The Respondent is ordered to pay to the Claimant compensation for unfair dismissal of £3,478.12 (net) in respect of the basic award.

6. The Recoupment Regulations do not apply.

REASONS

1. In these proceedings the Claimant brings complaints of unfair dismissal, sex and disability discrimination and wrongful dismissal (breach of contract). The complaints of disability discrimination that remain are of discrimination arising from disability and a failure to make reasonable adjustments. The complaints of direct and indirect disability discrimination and indirect sex discrimination have either been withdrawn or struck out at an earlier stage.

2. Orders for anonymisation of the Claimant and the relevant complainant (identified in these proceedings as 'S') were made at an earlier preliminary hearing. Those orders continue. There is no application to anonymise the name of the Respondent or any other individual.

3. In relation to the complaints of disability discrimination, the disability relied upon is Attention Deficit Hyperactivity Disorder (ADHD) which is conceded as a relevant disability. Knowledge of the disability is not conceded.

4. This hearing was partly conducted by video via the Cloud Video Platform (CVP) and partly in person. In coming to our decision we have taken into consideration the oral evidence of the Claimant who gave evidence on his own behalf. No other witnesses were called on his behalf. The Respondents gave evidence through Miss Marie Murray (the investigating officer), Mr Ian Craig (the dismissing officer), Ms Nicola Graham (an HR Officer) and Councillor Diane Cank (Chair of the Appeal Committee panel). The decision and reasons represent the views of all three members of the Tribunal.

5. At the commencement of the hearing and at various intervals throughout the parties were informed that whilst any witnesses were still giving evidence they must not discuss the case with anyone else during any break or until their evidence was completed. In contravention of that instruction the Claimant (who joined the hearing remotely by video) was overhead at the commencement of one screen break to speak briefly and to make a comment to someone else about the case. It was not so much a discussion but a comment about his cross-examination. The Respondent made an application for the claim to be struck out. The Tribunal considered the matter but gave a provisional view that a fair hearing was still possible and the application was not pursued further.

THE FACTS

6. The Claimant was employed by the Respondent as a Neighbourhood Housing Officer (NHO) from 1 February 1994. At the time of the relevant events his Team Leader and line manager was a female officer, S. The Claimant's role involved providing tenancy and estate management services to residents of local authority homes. It frequently involved dealing with vulnerable tenants. Some of the cases he dealt with involved harassment, anti-social behaviour and domestic violence.

7. On 26 November 2018, whilst S was completing the Claimant's performance and development review the Claimant kissed the fingers of his hand then placed it on S's hand saying: "I know this is unprofessional". He is also alleged to have said that he knew it was 'inappropriate' to do this. We found on the facts that he did not make

say it was inappropriate, but we do find, as admitted, that he accepted this act of his was unprofessional.

8. On 29 November 2018, the Claimant sent S a picture of the cottage where he had been staying on holiday.

9. On 2 December 2018, whilst at home the Claimant noticed S was watching a rugby match nearby in which S's young son was playing. He initiated an exchange of phone messages with S as follows:

W: Are you watching [ ] match because I can hear a lot of match activity?

S: His hasn't started yet but there's others playing.

W: Would you like some company or are you with someone else?

S: I'm ok thanks I'm with the Rugby mums.

10. On 3 December 2018, the Claimant made S a cup of tea. That was unusual because W had never done that before. Later in the day he showed S his holiday photos. Whilst doing so he put his hand on S's back and rubbed it in a circular motion. Later, when speaking to a colleague he said about S: "She's all mine".

11. Later the same day the Claimant came over to S's desk. He rested his hand on the arm of a chair next to S and rubbed S's hand.

12. At lunchtime on the same day the Claimant told a colleague: "I really love [S]". The colleague said: "you don't stand a chance". The Claimant replied: "I know".

13. The Claimant then initiated an exchange of messages with S as follows:

W: This may seem a little strange. Will you tell me your middle name and your birthday because I have only known you for 17 years. After work hours.

S: Was this meant for me?? Hope not as it would be a bit odd??

W: If I keep texting a bit may become a lot so please ignore me.

S: ??

14. In late November and early December 2018, there was the following exchange of emails between S, the Claimant and others in relation to one particular property:

From: JG [a Technician]
To: S and W
Sent: 29 November 2018

"Our electrical contractor, ……has recently visited to carry out an electrical installation condition report …… and the property needs a rewire. Stef has reported the place smells really bad. The lady has six cats that use her lounge floor and walls as a toilet".

15. As a consequence S decided that it needed a site visit. S emailed the Claimant as follows:

From: S
To: W

Sent: 30 November 2018

"Hi. Can we do a joint visit...I love cats."

16. The Claimant replied as follows:

From: W
To: S
Sent: 5 December 2018

"That's good I do too, some of the time, but you all of the time these days ??????????? Help.

17. S forwarded the email exchange to her line manager, Miss Marie Murray, adding:

'This is a little unnerving … I may discuss with you as I've also had messages.'

18. On 10 December 2018 the Claimant left flowers on S's desk.

19. On 11 December 2018, S discussed the recent events with Miss Murray. S made it clear made it clear that she wanted the behaviour from W to cease.

20. As a consequence Miss Murray invited the Claimant to a meeting on 13 December to discuss the concerns raised by S.

21. There were in fact two meetings that took place on 13 December 2018. At the first meeting W admitted that he 'had feelings' for S and in fact had them for years. The Claimant suggested that an office move might be necessary. Miss Murray told him that this was a possibility but it was the last option however the inappropriate and unprofessional behaviour had to stop as it was making S uncomfortable. She also advised the Claimant about a service with AMICA which deals with counselling issues. The Claimant said he did not have mental health issues and did not wish to take up the offer. The Claimant said he wanted to apologise to S.

22. Miss Murray then rang S to tell her of the outcome of her discussions with the Claimant. She mentioned the suggestion of an apology. S made it clear that she did not wish to speak to W about it at all.

23. At the second meeting on 13 December, Miss Murray explained to the Claimant that S did not wish to speak to him and that he must cease all inappropriate communications with her and that he was not in fact to speak to S about this matter at all. Miss Murray went on to say that she would in fact transfer W to another office. She made it clear that W's attentions towards S were unwanted and that S had become very stressed by his behaviour. The Claimant wanted to speak to S directly but was told that S did not wish to discuss the situation with him.

24. There is no note of either of the two meetings on 13 December but there is a relatively contemporaneous email sent by Miss Murray to HR on 19 December 2018 to Miss Demmer. We are satisfied it accurately records the discussions Miss Murray had with W, in particular that the Claimant's attentions were unwanted, that his actions had been distressing for S and that S did not wish to talk to W. Miss Murray ended the email by saying she hoped that this was matter was now resolved and that "(W) knows he is not to make any inappropriate or unprofessional contact with (S)".

25. On 17 December 2018, the Claimant was transferred to a different office where he would no longer be line managed by S or have direct day to day contact with her.

26. On 3 January 2019, in a message sent outside working hours, the Claimant sent the following WhatsApp message to S:

"I am trying to be as brave as I can but maybe this is more foolish behaviour. Not sure which. If you feel you do not want to indulge me then stop reading now and delete me. I only ask that you do not go to Marie [Murray] with this and deal with it yourself please.

I do feel that some kind of explanation is needed now that I have had some time away from [ ].

It is hard to put into words though the way you were making me feel. Forgive me if I misinterpreted things you were saying and doing, please. Little things like when you were talking about the running club, going to the fireworks, looking through the cookbook in the office kitchen, there were other very lovely plays then calling me over to your car when you were wearing a short skirt in the summer then not saying anything just letting me look. (That is brave of me, so say you don't remember if you dare). Then you are always exclaiming how things are ridiculous and that you need to get online to find a man. That is the other thing that is deeply puzzling about you. How such an attractive woman could be on her own yet wanting someone. I feel that I have to tell you that from the first moment I saw you at [ ] you pressed all my buttons however there was an incident of trying to overplease you by going in on the Saturday to work and blaming it on leaving a pie in the oven. Lol.

Then there was the time we spent working as Team Leaders when I caressed your back. Marie had told me that you were going through the change and that I should be understanding so I just wanted to let you know that you are still very appealing and desirable. Then there was the time you meant over me [sic] to give me that mug and your beautiful locks of curly hair enveloped me albeit for a fleeting second.

I digress, sorry, I own up to not showing the photos of the spa visit just to try and make something happen and yes saying you 'are mine' in front of office staff was very stupid but it was partly to reassure you that you are wanted. Sadly I think I may have ruined things for me for good. Then there was the question about wanting to know your rob [*it is agreed this should be d.o.b*] etc. So sorry about the intensity but I just needed to put a post in the ground if that will work ever make sense to you.

Did not mean to send this yet. Shit messed up again. I feel like I have to rush the ending now but the long and short of it if you are mad with me or feel that I am a bit weird you should just tell me as you say it is good to talk. I am anticipating that you just send me a load of question marks which will be also upsetting so please try words. One last thing they [that] kiss on your hand was the most gorgeous kiss I have ever given a girl anywhere! You still may go to Marie to try and punish me but not being able to see you anymore is surely punishment enough. I don't want to be corny but I will apologise for most things but I can not apologise for being in love with you. (Cheesey and proud).

Also sorry for focussing on your tummy as if it is a fault. It is perfectly O.K"

27. S replied with the following message:

"L.E.A.V.E M.E A.L.O.N.E"

28. The Claimant responded with:

"I promise this is the last you will hear from me. So so sorry."

29. On 4 January 2019 S contacted HR to make it clear that she now wanted some formal action to be taken. S also indicated that she would be contacting the police about the events.

30. On 7 January 2019, S met with Miss Murray and said that she wanted to make a formal complaint and action to be taken in respect of W's conduct. She made it clear that she was very upset at what had happened.

31. In early January 2019 the Claimant was invited to a disciplinary investigation meeting by letter dated 8 January 2019. The relevant parts of the letter were as follows:

"I am giving you advance notice of my intention to invite you to an investigation meeting in relation to the matter of your behaviour towards your previous manager [S], and the communications you sent her. In the meantime, I am instructing you not to make any further attempts to contact [S] under any circumstances. In addition, you should not seek to influence anyone else involved in this matter in any way. Breaches of these conditions may in itself be subject to disciplinary action".

32. On 11 January 2019, Miss S made a formal grievance of sexual harassment in relation to the Claimant's conduct. She did not set out all of the incidents in her grievance but in terms of what she saw as the desired course of action she wrote:

"I would like disciplinary action to be taken against W for his sexual harassment of him despite being told not to do so. I would request that I do not have to physically meet or sit with W in this process if needed."

33. A formal grievance meeting took place with S conducted by Miss Murray on 22 January 2019. The notes of that meeting were subsequently sent to S to check. The notes were agreed as broadly accurate by S with some minor amendments. These notes were later adopted as S's 'statement' for the purposes of the subsequent investigation and disciplinary process.

34. On 18 February 2019, Miss Murray held an investigation meeting with the Claimant.

35. On 19 February 2019, the Claimant was suspended.

36. On 28 February 2019 Miss Murray wrote to S to say:

"You wanted as a resolution of your grievance that: Disciplinary action be taken against W for his conduct towards you, reassurances be given that you will not have to meet W face to face whilst this matter is concluded. After giving careful consideration to these matters I can assure you that I shall be taking disciplinary action against W in relation to his conduct towards you."

37. On 18 April 2019, the Claimant was invited to a disciplinary hearing to consider three allegations, namely that (1) he had sexually harassed his manager by subjecting her to unwanted behaviour of a sexual nature (2) that he had disregarded a clear management instruction and continued to contact her and sexually harass her and (3) that he breached the Council's duty of trust and confidence in his ability to carry out the role of Neighbourhood Housing Officer.

38. On 8 May 2019 Miss Murray prepared a document for use at the disciplinary hearing which included the following relevant remarks:

"Sexual harassment includes inappropriate touching; invasion of privacy; unwelcome sexual text messages and comments…….. He has then attempted to deflect the blame onto S herself. This is often the defence of men who are abusers of women. W, through his conduct, has demonstrated he is: A perpetrator of sexual harassment and unsympathetic to victims of abuse…….

His actions were uninvited and unwelcome and of a sexual nature. W chose to disregard clear a management instruction and continued to sexually harass his manager. This continued after he moved office. W has demonstrated a lack of maturity, understanding, compassion and empathy. These are serious matters and call into question his ability to perform his role of NHO where the safety of vulnerable tenants is at risk."

39. The disciplinary hearing was held on 8 May 2019. It was conducted by Mr Ian Craig who was at the time Head of Service in Housing but has since left the Respondent's employment.

40. Mr Craig decided that he would hear directly from S at the disciplinary hearing. The discussion would be audio recorded and played back to the Claimant who would then have the opportunity to ask questions in written form with the result that at no point would S have to see the Claimant face to face.

41. Mr Craig began by asking S a number of questions. S then made a long statement. It is not clear whether S read from a pre-prepared document or spoke off the cuff – we find it was more likely to be the former as she spoke continually without interruption. A copy of her written note if there was one has never been produced. Mr Craig then asked S some further questions until the lunchbreak. After the break the audio recording was played to the Claimant and his trade union representative. The Claimant was then allowed to put 4 questions to S in writing. The questions were put to S without the Claimant or his trade union representative being present. The Claimant was then asked to make a statement. He alleges that Mr Craig continually interrupted him and that he could hear Miss Murray in the background coaching S. According to the notes, the meeting ended at 17:45pm.

42. Mr Craig met to inform the Claimant of the outcome on 16 May 2019 when W was informed that was to be dismissed for gross misconduct.

43. On 17 May 2019 Mr Craig wrote to the Claimant to set out his reasons for dismissal.

44. The Claimant appealed on 28 May 2019.

45. On 13 August 2019 the Claimant presented his claim to the Employment Tribunal.

46. The appeal hearing took place on 27 November 2019 before a Committee of elected Councillors and chaired by Councillor Cank. The notes of the appeal hearing show that the appeal hearing commenced at 10.25am, that the discussions ended at 2.45pm and the meeting closed at 3.30pm. The Committee dismissed the appeal.

THE LAW

47. The law in this case is not in dispute. The relevant statutory provisions as to unfair dismissal are set out in the Employment Rights Act 1996 and the law in relation to the discrimination complaints is set out in the Equality Act 2010. The relevant statutory provisions are as follows:

Employment Rights Act 1996 ("ERA 1996")

Section 98 ERA 1996

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(b) relates to the conduct of the employee,

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

Equality Act 2010 ("EA 2020")

Section 13

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."

Section 15

"(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

Section 20

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

Section 23

"(1) On a comparison of cases for the purposes of section 13……..there must be no material difference between the circumstances relating to each case."

Section 26

"(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

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

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

(a) the perception of B;

(b) the other circumstances of the case;

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

Section 123

"(1) Proceedings on a complaint within section 120 may not be brought after the end of

(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or
(b) such other period as the employment tribunal thinks just and equitable."

Section 136

"(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision".

Relevant case law

48. In relation to the complaint of unfair dismissal, and in applying section 98(4) ERA 1996, we have borne in mind the guidance in **HSBC Bank plc v Madden** [2000] ICR1283 (originally set out in **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439) which is that:

"(1) The starting point should always be the words of section [98(4) ERA 1996] themselves.

(2) In applying the above section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal would have done the same thing.

(3) The Tribunal must not substitute it's decision as to what was the right course to adopt.

(4) In many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view another employer quite reasonably take another.

(5) The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band it is unfair."

49. It is now well established that the band of reasonable responses test applies to the investigation as well as the dismissal (see **Sainsbury's Supermarket Ltd v Hitt** [2003] IRLR 23).

50. In **British Home Stores v Burchell** [1980] ICR 383, the Court of Appeal set out some helpful criteria to be applied by tribunals in cases of dismissal by reason of misconduct. Firstly, the Tribunal should decide whether the employer had an honest and genuine belief that the employee was guilty of the misconduct in question. Secondly, the tribunal has to consider whether the employer had reasonable grounds upon which to sustain that belief. Thirdly, at the stage at which the employer formed its belief, whether it had carried out as much as investigation of the matter as was reasonable in all of the circumstances. Although **Burchell** was decided before changes were made to the burden of proof, the three-step process is still helpful in determining cases involving dismissal for misconduct. The touchstone is of course always the wording of section 98(4) ERA itself.

51. Where the Tribunal finds that the Respondent failed to follow the appropriate procedural steps or a fair procedure a Tribunal must ask itself whether this would have made any difference to the eventual outcome. As a consequence, this may take a form of a reduction to the compensatory award to reflect the possibility that the claimant may have been fairly dismissed in any event (see **Polkey v AE Dayton Services Ltd** [1987] IRLR 50). This is often referred as the **Polkey** principle. The deduction can extinguish the whole of the compensatory award.

THE ISSUES

52. The issues in this case are as follows:

Unfair dismissal

52.1 What was the reason for the Claimant's dismissal? The Respondent alleges that it was gross misconduct and relies on three allegations namely:

52.2 The Claimant sexually harassed his manager, S, by subjecting her to unwanted behaviour of a sexual nature;

52.3 The Claimant disregarded a clear management instruction and continued to contact and sexually harass his manager; and

52.4 The Claimant breached the Respondent's duty of trust and confidence in his ability to carry out his role as a Neighbourhood Housing Officer.

53. In respect of each of the allegations of misconduct:

53.1 Did the Respondent have a genuine and honest belief that the Claimant had misconducted himself in the manner alleged?

53.2 Did the Respondent have reasonable grounds upon which to sustain that belief?

53.3 At the stage when the Respondent formed its belief, had the Respondent carried out as much investigation of the matter as was reasonable in the circumstances?

54. Was the decision to summarily dismiss the Claimant for the alleged misconduct within the range of reasonable responses open to the Respondent in the circumstances?

55. In all the circumstances of the case, including the size and administrative resources of the Respondent, did the Respondent act reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant?

56. If the dismissal of the Claimant was unfair on procedural grounds, would the Claimant have been dismissed in any event had the Respondent undertaken a fair procedure?

57. Did the Claimant conduct himself before his dismissal in such manner that it would be just and equitable to reduce the amount of the basic award?

58. Was the Claimant's dismissal to any extent caused or contributed to by any action of the Claimant and, if so, is it just and equitable to reduce the amount of the compensatory award?

59. Did the Respondent unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures and, if so, is it just and equitable to increase any award to the Claimant pursuant to Section 207A Trade Union & Labour Relations (Consolidation) Act 1992?

<u>Discrimination arising from disability (section 15 EA 2010)</u>

60. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of the Claimant's disability by:

60.1 invoking and pursuing disciplinary action against the Claimant for his alleged misconduct? and/or

60.2 deciding to summarily dismiss the Claimant for such alleged misconduct? and/or

60.3 upholding his dismissal on appeal?

61. If the Respondent did treat the Claimant unfavourably because of something arising in consequence of the Claimant's disability can the Respondent show that such treatment is a proportionate means of achieving a legitimate aim?

62. Can the Respondent show that it did not know and could not reasonably have been expected to know that the Claimant had the disability?

Failure to make reasonable adjustments (sections 20/21 EA 2010)

63. Did the Respondent apply a provision, criterion or practice ("PCP") of treating everyone as operating to the expected standards of neuro-typical interpersonal contact when undergoing formal procedures, in particular the disciplinary policy and procedure?

64. If so, did that PCP put a person with the Claimant's disability at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

65. If so, did the Respondent take such steps as it was reasonable to take to avoid the disadvantage in relation to the Claimant?

Direct sex discrimination

66. Have the allegations been presented out of time?

67. If not, did the Respondent:

67.1 Treat the Claimant less favourably than S in gathering information before the Claimant's investigation meeting on 18 February 2019?

67.2 Treat the Claimant less favourably than S by considering that the Claimant was unsuitable to do his job because of his behaviour towards S but gave no consideration as to whether S was equally unsuited to her job by reason of her behaviour towards the Claimant?

67.3 Treat the Claimant less favourably than S by giving them different instructions regarding ongoing communications?

67.4 Treat the Claimant less favourably than S by only considering S and Marie Murray's version of events?

67.5 Treat the Claimant less favourably than it would treat others by preventing the Claimant from reading his whole statement at the disciplinary hearing?

67.6 Treat the Claimant less favourably than it would treat others by ignoring the Claimant's claim at the disciplinary hearing that there had been collusion between Miss Murray and S.?

67.7 Treat the Claimant less favourably in failing to properly consider or understand the Claimant's complaint at the disciplinary hearing about the part an ulterior motive played in the decision to transfer the Claimant to another office?

67.8 Treat the Claimant less favourably by wrongly accusing the Claimant of changing his story in the disciplinary hearing when no such allegation was made to S?

67.9 Treat the Claimant in all the circumstances less favourably than S by subjecting him to disciplinary action and summarily dismissing him for his conduct towards S but taking no action against S for materially similar behaviour towards him?

70. Is S an appropriate comparator?

71. If the Respondent treated the Claimant less favourably than others in any of the respects set out above, was such treatment because of the Claimant's sex?

72. Although we have included 67.9 above as an issue in the list (as it appears to be agreed between the parties) we are satisfied that this allegation was withdrawn earlier and thus does not require further consideration.

CONCLUSIONS

The unfair dismissal complaint

73. We are satisfied that the Respondent has for the purposes of section 98(1) ERA 1996 discharged its obligation and proved that the reason for dismissal was for conduct. That is a potentially fair reason for dismissal under section 98(2)(b) ERA 1996.

74. We have gone on to consider whether the dismissal was fair having regard to the provisions of section 98(4) ERA 1996. In doing so we have considered the **Burchell** test but borne in mind the wording of section 98(4) ERA 1996. In doing so we have been careful not to substitute our views for the Respondent.

75. We are satisfied that the Respondent held an honest and genuine belief in the Claimant's misconduct. There is no serious challenge to that proposition.

76. The relevant misconduct was:-

76.1 The Claimant kissing his fingers and placing them on S's hand. We accept that he did not say that it was 'inappropriate' only unprofessional. The contemporaneous manuscript notes do not make reference to the act being admitted as inappropriate and the Claimant has always challenged that he used that word. However, it lessens very little the effect of the act itself and even if the Claimant does not admit it, the fact is that objectively what he did was both unprofessional and inappropriate.

76.2 The Claimant texting S asking for her date of birth and middle name. This information was not required for work purposes. It was personal information which S rightly regarded as private.

76.3 The Claimant telling a colleague about S that he "really loved" her.

76.4. The Claimant saying "she's all mine" about S and placing his hand on her back and rubbing it.

76.5. The Claimant placing his hand on top of S's hand when talking about paperwork. This allegation is denied but we find that it happened. It is an unusual allegation to invent. It is consistent with the Claimant's actions on the day which involved other unwanted physical touching.

76.6. The Claimant telling S saying via an email that he also loved cats some of the time but loved S "all of the time these days".

76.7 The contents of the WhatsApp message of 3 January 2019 making comments about S such as her body image, the length of her skirt, that he found her to be an attractive woman and that he loved her and so on.

77. We find that the Respondent's belief of misconduct was based on reasonable grounds. The Claimant did not dispute the vast majority of the acts alleged against him.

78. Mr Downey submits that the Claimant's actions should not be considered as amounting to sexual harassment because they do not satisfy the statutory test under the EA 2010. In our judgment that submission is cannot be correct. There is no obligation on an employer to find that conduct must satisfy the statutory definition for it to amount to sexual harassment. That would place an unnecessarily high threshold on misconduct warranting disciplinary action or dismissal.

79. In any event even if we are wrong in that respect, the relevant provisions of section 26 EA 2010 are satisfied in this case.

80. The conduct was certainly of an unwanted nature. S had emailed Miss Murray about the W's behaviour on 5 December and spoken on 6 and 11 December saying that she wanted such behaviour to stop. At the disciplinary hearing S said that by the time W had left flowers on her desk (which appears to have been the final straw for her), she did not wish speak to W. The day after receiving the WhatsApp message, S emailed a Senior Manager to express concern about W's inappropriate contact and wanted it to be dealt with informally. S also went to the extent of reporting the matter with the police. There can be no doubt that the relevant conduct was unwanted.

81. The conduct was of a sexual nature involving non-consensual touching, unwelcome sexual advances and remarks about S's body and appearance. The Claimant accepted that he said about S that 'you are mine'. He admitted comments about his love for S when speaking to a colleague. In his WhatsApp message there was a reference to S's short skirt, that she was as an 'attractive woman', a reference to her 'beautiful locks', and that from 'the first moment I saw you … you pressed all my buttons all at the same time', that the 'kiss on your hand was the most gorgeous kiss I have given a girl anywhere'. These were all comments and conduct of a sexual nature.

82. The conduct clearly created an intimidating, hostile, degrading, or offensive environment. S was worried about the fact that W knew where she lived and that she felt 'weird, unnerved and ugly as a result'. S said that she was thinking about this on a daily basis and the only reason she had not blocked W on her contacts was that she wanted to have the relevant evidence if needed. The flowers left on her desk made her feel 'really sick'. S said she suffered sleepless nights wondering whether W might be sitting somewhere wanting to look at her. She made it clear that she found all of this very distressing.

83. We are also satisfied that it was reasonable for the conduct to have the necessary effect. This was not a case of S being hypersensitive or feeling excessively vulnerable. S had acted in a proportionate way only coming forward when it was absolutely necessary.

84. We have also taken into account the following factors in determining reasonable belief:

84.1. The majority of the allegations are and were admitted by the Claimant;

84.2. The Claimant appears to have accepted that he had acted inappropriately because it was he who initiated a discussion about a transfer to another office and he did not ultimately object to the transfer;

84.3. The Claimant was aware of the clear management instruction not to contact S as is apparent from the following from his own WhatsApp message:

"maybe this is more foolish behaviour…. I only ask that you do not go to Marie with this and deal with it yourself please?"

85. We do not accept the Claimant's contention that there was or could be any doubt as to what he was told he could and could not do going forward. He acknowledges that he was told not to contact S. It must have been apparent to him that what was being prohibited was *any* inappropriate contact, not just contact at work. The fact that the WhatsApp message was sent out of office hours is irrelevant.

86. We are satisfied that there was no ambiguity in the instructions to W not to contact S. It is unfortunate that there is not contemporaneous note of the meeting or that a confirmatory letter was not sent to W, but we are satisfied that the Claimant was clear of the management instructions not to contact S.

87. We have considered the third allegation of misconduct. Councillor Cank accepts that this was not something that was factually separate from the other two allegations but rather a by-product of the first two. Looking at matters in the round what is important is the Claimant's conduct which is accurately reflected in the first two allegations. The third allegation adds very little if anything.

88. It is in relation to the investigation where the Respondent runs into a number of procedural difficulties.

88.1 Firstly, Miss Murray was the appointed or self-appointed investigator despite the fact that she was a material witness in the investigation. Miss Murray had held two relevant meetings on 13 December with the Claimant. She was directly and personally involved at practically every important stage prior to dismissal. It was Miss Murray who had given the relevant instructions to W regarding to the second allegation. She had spoken to S throughout the process. She had dealt S's grievance and conducted the grievance meeting. She had decided the outcome of the grievance and determined there the Claimant had been guilty of sexual harassment prior to the investigation being completed. Councillor Cank recognised in the appeal that it was wrong for Miss Murray to undertake the investigation. She agrees it was "not ideal" but unfortunately the Appeal Committee chose not to do anything about it.

88.2. The investigation itself was flawed. There was no witness statement taken from S. What was regarded as her witness statement were the notes of the grievance meeting which Miss S had approved. It was necessary in a case such as

where the allegations were detailed and specific that a witness statement was taken from S setting out the facts.

88.3 The framing of the allegations in advance of the investigation meeting was vague and short of detail. The letter inviting the Claimant to an investigation meeting simply referred to: "*the matter of your behaviour towards your previous manager … and communications your sent to her."* There is no reason why the notice could not have been more explicit setting out the specific allegations of alleged harassment and behaviour which constituted the misconduct in more detail.

88.4 In the interview stages of the investigation with W, Miss Murray referred to notes which she quoted to W. Those notes were not given to the Claimant at the time. There was no reason given for that. To see them would have helped to understand the Claimant to understand the case against him better and to follow the narrative. The notes were given to him later but there was no reason not to disclose them at the time.

88.5 The procedure adopted by Mr Craig at the disciplinary hearing does not follow the Respondent's actual procedures. It may have been something that Mr Craig regarded as a fair and reasonable adjustment in the circumstances but he is first and foremost obliged to follow the Respondent's internal policies and procedures. He did not seek to agree them with the Claimant or his trade union representative. Mr Craig was not entitled to simply invent a process as he saw fit, or as he went along. More importantly perhaps, the Claimant was not given an adequate opportunity to formulate his questions to S. It was unsatisfactory to simply play W a tape recording of the discussions with S and then to ask him (in very limited time) to formulate a limited number of written questions. A fair process would have at least required Mr Craig to provide a transcript and time to formulate question after careful consideration. Mr Craig was right to ask the questions he did to fill in the missing gaps arising from the investigation but he ought to have realised that the Claimant would need time to review the new information.

88.6 We also accept the Claimant's contention that Mr Craig cut short the Claimant during his presentation. The Claimant was denied the opportunity to say all that he wanted. The notes make it clear that very little time appears to have been given to the Claimant as the majority was spent in Mr Craig fact-finding with S. Mr Craig appears to have been keen on ensuring that the process was completed on the day. There was no need to hurry – he could have adjourned and reconvened. If it was going to take longer, extra time should have been allocated.

88.7 In relation to the appeal there are two serious procedural faults. There was unreasonable delay in dealing with the appeal and the appeal panel failed to consider all of the relevant matters and issues.

88.8 The ACAS Code of Practice makes it clear that appeals should be heard without unreasonable delay. In our view a delay of six months constitutes unreasonable delay. An appeal is an important part of the dismissal process and it is essential that, in accordance with the ACAS Code, it is dealt with without unreasonable delay. The principal cause of the delay according to the evidence of Miss Graham is for the need to appoint elected Councillors to hear an appeal. The Respondent's procedures do not require *all* appeals to go to elected Councillors. Some appeals (for example where the dismissal is for 'some other substantial

reason') go to internal managers instead. That is usually quicker. The decision to hold an appeal before elected Councillors appears to be a Political decision by the local authority. Miss Graham explained that availability of Councillors is often difficult. There are not many Councillors on the panel and Councillors are generally not keen to undertake the hearing of appeals. Thus, the pool for selection is small and matching diary availability is difficult. In this case the Councillor who was due to chair the appeal fell seriously ill (and subsequently died) and had to be substituted at a late stage. That does not appear to have been the principal cause of the delay however as a replacement was found fairly quickly after only a few days. The principal reason for the delay was a systemic one of finding Councillors to hear the appeal.

88.9. It seems to us that if there is a systemic cause for delay in dealing with an appeal then the Respondent needs to address this. To simply suggest that this is how things are is not a satisfactory explanation. The net result in this case was that by the time the appeal was heard the Claimant had not only issued proceedings but even had a case management hearing. That state of affairs makes it difficult to have a fair appeal hearing.

88.10 We are also satisfied that the appeal panel only considered their decision for some 45 minutes or so as the Respondent's own note suggests and not for longer as Councillor Cank now believes. We doubt very much whether all of the matters that are said to have been discussed at the appeal were indeed considered and determined. There simply would not have been enough time to do so.

89. Mr Downey invites us to conclude that these defects are matters of substance. We do not agree. They are properly classed as 'procedural'. We have therefore gone on to consider if any of them would have made any difference to the eventual outcome.

Polkey

90. Having considered the evidence carefully we are satisfied that if the procedural defects were removed the Claimant would still have been fairly dismissed for gross misconduct. He admitted much of the behaviour he was accused of and which, in our view, objectively amounts to conduct constituting sexual harassment. The Respondent had an honest and genuine belief based upon reasonable grounds that the Claimant had conducted himself inappropriately and that he had sexually harassed S. The belief was based on reasonable grounds. The core facts in this case would have remained the same and would have led the Respondent to dismiss the Claimant even if the procedures had been applied correctly. We therefore consider that a **Polkey** reduction is appropriate.

91. Mr Craig did carefully consider the allegations. If his mindset had been one to simply adopt the management case he is unlikely to have undertaken the detailed enquiry of S of his own at the disciplinary hearing. Ultimately, after such consideration he concluded that the Claimant had engaged in 'totally unacceptable behaviour' when the Claimant had contacted S when given clear instructions not to do so. On the evidence before him he was entitled to come to that conclusion.

93. In all of the circumstances we consider that having regard to the **Polkey** principle there should be no compensatory award.

Contributory conduct

93. In relation to contributory conduct we have considered the provisions of section 122(2) ERA 1996 which states:

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

94. Somewhat predictably we are invited by the Respondent to make a 100% reduction. The Claimant invites us not to make any reduction at all.

95. In **Hollier v Plysu Limited** [1983] IRLR 260 the EAT suggested that contribution should be assessed broadly and should fall within the following categories:

wholly to blame (100%); largely to blame (75%); employer and employee equally to blame (50%); slightly to blame (25%).

96. In **Devis and Sons Limited v Atkins** [1977[ICR 662, the House of Lords made it clear that there was no reason in principle why an employee could not contribute 100% to his dismissal. However, 100% reductions are relatively rare and even where there are procedural flaws only it is not necessarily the case that a 100% contribution will automatically follow.

97. In coming to our decision we have had regard to the following factors:

97.1 That at no stage prior to 13 December had the Respondent taken any action against the Claimant for his behaviour up to that point. This included a decision not to suspend or undertake any investigation. The Respondent was certainly aware (through Miss Murray) of acts which could constitute sexual harassment.

97.2 Miss Murray's evidence to the Tribunal was that if the Claimant had not sent his WhatsApp message on 3 January 2019 he would not have been dismissed. What was therefore regarded critical was the sending of the WhatsApp message *combined* with the disobedience of the management instruction not to contact S inappropriately.

98. Taking those facts into consideration we cannot say that a 100% reduction is appropriate because it is not just the harassment that leads to the dismissal but the harassment plus failure to follow a management instruction. We consider this case falls into the employee being 'largely to blame' and thus a 75% reduction of the basic award is appropriate.

99. The Claimant's basic award at applying the cap would be £13,912.50. Following the deduction for contribution it comes to £3,478.12.

100. The ACAS Code of Practice does not apply to the basic award and thus there is no question of an uplift.

Discrimination arising from disability

101. We will deal firstly with the issue of the Respondent's knowledge of disability. The Claimant did not at the point of dismissal himself of his disability or any disability. He appears only to have 'discovered' the fact of ADHD in January or March 2020.

102. In our judgment it would not have been reasonable in the circumstances for the Respondent to have greater knowledge of the disability (or *a* disability) when the Claimant himself did not have that knowledge. Whilst we acknowledge that not all disabled employees may think of themselves as disabled, even when they are, the Claimant in this case was himself not only ignorant of any disability but specifically *denied* having any mental impairment at the meeting with Miss Murray on 13 December 2018.

103. Although S expressed a view that the Claimant might have a mental health issue, and the Claimant said he had difficulties reading social cues, this would not necessarily have put the Respondent on notice that the Claimant was disabled. The Claimant declined a reference to AMICA for counselling. In short, there was nothing to put any of the Respondent's employees on notice as to a disability or the disability of ADHD.

104. Furthermore, the Claimant had worked with S and Miss Murray for many years and at no stage during that time did he say that he had a mental health condition or that he suffered from ADHD or anything similar. He did not at any time present any medical evidence nor did the Claimant ask to be referred to occupational health on this issue. The highest that could be said was that he behaved oddly at times but that would not be enough to put the Respondent on notice. We are therefore satisfied that the Respondent did not have knowledge of the disability at the material time nor could they reasonably be expected to know.

105. Whilst the absence of knowledge means the disability discrimination complaints must fail, we have nevertheless gone on to consider the substance of the allegations of disability discrimination.

Discrimination arising from disability (section 15 EA 2010)

106. It is conceded that the Respondent treated the Claimant unfavourably by invoking disciplinary action and deciding to dismiss him and also in not upholding his appeal.

107. In our judgment the cause of the unfavourable treatment was the Claimant's sexual harassment and his disregard of clear management instructions not because of anything arising in consequence of the Claimant's disability.

108. Even if it was something arising from the Claimant's disability, dismissal was a proportionate means of achieving a legitimate aim. The Respondents are obliged to maintain appropriate standards of conduct in the workplace and to safeguard their employees. The Claimant could no longer be trusted to behave appropriately particularly having regard to his disobedience of a clear management instruction.

Failure to make reasonable adjustments

109. The provision, criterion or practice (PCP) relied on is that the Respondent treats everyone as operating to the expected standards of neurotypical interpersonal contact when undergoing formal procedures.

110. The Claimant has failed to establish that such a PCP factually exists or was applied by the Respondent. There has been no evidence or submission in support of this proposition. Accordingly, the failure to make reasonable adjustments complaint must fail at the first hurdle.

Direct sex discrimination

111. The complaint of direct sex discrimination has not been seriously pursued. The Claimant has said very little about the allegations of sex discrimination in his witness statement. In the course of the hearing they have amounted to little more than Mr Downey formally putting his case to the relevant witnesses (as he is obliged to do) but without any factual basis or any substantive questioning. Our best estimate is that the discrimination part of the case has, in a multi-day hearing, taken less than one hour in terms of cross-examination and answers. The submissions fail to deal with the issue of causation - why any alleged less favourable treatment was because the Claimant was a man.

112. The complaint of sex discrimination appears to have originated from what the Claimant regarded as a stereotypical assumption about men contained in Miss Murray's statement (referred to at paragraph 38 above) but the allegations set out in the list of issues are however very different.

113. The allegations of sex discrimination are dismissed for the following reasons:

113.1 Some of them have been presented out of time. The Claimant presented his claim on 13 August 2013 having begun ACAS early conciliation on 10 June 2019. He received an ACAS early conciliation certificate on 14 June 2019. The result is that any acts prior to 10 May 2019 are out of time. The first three of the direct sex discrimination allegations are said to have taken place between December 2018 and March 2019. We are satisfied that these allegations are not acts 'extending over a period'. The Claimant has not provided any reason as to why it is just and equitable to extend time. Our primary finding therefore is that those allegations have been presented out of time and must be dismissed as such. We have nevertheless gone on to consider the allegations if it transpires that we are wrong in that respect.

113.2 W relies on S as the relevant comparator. Clearly that cannot be right. S was the complainant and victim in this case, whilst W was the perpetrator. Their circumstances for the purposes of section 23 EA 2010 are therefore materially different. Accordingly, there is no proper comparison for the purposes of establishing less favourable treatment. The Claimant does not rely upon a hypothetical comparator.

113.3 The allegation that Miss Murray did not gather all of the relevant information before the investigation meeting - in the sense that she did not obtain a written statement from S – because of W's gender is somewhat contrived. The reason for

Miss Murray's actions was not because of gender but a lack of experience and a lack of guidance from HR.

113.4 It is agreed that Miss Murray did not consider the Claimant suitable for his job but that was not because he was a man. It was because of his inappropriate conduct.

113.5 We accept that different instructions were given to the Claimant and S regarding ongoing communications. The reason for that was not because the Claimant was a man but again because of his inappropriate conduct. S had not engaged in any similar behaviour.

113.6 It is not correct to say that the Respondent only considered S's version of events. The Claimant's views were considered at several points such as the disciplinary hearing and the appeal hearing. The Claimant fails to prove facts from which any inference of discrimination may be drawn.

113.7 The reason for Mr Craig not allowing the Claimant to read the whole of his statement of the disciplinary hearing was because Mr Craig was keen to finish the disciplinary hearing on the same day and not because the Claimant was a man. It is likely he would have done the same thing if W had been a woman.

113.8. Mr Craig did consider an allegation that Miss Murray and S were colluding in the production of notes. The allegation was considered but rejected. Even if there were no sound reasons for rejecting it the Claimant has failed to adduce any facts to show that it done was because he was a man.

113.9 There was no ulterior (or discriminatory) motive to transfer the Claimant to another office. The Respondent did not need a reason to transfer. It could have transferred the Claimant at any stage under the contract of employment. In any event it was the Claimant who had initially suggested moving offices when the allegations of sexual harassment were first put to him on 13 December. At his disciplinary hearing the Claimant accepted that he agreed to move offices saying: "*at the time it was the best thing to happen*".

113.10. After the Claimant's dismissal and in preparation for the appeal hearing Mr Craig said that the Claimant had been inconsistent in his responses. He provided a 'table of inconsistencies' in the Claimant's version of events. The production of this document had nothing to do with the Claimant's gender but rather because Mr Craig was keen to establish inconsistencies in the Claimant's evidence in the disciplinary process and to lend weight to his decision to dismiss.

114. For the reasons given the complaint and allegations of direct sex discrimination are all dismissed.

<u>Wrongful dismissal</u>

115. We are satisfied that the Claimant's conduct amounted to a repudiatory breach of the implied term of trust and confidence. Dismissal in the circumstances was justified. As such the complaint of breach of contract must be dismissed.

Breach of Article 8 rights

116. The Claimant alleges that in dismissing him the Respondent has breached his rights under Article 8 of the European Convention on Human Rights.

117. Article 8 of the Convention states:

"Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

118. In our judgment the argument is without merit. Even if Article 8 is engaged – and we do not believe that it is - it does not give the Claimant a right to sexually harass a colleague. Furthermore, the Respondent has a duty to prevent behaviour that it reasonably considers amounts to sexual harassment and the management instruction for the Claimant not to contact S inappropriately was a reasonable one. That was not interference with W's private life. The Claimant implicitly accepted that was the case because he recognised he may have to be transferred to another location. It was also for the protection of health and the protection of rights and freedoms of others.

Application for a re-instatement/re-engagement

119. Following the announcement of our decision in open Tribunal the Claimant made an application for reinstatement/reengagement. The application was opposed.

120. The relevant statutory provisions as to re-instatement and/or re-engagement are found in the ERA 1996 and are as follows:

Section 113

"An order under this section may be—

(a) an order for reinstatement (in accordance with section 114), or

(b) an order for re-engagement (in accordance with section 115),

as the tribunal may decide."

Section 116 ERA 1996

(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—

(a) whether the complainant wishes to be reinstated,

(b) whether it is practicable for the employer to comply with an order for reinstatement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

(3) In so doing the tribunal shall take into account—

(a) any wish expressed by the complainant as to the nature of the order to be made,

(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.

(4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.

(5) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of subsection (1)(b) or (3)(b), whether it is practicable to comply with an order for reinstatement or re-engagement.

(6) Subsection (5) does not apply where the employer shows—

(a) that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement, or

(b) that—

(i) he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and

(ii) when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.

121. Section 113 ERA provides that a reinstatement or re-engagement order may be made. The criteria for doing so is set out in sections 116(1)(a) – (c) ERA 1996.

122. It is certainly the Claimant's wish to be reinstated but it is also the case that the Claimant has substantially caused or contributed to the dismissal. The key issue is whether it is practicable for the employer to comply and whether we should exercise our discretion to make such an order.

123. Mr Downey submits firstly that this is not a matter that can be dealt with now because there is no evidence before the Tribunal on re-instatement as the evidence does not deal with practicability. He submits that the Claimant has had an opportunity to reflect, that he has learnt his lessons, that he moderated his behaviour since 3 January after sending the WhatsApp message and there was no repeat of his behaviour after that date. Despite the passage of time he argues that W can be re-integrated into the team.

124. The application for reinstatement/re-engagement is strongly resisted. Mr Livingstone refers to the significant contributory conduct found by the Tribunal. He also points out correctly that 'practicable' does not mean 'possible'.

125. In **Kelly v PGA European Tour** [2021] EWCA Civ 559, Lewis LJ set out the following guidance (at paragraphs 45 to 46):

"……The employer will need to establish that it genuinely believes that, if re-engaged, the employee would not be able to perform the role to the requisite standards and that that belief is based on rational grounds. Mere assertion by an employer that it does not believe that the employee would,

if re-engaged, be able to meet the demands of the role will be insufficient. But if the employer is able to establish that it genuinely and rationally had such a belief, that will be relevant to, and probably determinative of, the question of whether it is practicable for an employer to comply with an order for re-engagement.

Similarly, an employee may have engaged in conduct which did not, of itself, cause or contribute to dismissal, but which an employer may genuinely and rationally believe means that it can no longer rely upon the integrity of the employee and is unable to have trust or confidence in the employee in future if he were to be re-engaged…….the tribunal will have to test whether the employer genuinely believes that the employee cannot be trusted to work for the employer in future and whether there is a rational foundation for that belief. It would not be appropriate to seek to restrict the type of conduct capable of leading to such a conclusion to a category defined, or described, as extreme cases. Rather, the nature of the conduct may well be a factor that is relevant to the assessment of whether the belief is genuinely held, or whether there is a rational basis for the belief. If, for example, the conduct was insignificant or involved minor misconduct, or occurred a long time ago, that may be a factor pointing to a conclusion that the belief that the employer cannot trust the employee to work for him is either not a genuine reason for objecting to re-engagement or is a belief that has no rational basis.

126. Underhill LJ agreed with Lewis LJ and went on to add the following:

"Although I agree with paragraphs 44-46 of Lewis LJ's judgment I would be sorry if the question of the "practicability" of reinstatement or re-engagement became subject to too many glosses. In particular, I am wary of tribunals becoming too focused on the language of "trust and confidence", which may carry unhelpful echoes from its use in other contexts. In this context it simply connotes the common-sense observation that it may not be practicable for a dismissed employee to return to work for an employer which does not have confidence in him or her, whether because of their previous conduct or because of the view that it has formed about their ability to do the job to the required standard. Of course any such lack of confidence must have a reasonable basis. The important point made by the EAT in *United Lincolnshire NHS Foundation Trust v Farren* is that while that is an objective question it must be judged from the perspective of the particular employer: that reflects a proper recognition that an employment relationship has got to work in human terms. However, each situation must be judged on its particular facts."

127. Having considered the matter, we refuse the application for re-engagement or re-instatement for the following reasons:

127.1 The Tribunal has already found that the Claimant engaged in conduct which destroyed trust and confidence in the employment relationship by reason of sexual harassment by the Claimant of S. The loss of confidence was a reasonable conclusion. It would be practically impossible for the Claimant to work in the Housing section of the Respondent where S was already employed or with his former colleagues having regard to what had transpired, even if they were based at different locations.

127.2 Even if S was not to come into contact with W, Miss Murray is still employed by the Respondent. Some of the Claimant's suggestions during the course of this hearing, for example that Miss Murray had fabricated an email HR and that she had colluded with S in the production of notes, would not make it realistically possible for the Claimant to maintain a working relationship in the Housing Department.

128. Mr Downey says that the Claimant has learnt his lesson and that what he did is unlikely to be repeated. We are not so sure. From the way in which the Claimant has conducted this case it appears that his attitude has if anything hardened over time. From the initial state of affairs when he appeared to some extent to be remorseful and apologetic he has subsequently sought to justify his actions and to

imply that he was to some extent S was to blame by either giving him mixed messages or misleading messages, which in our view was clearly not the case.

129. Insofar as it is suggested the Claimant has an 'unblemished' record after the WhatsApp message there appears to have been very limited opportunity for W to do anything else. The Claimant was suspended a few weeks after the message never to return to work again.

130. The Respondent does not genuinely believe that the Claimant if reinstated would be able to avoid such behaviour in the future or that he would obey management instructions in telling him to refrain from such conduct. In viewing the matter from the Respondent's perspective, we are satisfied that they have good reasons for that belief and that a working relationship are unlikely to work.

131. The application for reinstatement/reengagement is therefore refused.

_____

Employment Judge Ahmed

Date: ~~9 July 2021~~ 4 August 2021

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE