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EMPLOYMENT TRIBUNALS

Claimant: Mr C Kerins
Respondent: Barclays Bank UK plc
Heard at: East London Hearing Centre
On: 28, 29, 30 and 31 January 2020
Before: Employment Judge Moor

Representation

Claimant: in person
Respondent: Ms L Bone, counsel

JUDGMENT

1. The Claimant was not unfairly dismissed.
2. The Claimant was wrongfully dismissed
3. The Respondent is ordered to pay to the Claimant damages for wrongful dismissal (breach of contract) in the sum of £12,282.39.
4. The claims for unpaid holiday pay and sex discrimination are dismissed upon withdrawal.
5. Recoupment does not apply.

REASONS

1. The Claimant was dismissed from his employment as a business manager with the Respondent bank after 28 years' service. The Respondent has about 16,000 employees in the UK. The Claimant brings claims of unfair and wrongful dismissal.

Issues

2. I dismiss the claims for holiday pay and sex discrimination, which the Claimant

withdrew prior to this hearing.

3. The agreed list of issues sets out the legal questions I must ask in relation to the unfair dismissal claim. I clarified at the outset that I would consider the claim form for the factual arguments.
4. On the first day, the Claimant raised a further argument that in respect of the misconduct found against him he was not acting in the course of his employment. The Respondent was able to deal with this argument on the evidence and Ms Bone assisted the Claimant and the Tribunal with the relevant legal principles. If an amendment is required to raise this issue, I allow it because a fair trial of that issue was possible and it was in the interests of justice to allow it, the Respondent not being put to any prejudice by it being raised at this late stage.
5. At the outset, I clarified that, in respect of the wrongful dismissal claim, (that the Respondent had acted in breach of contract by dismissing the Claimant without notice), I had to decide myself on the evidence I heard whether I judged the Claimant to be guilty of conduct amounting to gross misconduct i.e. a fundamental breach of contract, which would have allowed the contract to be terminated without notice.

Findings of Fact

6. Having heard the evidence of Mr Evans, Mr Gibson, Mr Howick, the Claimant, Mr Dalby, and having read the signed witness statements of Mr Lawley and Mr Thackray, and having read the documents referred to me and having watched extracts of CCTV from 8 December 2017, I make the following findings of fact.
7. I first make findings that can apply to both heads of claim. I then divide my findings between those relevant to the unfair dismissal and those relevant to the wrongful dismissal. I realise this makes my judgment more unwieldy but is in accordance with appeal court guidance when both claims are made.

Common Facts

8. The Claimant worked for the Respondent bank from 6 August 1990 until his dismissal on 24 August 2018. He was promoted over the years and worked latterly as a Business Manager, grade 5, earning a basic salary of £48,000 with considerable additional benefits, the value of which are set out in the Respondent's Counter Schedule of Loss. Until his dismissal, he had a clean disciplinary record.
9. The Claimant was dismissed for gross misconduct arising out of his conduct towards a colleague, referred to as employee A, before, at and after a work Christmas party on 8 December 2017. Initially that dismissal was for 3 allegations: inappropriate conduct; trying to kiss A; and putting codeine in A's drink. On appeal, the allegation that the Claimant put codeine in her drink was **not** upheld. The Respondent made clear at this hearing that the reason for dismissal did **not** include the codeine allegation.
10. I therefore need not have heard any evidence about the codeine allegation. Unfortunately, each side wished to refer to it in an attempt to undermine the

credibility of A or the Claimant. I allowed them each some scope to do this, while seeking to keep it in proportion.

11. The Claimant was a more senior employee than A. She was also a Business Manager but at grade 4. His grade gave him a higher level of responsibility and about 30% more pay. He was not her manager. They were both managed by Ms Lucas. They would occasionally cover for each other's work.
12. The Claimant and A were good friends as well as work colleagues. As part of this friendship they shared chatty and humorous texts about what was going on in their lives. During the investigation A described their interactions before the day of the party as 'harmless banter flirting' (144); she described him as a very close friend (78) and told the disciplinary hearing officer that he had been the friend she needed in difficult circumstances and that in the past he had always made her feel comfortable (271). She did not want to have a personal relationship with him.

Contract and Policies

13. The Claimant's contract remains the one he signed on 6 August 1990. It required 12 weeks' notice of termination by the Respondent.
14. The Claimant also received a rules and information booklet. The contract states '*The terms of the booklet are incorporated in your contract of employment and you are bound by the terms of the booklet for the time being in force*'. This booklet has been replaced over the years with policies online that he was sent from time to time. He was required to undertake online tests about them to make sure he had read them. He accepts he was aware of the following policies.

Conduct Policy

15. The Conduct Policy (173) provides that the Bank's employees are expected to act with the highest standards of conduct and integrity. It states that it '*does not form part of the employment contract or otherwise have contractual effect*' (174).
16. Under '*Work Related Social Events*' it provides '*if you are over 18, alcohol may be consumed at social events, provided this is in moderation and that you remain professional at all times. You must behave appropriately at all times at work related social events ... You must not act in breach of any of Barclays' policies at these events including, but not limited to, breaches of other sections of this policy and Barclays' Bullying and Harassment Policy, and Disciplinary Policy. Work related social events are commonly held outside of working hours and may take place away from your normal workplace but are still considered to be an extension of the workplace.*'
17. Under '*Personal Relationships at Work*' it provides that '*... at work related social events you must not engage in intimate or inappropriate physical conduct or personal behaviour.*'

Harassment Policy

18. The harassment policy, dated 2014, again includes a statement that it is not intended to be of contractual effect (169). It provides that '*unintentional ...*

harassment is also unacceptable. And states *'if it is found that you have harassed... others it may be grounds for disciplinary action, up to and including dismissal.'* (170) (my emphasis)

19. Harassment is defined as *'any unwanted conduct which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment or is personally offensive to the recipient.... Harassment may take a wide range of forms and includes any unwelcome physical ... conduct. It can be a serious of incidents or a single incident in some serious cases.'* Examples are given including *'unwanted physical contact (including sexual advances).'*

Disciplinary Policy

20. The disciplinary policy also sets out that it is not intended to have contractual effect (226). It states that *'gross misconduct is a serious breach of Barclays' rules, ... policies, ... or other misconduct of a serious nature. A finding of gross misconduct will normally result in summary dismissal.'* Examples of gross misconduct in the policy include *'an act of ... harassment whether on or off Barclays premises, during or outside of working hours or on social occasions for which Barclays is responsible and/or its employees are associated.'*

21. The harassment and disciplinary policies are not entirely consistent with each other as to whether any act of harassment is regarded as gross misconduct. Counsel submitted, and I agree, that the best interpretation is that an act of harassment can be but is not necessarily viewed as gross misconduct by the Respondent.

22. The disciplinary policy states that:

22.1 any disciplinary investigation will be carried out *'as soon as reasonably practicable'*;

22.2 the investigating manager decides whether the matter should progress to a disciplinary meeting;

22.3 the employee is sent an invitation to any disciplinary hearing *'setting out the allegations'* and giving him *'sufficient time to prepare for the meeting'*;

22.4 a disciplinary meeting *'can be adjourned to enable the manager to investigate any matters further and to seek further advice ...'*;

22.5 an appeal meeting will be held *'as soon as is reasonably practicable and normally within 20 working days'*.

The Barclays' Way

23. I was also referred to The Barclays' Way, a statement of the bank's values. Under the 'Colleague' section the Respondent states that *'we treat each other with respect'. 'In doing this we... take a zero-tolerance approach to ... harassment.'*
24. Under 'Harassment' in this document, the Respondent states that *'colleagues must not make any comments or acts or physical contact that could be perceived*

as sexual harassment'. The Claimant understood this.

25. The Claimant agreed that someone unwell was vulnerable and he should be particularly careful to treat them appropriately. He also agreed that he should be mindful of people's personal boundaries.

Christmas Party

26. On 8 December 2017, the Claimant and A attended a work Christmas party at a casino in Milton Keynes along with about 13 other members of their team, including their manager.
27. The Claimant and A both booked rooms in a hotel opposite the casino (about a 5-10 minute walk away) because both wanted to drink and did not want to drive home. This was normal for them both, as A told her manager (76.) They paid for these rooms themselves. The hotel was not part of the casino. They had a drink in her room beforehand for around 45 minutes.
28. The party started at 7.30pm and comprised dinner, a poker lesson, a poker game, a drink at the bar and roulette. It included 2 complimentary alcoholic drinks. The Claimant and A drank some alcohol during the evening but neither was drunk or was found to be drunk in the ensuing disciplinary investigation.
29. Mr Lawley and Mr Thackray, the Claimant and A, were the last to leave the party. The latter two just after the former two at about 12.50am.
30. At some point in the evening A had become unwell (to what extent is disputed) and texted her friend to say she was not going to meet him afterwards as she had planned. Because she was unwell the Claimant went back to her hotel room with her. He stayed in her room for about 20-30 minutes. He then left for his own room. They exchanged a few texts before sleeping.
31. Later A complained that she thought the Claimant had put codeine in her glass of wine at the poker table during the evening and this was subsequently investigated along with an allegation that he had tried to kiss her and of 'inappropriate conduct'. These allegations were initially upheld and the Claimant was dismissed. On appeal the allegation that he had drugged her was not upheld, but the Respondent took the view the dismissal was still justified for the remaining allegations.

Facts for Unfair Dismissal Complaint

Complaint

32. On the Monday after the party, the A and the Claimant had a conversation about it. She did not confront him directly (269) but asked him about a tablet strip she had found in her room. She sent him a text to say after this conversation that she did not feel comfortable. They did not remain friendly.
33. A contacted the casino in December to see whether its CCTV could cast any light on her belief.
34. On 21 December 2017 A asked to speak to Ms Lucas urgently but because she

was away, she had an initial conversation with her deputy and then met her on 2 January 2018. Ms Lucas summarised A's complaint that once she felt unwell at the party, the Claimant *'offered to escort her, which was normal. He went to her room, which again was nothing unusual as they were good friends. She lay on the bed but still felt unwell. So asked him to leave. He approached her and kissed her on the cheek. She pushes him away and asked him to leave as she was going to bed. He did leave.'* A believed he had drugged her. She was upset and did not wish to work with him. She did not wish to raise a grievance. It was left that A would not work in the same team as the Claimant and would consider what she wanted to do. She would go back to the casino for evidence (78).

35. Ms Lucas and A met again on 26 February 2018. At that point she told Ms Lucas that as soon as she had had the drink she felt unwell at the poker table. *'Like her airways were closing up.'* She told the Claimant to get some throat sweets from her coat. And at the bar she started to feel really bad. She texted her friend to cancel their meeting afterwards. It did not concern her that the Claimant came into her room because he had always been a friend. She then said *'at that point I felt uncomfortable as Craig sat on the side of the bed as I was sat there with my feet up on the bed. ... I said I wanted to go to bed as I felt so unwell and Craig had come round the side of the bed. I said can you go I feel so unwell I want to go to sleep. He said you go to bed I will stay here. At that point I asked him to leave 4 times before he walked around towards me on my side of the bed and I was getting quite angry with him as I felt so unwell. When he came round to my side of the bed I guessed he came to say goodbye so he kissed me on my cheek.'* When asked whether he would have approached her in that way before she said *'I don't know. Probably not hugs but not a kiss.'*[sic] *'He then moves his face so his lips touch my lips and I tell him to go. So then he leaves.... I felt so uncomfortable.'* She did not remember that she had texted him back later that night. (101-102)

Decision to Investigate as Disciplinary charge

36. On 1 May 2018, some 4 months after the complaint, the Respondent sent an invitation to the Claimant to attend an investigation into allegations of *'potential misconduct on the evening of 8 December 2017.'*
37. The delay in investigating was because line management thought there could be no disciplinary action if A did not wish to make a grievance. The director of HR intervened to require an investigation. The Claimant was suspended. Mr Evans, Area Business Manager, was appointed the investigator.
38. Mr Evans spoke to Ms Lucas, A, and the Claimant.
39. In relation to events in the bedroom, A did not have a clear recollection of everything that happened but described the Claimant sitting on the bed with his legs upon the bed. *'I felt uncomfortable how did he get there. Asked him to leave. I want to go to sleep. Asked him 4 times. He walks to my side of the bed. He gives me a hug, which isn't normal. His lips then touch mine. I pull my face away. Ask him to leave. ... When I tell him to leave he goes, sorry I missed, he kissed me on the cheek.'* ... *'as soon as I saw him on the bed I wanted him to leave...'* When asked what she thought had happened to her, she said *'he kissed me on the cheek and then he left... I felt I was being tested.'*

40. She told Mr Evans, *'If I hadn't found these tablets I wouldn't have done this.'*
41. Of the kiss, Mr Evans stated in his evidence to me that he thought that the kiss was a *'kiss on the cheek that touched lips'*. He did not think A was saying the Claimant was trying to kiss her on the lips.
42. At the beginning of his meeting with the Claimant, Mr Evans began to ask the Claimant about the relationships at work policy. The Claimant then asked what the allegations were and Mr Evans first response was to say *'I will come to that later is that ok'*. The Claimant responded that employee support had told him he could ask and then Mr Evans informed him that the allegations the spiking of the drink and *'an unwelcome approach'*. The Claimant denied drugging A and gave Mr Evans his account of what occurred in the hotel room after the party. He saw A coughing at roulette, he had got a lozenge for her at her request. As the evening went on her coughing became worse and *'she was struggling'*. By the time they walked back she was not feeling great, shivering and he wanted to make sure she was ok. In the room he wrapped her in her duvet and *'rubbed her back to get her breathing back'*. He did not remember that she had asked him to leave the room. When asked *'have you tried to kiss her before'* he replied *'a goodnight kiss yes nothing further'*. He volunteered the text messages exchanged between them afterwards and did not agree that they were flirtatious. He thought they showed A was not unhappy with him at the time.
43. In his evidence to me Mr Evans understood that there had been an agreement between A and the Claimant to meet in her room in advance of the party. The Claimant told him that he had brought 3 bottles to the room as a choice. Of the pre-party drink, Mr Evans said in his report *'as they have both confirmed they were friends and it was not seen as usual'*.
44. Mr Evans understood from A that she had two complaints: her drink being drugged and being inappropriately approached in her room afterwards. He was not consulted about a third allegation.
45. In his evidence to me Mr Evans considered the variations in A's version of events were because of *'the time frames that had elapsed'* and his view therefore that A might well have been confused about the chain of events.
46. Mr Evans contacted the casino who told him that they doubted they had any footage and would only release it to the police casino's. This explains why Mr Evans did not follow up the CCTV even though, in hindsight, it seems obvious that he could have asked A and/or Claimant to obtain it under a Subject Access Request.
47. Neither in his written statement to me nor in his investigation report did Mr Evans state that he had done any investigation into the effects of codeine and alcohol. I therefore asked him in my questions whether he had done so. He told me (and one of the internal emails confirms) that he had tried to find out whether codeine was soluble but his research was inconclusive. I accept that he went this far.
48. Mr Evans told me that he looked online to find out the effects of codeine in alcohol. He recalled to me that his online search showed codeine *'could cause drowsiness'*. He then said he found it *'was a sedative'*. He was unclear in his

answers to me which it was and whether these effects were with or without alcohol. He said he probably did not write down the outcome of this search. Is it plausible that Mr Evans could have forgotten to write, in his very full written witness statement, something so relevant to his investigation or indeed failed to include this research in his investigation report? The outcome either way would have been important either to show evidence supporting A's belief or supporting the Claimant's denial. On the other hand, his evidence to me is of such a cursory search that he may well have forgotten to mention it. On balance, I find he probably did have a brief look online and discover from an unknown source that codeine could cause drowsiness. Ms Lucas told Mr Evans that she had not seen A become drowsy and that no one had mentioned this (138). Ms Lucas was at the poker table, where A alleged her behaviour had changed. This is independent evidence supporting the Claimant's statement whose account was not that she was drowsy but that she was coughing, supported by A recalling the request for lozenges. Mr Evans failed to highlight either of these pieces of evidence in his report. Mr Evans did not tell me in his evidence or inform the disciplinary manager of any research that showed codeine could cause coughing or breathlessness with alcohol. Indeed in his oral evidence, Mr Evans did not think that having a cough requiring a lozenge sounded like the effects of being drugged.

49. In the absence of CCTV Mr Evans decided not to investigate the behaviour change issue with other colleagues who were at the casino. He explained this by saying he thought to do this would '*impact on both parties' well-being*'. In evidence to me he said he did not think that to find out whether or not others would say A was slumped '*would have added much to our case*'. I have had to ask myself whether this was Mr Evans simply misspeaking under the stress of giving evidence or whether this comment showed his approach to the investigation was to look for evidence that supported the allegations rather than supporting the Claimant's account. It seems to me the latter. A and the Claimant had given Mr Evans quite different evidence about the nature of her illness: he coughing; she a whole range of symptoms including that the casino had told her she was slumped at the poker table. The recollection of others present might have cast important light on whose was more accurate.

50. Mr Evans recommended that there was a case to answer on both allegations.

Disciplinary

51. Ms Washington-Jones, Head of Risk Coaching and Training in Relationships and Small Business, wrote to the Claimant on 15 June 2018 to say that there was a case to answer and it would proceed to a disciplinary hearing. A further letter was sent on 18 June 2018, enclosing Mr Evans' report and stating two allegations 'that you put codeine in a colleague, A's, drink'; and that 'you tried to kiss A' (236).
52. By this time Ms Washington-Jones had copies of texts provided by the Claimant between him and A, after he had returned to his hotel room as follows:

1.19 Claimant: *My rooms a bit cold*

1.20 A: *I bet it's not*

1.21 Claimant: *Yours is def hotter!*

1.21 A: *lol*

1.23 A: *So sleepy zzz*

1.23 Claimant: *I'd keep you company*

1.23 A: *I know x*

1.24 A: *I was so tired*

53. The disciplinary meeting was held on 25 June 2018. The Claimant asked why CCTV had not been obtained and explained why it was important for the codeine allegation.
54. The Claimant confirmed he and A had met before in hotel rooms. He recalled taking a total of 3 bottles to the room, explaining, '*I didn't know what A would want to drink.*' (242) He initially took 2 and went back for the third because they were not her choice. He confirmed that this was not any different to other occasions. The Claimant said the pre-party drink in A's room was from 6.20pm to about 7/7.30pm. The pre-party texts between them confirmed the start timings and it was not in dispute that the party started at 7.30pm.
55. The Claimant referred to text messages: one from A on 27 November stating that she had something viral and him asking her if she still had a sore throat (244). He produced a letter dated 16 May 2018 from Dr Neil Douse, at The Stonedean Practice, that if someone had had a respiratory tract infection then cough symptoms could last up to 4 weeks; that during that time the throat and nasal passages will tend to be of increased sensitivity to any irritant; and that alcohol was such an irritant (123). He also pointed out some contradictions and exaggerations in A's account of her illness and that she had not been asked about her health (248).
56. Ms Washington-Jones misrepresented part of his account during the disciplinary hearing. She stated '*so you are now saying she did not ask you about the tablet*' (bottom of 246). This is incorrect. The Claimant had said she asked him about tablet (top of 246) but that A did not accuse him of anything. As it turned out this accorded with A's recollection to Ms Washington-Jones (269).
57. In relation to the kiss the Claimant denied that A was lying on the bed, rather sitting up with the duvet over her (247). He stated that he got up from the bed and kissed her on the cheek but caught her on the side of the mouth. When asked what made him leave the room, he responded '*her breathing was ok*' (247).
58. Ms Washington-Jones asked him about the text he sent afterwards: '*I'd keep you company*' and suggested to him he was seeking an invitation to return to A's room. He denied this and pointed to her texts, especially the one with the kiss, as showing she was not angry with him after he had left the room.
59. At the end of the meeting Ms Washington-Jones told him she should be able to make her decision in 3-4 weeks.

A's account to Washington-Jones

60. Ms Washington-Jones saw A on 10 July 2018. Early on, Ms Washington-Jones told her the Claimant's suspicion that A was raising the issue because of a missed promotion. This really upset A.
61. On Ms Washington-Jones asking about the 3 bottles of wine, A said she did not think it was unusual to have a couple of drinks before a night out. A said she had gone out with colleagues including the Claimant before and had a few drinks before going out. She said it was not unusual for the Claimant to bring a bottle ahead of an evening out so she did not think anything of it. Ms Washington-Jones asked her whether she thought anything of the fact of the 3 bottles. A said that, to her recollection, he had brought wine and then gone to get another bottle as the one he had originally brought was not one A liked. A said she thought it was 2 bottles not 3. She said she only had one glass.
62. A confirmed her account about the kiss and asking him to leave and then said that she had been quite scared (271). When Ms Washington-Jones put the texts to her and the Claimant's inference that she was not upset, A said *'at the time she thought CK had tried to kiss her and she did not think he had spiked her drink. Said this changed everything as she went from feeling comfortable to feeling violated.'* She told Ms Washington-Jones that she had always felt very comfortable in the Claimant's company beforehand.
63. Ms Washington-Jones asked A what she thought the 'I'd keep you company' text meant. A said she thought of the message as being *'quite innocent. She said she had quite a lot of male friends. A said to her it was A saying he'd be there for her whilst she was unwell.'* When asked why she had put an 'x' after the text A said *'that when one feels unwell and someone is nice to you it prompts that kind of reaction'*.
64. As for the CCTV, A told Ms Washington-Jones that the casino had told her they could release the footage to her. Ms Washington-Jones did not follow this up.
65. A confirmed the Claimant's account about the lozenges because after she had the drink, it had felt like her throat was closing up. Ms Washington-Jones did not ask her whether she had had a viral illness or a sore throat in the 2 weeks prior to the party.
66. It was only on 11 July 2018 that the Respondent interviewed Mr Thackray and Mr Lawley, some 7 months after the event. Neither of them had noticed A being unwell. Nothing stood out to them as exceptional about the evening. Mr Lawley confirmed they had been the last 4 to leave. That there had been a drink in the bar and they then moved onto the roulette table (275). (Counsel suggested to me that the Claimant's recollection about this was not credible because it was not mentioned before, but I note that this was also Mr Lawley's recollection.)
67. The Claimant wrote on 24 July 2018 to inform the Respondent that the casino had retained the CCTV footage and *'depending on when it starts it will confirm I sat down first'*. This does not suggest to me that the Claimant had seen the footage at this time, as is now alleged: indeed the phrase 'depending on when it starts' suggests the contrary. He was merely confident in his recollection of those events because he knew he was sitting next to the dealer.

Addition of New Allegation and Second Disciplinary Hearing

68. On 30 July/1 August Ms Fleming, of Employee Relations, suggested that Ms Washington-Jones have another meeting to explore inappropriate conduct: the 3 bottles of wine; how many times asked to leave the room; why did he lie on the bed; had they ever kissed before. Even though all of this had already been explored already. In an email she wrote *'that will help us move away from his mitigation that she was comfortable with the texts and keep the focus on his behavior [sic] and his motivation. We are challenging his behaviour and her response to it is not mitigation.'* (300)
69. The Respondent then sent A further written questions. One asked her to confirm that she had asked the Claimant to leave 4 times. She agreed. She said the first time she told him to leave he was sitting on the bed. And she told him to go 'after he put his lips on mine'. Another asked how many bottles of wine there had been at the pre-party drink. She maintained her recollection that the Claimant brought 1 bottle and then went back for another because the first *'wasn't of my choice'*. She said the Claimant *'said he would bring a bottle of wine and I said that was fine but I would only be having one drink.'*
70. The casino sent a timeline of events. It was forwarded in an email from their 'collator'. The transcript was mainly about events in the poker room (as that is where A originally had alleged the drink tampering to have taken place). It confirmed that, while the camera was on the Claimant he was not observed tampering with drinks.
71. On 7 August 2018, the Respondent sent a further disciplinary hearing invitation in which it alleged *'your conduct was inappropriate and not in line with The Barclays Way – Code of Conduct'*. It did not include any new factual allegations.
72. At this second hearing on 9 August 2018, the Claimant asked whether the new allegation was 'linked to the allegations beneath [it]'. Ms Washington-Jones said it was linked to his to conduct on the same evening (343). She did not tell him what additional parts of his conduct it related to. This was only explained in her dismissal letter.
73. Ms Washington-Jones began with the pre-party drink. The Claimant said that they were not running late and told her that they met in her room around 18.40 and the casino started at 7.30 (345). He said that during the drink A was doing her make-up. He had not wanted to be late on leaving his house but there was time for a drink. He again repeated that the number of bottles was to give A a choice. He said he did not drink that much. Ms Washington-Jones stated *'in her mind CK was very generous in bringing so much alcohol and running back to his room given the time pressure'*. Mr Gibson confirmed that she did not actually think he was being generous. She was therefore being sarcastic.
74. The Claimant explained he had no expectation he would go back to the room where the bottles were left. He knew A was going to meet a friend after the party. He said they had met in hotel rooms before.
75. Even though A had confirmed that she had asked Claimant to get her lozenges from a coat pocket, Ms Washington-Jones put to him his different recollections as

to whether it was his coat pocket or hers (349).

76. In relation to how the evening came to an end in A's room, the Claimant denied that A had asked him to leave 4 times and the night came to an end by agreement. When asked what words were used to end the evening, the Claimant responded to Ms Washington-Jones that he could not remember so many months after the event (352).
77. The Claimant said it was not unusual to hug on a social occasion. He pointed out that A had originally said it was a kiss on cheek and now said 'his lips touched mine'. At that, Ms Washington-Jones said to him that her understanding of the kiss was that '*it was one of those awkward moments where CK had gone for the cheek and had mislanded and lips had touched*' (353).
78. The Claimant asked whether Ms Washington-Jones had done any research on codeine at all. Mr Gibson said only '*this had been done to a limited degree*' (354). In his evidence to me Mr Gibson said Ms Washington-Jones had looked on the internet about the effects of codeine in alcohol but he was not with her when she had done so. The results of that search were not printed out and were not shared with the Claimant. In my judgment if such research had been done I would have seen some written evidence of it or reference to it in emails. I find that Mr Gibson's reply to the Claimant is more likely to be a reference back to the codeine solubility investigation that Mr Evans had done which he found to be inconclusive. In my judgment, therefore, Ms Washington-Jones is not likely to have done any investigation of the effects of codeine on alcohol.

Dismissal Decision

79. Ms Washington-Jones upheld all the allegations against the Claimant. I will not set out her conclusions in relation to the codeine allegation because it was not upheld and is not relied on before me as part of the reason for dismissal.
80. In relation to the allegation of 'inappropriate conduct' Ms Washington-Jones gave a detailed analysis. In her view:
- 80.1 the pre-party drink in the room alone with a junior work colleague was wholly inappropriate given the amount of alcohol; the need to go back for more; when they were running late; and when there was an alternative option to drink in the casino bar;
- 80.2 entering A's room after the party, staying for up to 30 minutes, rubbing her back and wrapping her in a duvet were either signs of the Claimant's lack of integrity about how ill she was, or were inappropriate;
- 80.3 sitting on A's bed was an invasion of her personal space as she was in the bed, feeling unwell, with the duvet on top of her. It should have been apparent to the Claimant that this was overly intimate and risked making her feel uncomfortable. In her view it was likely he lay on the bed, which again risked making A feel uncomfortable and '*transgressed the boundaries of collegiate behaviour*';
- 80.4 as to the kiss, while she acknowledged that the Claimant had maintained

this was intended as a friendly goodbye kiss on the cheek which accidentally touched lips, even if that was the case, Ms Washington-Jones decided it was inappropriate being in mind the context of A being unwell, under her duvet and the Claimant rubbing her back, sitting on her bed and their 'grade differential'. She decided that the Claimant had '*acted recklessly*'. And he should have thought about how this behaviour could look to an independent observer;

80.5 she concluded that the conduct made A feel sufficiently uncomfortable to ask him to leave more than once. She explained that she preferred A's account on this rather than the vague one he had supplied on 9 August when asked about how he came to leave. She interpreted his later text as an attempt to invite himself back to A's room and said it could only be interpreted as suggestive. This supported her conclusion that A had to insist that he left. His apology suggested the tone on leaving was not as positive as he had tried to suggest;

80.6 the texts were not evidence that A had not been made to feel uncomfortable while the Claimant was in her room, but simply showed that, in spite of that, she was willing to respond in a friendly way on the phone;

80.7 she was concerned that the Claimant had shown no remorse and had not appeared to recognise that his conduct was at all inappropriate and this gave her concerns about his integrity;

80.8 she concluded the conduct she had described could be classed as harassment within the Respondent's policies, which extended to a work-related social event. The kiss was 'unwanted physical contact'.

81. As to the kiss allegation, she referred to her conclusions under the inappropriate conduct allegation. She upheld this allegation on the Claimant's own account. And decided that, even if this was intended as a friendly goodnight kiss, it was entirely inappropriate. She took into account the 3 bottles of alcohol, that A was unwell and vulnerable and that he was senior. She repeated her conclusion that this was unwanted physical contact and therefore harassment.

82. She reached the conclusion that the misconduct was serious and referred to the Respondent's zero-tolerance approach to harassment and therefore decided to dismiss. She decided his years of service were insufficient mitigation.

Appeal

83. It is right that the Claimant appealed the decision on the broad grounds that it was based on incorrect facts. He followed this up with a lengthy appeal letter and made numerous points at the appeal hearing. I do not accept Counsel's submission that the grounds of appeal were confined to those points on page 440 of the minutes of the hearing because Mr Howick dealt with far more than these in his appeal letter. Those grounds relating to the inappropriate conduct/kiss were numbered as follows in Mr Howick's appeal letter: point 9 (A felt comfortable), point 10 (they had met in a hotel room together before), point 11 (A's testimony regarding leaving the room had changed over time); point 13 (A described the

Claimant's text message as an example of someone being nice); point 14 (that he was remorseful) and point 15 (his long service).

84. Mr Howick prepared by reading all the notes of the investigation and disciplinary hearing. He made notes to himself. In them he adopted a sceptical approach to both A and the Claimant's accounts. For example: he identified the inconsistency in A's account between cheek and lip kissing; as to the alleged confrontation about the codeine he asked himself whether the Claimant could have been certain what A had implied; he asked himself about whether there were witnesses to the behaviour change; and he queried to himself the Claimant's accounts of A's illness.
85. On 17 October 2018 Mr Howick and the Claimant went to the casino to look at the CCTV. After which the Claimant provided a further 10 page statement about it. Mr Dalby confirmed that it had taken longer than expected to obtain the software that pixellated everyone else's faces.
86. At the appeal hearing on 23 October 2018, Mr Howick gave the Claimant a full opportunity to say what he wished, now knowing the extent of the added allegation.
87. Towards the end of the appeal he asked the Claimant in the light of the '*political and social environment that we are now in*' whether he thought it might be wrong to go into a female colleague's room. The Claimant acknowledged in hindsight that the contrasting views of the evening made him regret how his presence in A's room looked, but he felt it was not unusual behaviour for friends.
88. Mr Howick had a holiday and then considered matters. In his decision letter, of 27 November 2018, he upheld the Claimant's appeal against the codeine allegation.
89. It has been difficult for me to pin down from the documents and his evidence exactly what Mr Howick decided about the remaining allegations.
 - 89.1 While in his letter he first notes that he regarded Ms Washington-Jones' decision on the two remaining allegations 'fair and reasonable' (478), his later remarks do not to support the extent of her decision.
 - 89.2 In his letter he acknowledges that A was comfortable with the Claimant entering the room prior to the party and following its conclusion (477).
 - 89.3 He then relies on the Claimant's own admission that he had remained in A's room while she was unwell and had to apologise for his lips touching hers. His findings were that *this* showed a lack of judgment in view of the Barclays' Way and Harassment policy. And therefore the Claimant had conducted himself inappropriately.
 - 89.4 In his oral evidence he was clear that the kiss was an invasion of privacy and an act of unwanted physical contact, which was an act of harassment. He did not think A should have been put in that position.
 - 89.5 He went further and thought the kiss was not an accident because he thought it was odd for the Claimant to stay in the room so long. When he was taken, in re-examination, to A's statement that she had felt

uncomfortable when she saw A on her bed, he said that A had a level of discomfort from that point on. He thought that the text the Claimant had sent afterwards (I'd keep you company) could only be read suggestively and was unprofessional and inappropriate.

- 89.6 In my judgment, overall, Mr Howick's judged that the Claimant had stayed in the room, sat on the bed, and the kiss to be inappropriate conduct and an error of judgment, and not Ms Washington-Jones' long list beginning with the pre-party drink.
90. Mr Howick acknowledged in his letter that in A's meeting with Ms Washington-Jones, she said that when she found the codeine strip she went from feeling comfortable to feeling violated. Mr Howick considered it reasonable that *'her reaction and feelings may have changed once you left the room and particularly upon finding the codeine. Her feeling comfortable at the point you left the room in no way negates her subsequent feelings of shock and discomfort.'* Thus, he appeared to acknowledge that A's feelings about her discomfort may have changed upon finding the codeine. When asked in his evidence whether this did not provide mitigation when he came to consider whether to uphold the dismissal, Mr Howick said *'From our procedure. [It is] not about how someone feels about something. You breached our policy by doing what you did. How she felt is to a degree is immaterial. You either do it or you don't do it.'*
91. As to sanction, Mr Howick reflected for a considerable time on the Claimant's long service. Ultimately he considered the Claimant's actions and error of judgment brought an end to his career at the Respondent. Mr Howick took the view that the Claimant's long service meant he was better placed than anyone to understand the high standards expected of him. In deciding not to give a formal written warning, Mr Howick took into account what he regarded as the Claimant's lack of contrition or acknowledgement of any misdemeanour.

Mitigation

92. The Claimant did not begin his search for work until 14 December 2018. He was confident of succeeding in his appeal and wanted to return to work with the Respondent. He applied for very many jobs at and near his level of responsibility and was soon successful in obtaining one with a bank but was asked to leave after it obtained a reference showing he had been dismissed for gross misconduct. He continued to apply for jobs without success: as soon as he could not say he would get a clear reference the process stopped for many. He eventually set his sights a lot lower and obtained a job working in a sub-post office part-time at the beginning of November 2019.

Law on Unfair Dismissal

93. The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996 ('ERA'). The Respondent relies upon conduct within section 98(2)(b).
94. If a conduct has been shown as the reason for the dismissal then the Tribunal must decide whether the dismissal was fair or unfair under section 98(4) ERA and this *'(a) depends on whether 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.' This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

95. BHS Ltd v Burchell [1980] ICR 303 sets out guidance for the Tribunal in misconduct dismissals in considering the reasonableness of the employer's action. The Tribunal should usually consider whether the employer had a genuine belief in the misconduct; whether that belief was based on reasonable grounds and after reasonable investigation in the particular circumstances of the case.
96. Iceland Frozen Foods v Jones [1982] IRLR 439 establishes that, depending upon the misconduct alleged, there may be a range of disciplinary sanctions available to a reasonable employer. And as long as dismissal falls within this range, the Tribunal must not substitute its own view for that of the employer. However, the range of reasonable responses test is not a test of perversity or irrationality; nor is it infinitely wide. It is important not to overlook section 98(4)(b), which indicates that Parliament did not intend the Tribunal's consideration of a conduct case to be a matter of procedural box ticking. It is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer, see Bean LJ in Newbound v Thames Water Utilities Ltd [2015] IRLR 734, CA.
97. It will be unfair if the integrity of the decision to dismiss has been influenced by persons outside of the procedure, see Ramphal v Department for Transport [2015] IRLR 985 EAT. An investigating officer is entitled to call for advice from HR, but HR must be very careful to limit advice essentially to questions of law and procedure. They should avoid straying into areas of culpability or advising upon the appropriate sanction, beyond addressing issues of consistency. The employee being disciplined is entitled to assume that the decision will be taken by the appropriate officer without having been lobbied by other parties as to the findings she should make as to culpability.
98. The employee should be given notice of any changes in the case he has to meet so that he can deal with them and also given notice of representations made by others to the dismissing officer that go beyond legal advice and advice on matters of process and procedure. The question for the Tribunal is whether the influence of an external source was improper and if so whether it had a material effect on the ultimate decision of each relevant decision-maker.
99. In relation to procedural fairness, the Tribunal had regard to Sainsbury's Supermarket v Hitt [2002] EWCA Civ 1588 that the 'range of reasonable responses approach' applies to the conduct of investigations as much as to the decision of dismissal. I remind myself that a reasonable investigation and procedure usually requires an employer to be even-handed in its approach. Where there are serious charges with particularly serious consequences a more scrupulous investigation may be required, depending upon the circumstances, looking as much at exculpatory evidence as evidence put forward to show guilt.
100. In deciding whether the dismissal was fair or unfair, the tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the process was

defective, the Tribunal should consider the appeal and whether the overall procedure adopted was fair, see Taylor v OCS Group Limited [2006] IRLR 613, CA per Smith LJ at paragraph 47. The Tribunal should look at the facts rather than whether the appeal has been labelled a review or rehearing.

101. The Tribunal must have regard to the ACAS Code of Practice which sets out basic principles of fairness to be adopted in disciplinary situations, promoting fairness and transparency for example in use of clear rules and procedures. This includes the requirement that employers carry out necessary investigations to establish the facts of the case.
102. If a dismissal is unfair due to procedural failings but the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award, Polkey v A E Dayton Services Ltd [1987] IRLR 503, HL. This may be done either by limiting the period for which a compensatory award is made or by applying a percentage reduction to reflect the possibility of a fair dismissal in any event.
103. A basic and/or compensatory award may be reduced pursuant to sections 122(2) and 123(6) ERA respectively. Tribunals should address (i) the relevant conduct; (ii) whether it was blameworthy; (iii) whether it caused or contributed to the dismissal (for the compensatory award) and (iv) to what extent should any award be reduced.

Course of Employment

104. The question whether a person is acting in their course of employment usually arises when the employer is sued for acts of its employees. The 'close connection' test was confirmed in Mohamud v WM Morrison [2016] UKSC 11, paras 44-45. The court must ask whether there was a sufficient connection between the position in which he was employed and the wrongful conduct to make it right for the employer to be held liable. It approved the earlier statement of Scarman LJ in Rose v Plenty:

... the employer, having put matters into motion, should be liable if the motion which he has originated leads to damage to another.'
105. Ms Bone submits, and I agree, that if an employer is likely to be held liable for the conduct of the employee, then it must be entitled to seek to regulate that conduct through its disciplinary process.
106. Ms Bone helpfully supplied an example of a case about a Christmas party, Livesey v Parker Merchanting Ltd UKEAT/0755/03/DA. There an employee had harassed his colleague through a work Christmas party and had continued that harassment with an assault during the lift home from the party. The victim had brought an unfair constructive dismissal and sex discrimination case against the employer. The EAT overturned the tribunal decision that the employer was not vicariously liable. There was a continuous course of conduct of harassment that became cruder and more offensive as time went on. The EAT held that '*Bearing in mind that course of conduct it would seem to us totally unrealistic to draw any distinction between' the events at the party and in the car.'*

Submissions

107. Both the Claimant and Ms Bone made structured and useful submissions in writing. Ms Bone amplified hers orally. I refer to their written submissions rather than setting them out here.
108. In essence Ms Bone contended that on the basis of the Claimant's own admissions there was sufficient to justify dismissal and a finding of gross misconduct. She relied heavily on the fact that he admitted he had not sought A's permission or invitation to enter her room; to rub her back; to be on her bed or to kiss her. She contended that uninvited conduct was therefore unwanted and therefore harassment.
109. In oral submissions about whether the events in the hotel room were in the course of employment, Ms Bone relied in part on the Claimant's answer 'yes' to her question in cross-examination that he returned to the hotel room with A because he wanted to care for her 'as a colleague'.

Application of facts and law to issues on unfair dismissal

110. I must ask whether the Respondent had genuine belief in misconduct, based on reasonable grounds, after a reasonable investigation. I must consider whether a fair procedure was followed, namely one within a band of reasonable procedures. And then whether the decision to dismiss was one that a reasonable employer could have reached. I shall look at these questions only in relation to the allegations upheld by Mr Howick on appeal.

Course of Employment

111. Was the conduct in the hotel room committed in the course of employment?
112. The Respondent is very clear in its policies that work-related social events are covered by the conduct rules. All the events in the casino would be covered for this reason and because therefore they were closely connected with work.
113. The disciplinary policy defines work related social events as '*social occasions for which Barclays is responsible and/or its employees are associated*'. In theory this would include any social event in which employees participated, even if they were only there as friends, but a reasonable interpretation of the policy is not that the Respondent wished to regulate the life of its employees to that extent, but rather social events that involved employees as colleagues.
114. A and the Claimant had booked hotel rooms to make it more convenient to attend the work party. They did so because they were friends. They made the booking and paid for the rooms independently of work. It was an arrangement they made because they were friends as well as colleagues.
115. The Claimant ably distinguished the Livesey case by arguing that the decision in that case depended upon there having been a course of conduct during the party that continued into the car on the way home. Here, he says, quite correctly, he was not dismissed for a course of such conduct, but what he did after party.
116. Were the events in the room closely connected with employment? The facts are

not as clear cut as Livesey, because there was not a course of conduct going from the casino to the hotel. But in my judgment the Respondent could, in theory, reasonably be found liable for the events in the hotel room. They were so closely connected to the work-related party that they could be seen as part of the same event. The parties were in the hotel room because of the work party; they had booked the room because of it and had just returned from it; and they were there not only as friends but also as colleagues. The disciplinary policy includes conduct at social events associated with work colleagues. The social event in the hotel room was associated with work colleagues. The Claimant's conduct in the room probably therefore was in the course of his employment and it was reasonable for the Respondent to seek to regulate this conduct under its rules.

Was there a reasonable investigation?

Was the investigation even-handed?

117. These were very serious allegations against the Claimant: they were career-ending, as Counsel agreed. A reasonable employer should therefore have been scrupulous to investigate carefully and look for exculpatory evidence as well as evidence supporting the allegations.
118. I'm satisfied that, in relation to the kiss allegation, Mr Evans undertook a reasonable investigation by asking both parties about the circumstances of it. Other colleagues at the party were unlikely to be able to give useful evidence about this allegation: while illness was a factor relevant to whether the kiss was appropriate, both A and the Claimant agreed that she was to some extent unwell at her room and there was no one else present to give evidence about it.
119. While it was appropriate for Ms Washington-Jones to cross-question the Claimant on his account, she was not always even-handed in this. She suggested he had changed his account to her on the tablets question when he had not. She was sarcastic with the Claimant about bringing alcohol. She ignored his timings that showed they had plenty of time for a drink in the room, and continued to suggest to him they had no time for a drink. She put to A, the Claimant's points on her account but not tendentiously as she had done with the Claimant. She asked her a closed question on a disputed issue (how many times A had asked the Claimant to leave), simply getting her to confirm that it was 4 times. And in her conclusions she always drew the conclusion that was worst for the Claimant even when this was not supported by A's account (the number of bottles in the room, whether they were late, that the 'company' text was not innocent as A had described). Added to her complete failure to investigate adequately the codeine allegation, all of this suggests to me a closed-mind. I have grave reservations as to whether Ms Washington-Jones was even-handed.
120. But I have to look at the whole of the investigation, not only Ms Washington-Jones' part. In my judgment Mr Howick was even-handed in his approach to the facts, as his preparatory notes show. His marginal queries to himself show he identified problems and inconsistencies in relation to both the Claimant's account and A's account. This shows impressive neutrality. Here was not an appeal officer who was merely going to rubber-stamp the dismissal decision with fine words but no analysis. Mr Howick's notes in fact show precisely the neutrality that Ms Washington-Jones' approach did not. Mr Howick refused to uphold the codeine

allegation, again illustrating that he was keeping an open mind. I have found his decision to uphold the two remaining allegations was on a narrower set of facts than Ms Washington-Jones relied on and not, for example, the pre-party events.

121. Looking at the process as a whole, and applying a reasonableness test, I find that by the time the decision was made on appeal, an independent person had looked for evidence for and against the Claimant's case. Ms Washington-Jones failures in this were remedied by Mr Howick's approach and, therefore, in relation to the kiss and inappropriate conduct allegations the Respondent's investigation was reasonably even-handed.

Was it reasonable to add the third allegation?

122. It is reasonable to add a further allegation where the investigation reveals it. This was not done after Mr Evans' investigation but at the behest of Ms Fleming after the end of the disciplinary hearing after the point Ms Washington-Jones had indicated she would make a decision. When the allegation was added, the Claimant was not told of the facts relied upon before being given an opportunity to state his side of the story. That is contrary to the ACAS Code.
123. The Claimant understood this new allegation was linked to the kiss allegation. Was the 'inappropriate conduct' allegation about more than the attempted kiss? Plainly from Ms Washington-Jones' dismissal letter it was, in that she separated out the pre-party drink; the entering the room; the touching of A; and the being on her bed. On the other hand it could be said it was linked to the kiss allegation because it was the context around it.
124. While I criticise the way in which this allegation was added without telling the Claimant the facts of it at the outset so that he had a chance to prepare before the second disciplinary hearing, I have decided overall that it was probably not unreasonable because it was linked to the kiss allegation and its context. The Claimant knew he was being asked about the events before and after the party. Any uncertainty as to the scope of the allegation was resolved on appeal, when the Claimant had a further chance to state all that he wanted to say to Mr Howick, knowing the facts of the allegation.

Delay

125. I have considered the impact of the delay on the reasonableness of the investigation. The ACAS Code on Discipline at Work, paragraph 5, states that necessary investigations must be carried out without '*unreasonable delay*' and the Respondent own procedure states that investigation should be '*as soon as reasonably practicable*'.
126. A raised her concern promptly. She complained to the Claimant on 11 December and while she did not confront him directly she asked him questions about what had happened with the tablets at least. She then raised the matter with her manager later in December and they spoke in early January 2018.
127. The Claimant he did not know of any disciplinary investigation until 1 May 2018, nearly 5 months after the events. That delay was caused by the manager deciding that, because A did not want to raise a formal grievance, that it could not be raised

as a disciplinary matter. That decision was reversed by HR in March 2018. But even then matters took on a pedestrian pace. The manager was not interviewed by the investigating officer until 18 April and the Claimant was not invited until 1 May 2018. The new 'inappropriate conduct' allegation was not raised with the Claimant until August, when he had been assured that there would be a disciplinary decision after the meeting on 25 June.

128. In my view it is obvious from this set of facts that the allegations were not raised with the Claimant as soon as was reasonably practicable after the Respondent knew of the complaint. While the wrong advice explains the delay it does not excuse it. Nor can the delay in adding the further allegation be explained by what was discovered in the investigation, given that Mr Evans had interviewed everybody by early May: 3 months went by before the new allegation was added.
129. What problems did the early delays create? I disagree with Counsel's suggestion that memories were not impacted at all.
- 129.1 In his evidence to me Mr Evans considered the variations in A's version of events were because of 'the time frames that had elapsed' and his view therefore that A might well have been confused about the chain of events. This reasoning could equally apply to the variations in the Claimant's account.
- 129.2 And one of Ms Washington-Jones findings (that A was sufficiently uncomfortable to have to insist that the Claimant left) was on the basis that the Claimant's account about how he came to leave was vague. His response to her was that he could not remember the words used so many months after the event: the delay clearly had impact on his ability to recall some of the evening.
130. Nevertheless, overall, I agree with Counsel that the Claimant's memory was not impacted significantly by the delay. He was able, with the help of the timings of texts and the CCTV, when it arrived, to give a reasonably full account of the evening.
131. Finally, and crucially, Mr Howick reached his decision for the most part on actions that were not in dispute: essentially remaining in the room and the kiss for which the Claimant had apologised. Thus, while I criticise strongly the delay in this case, looking at the matter overall, it did not render the investigation unreasonable.

Investigation of the Codeine Allegation

132. If it had been necessary for me to decide, I would not have found Ms Washington-Jones' conclusion on the codeine was reached after a reasonable investigation or on reasonable grounds. Given how serious this allegation was, it is astonishing that Ms Washington-Jones did not investigate the effect of codeine with alcohol. While Mr Evans told me he had, Ms Washington-Jones did not have this information. In the earlier absence of CCTV, I do not accept that Mr Evans had reasonable grounds for not seeking the early accounts of Mr Lawley and Mr Thackray. It would have been easy to insist that they kept the investigation confidential. The delay in asking them questions about the night is likely to have affected their ability to recall any particular feature of the evening. His comment to

me in his evidence about this suggested he was looking for evidence to support the case rather than support the Claimant and that was the wrong approach. Ms Washington-Jones knew that the CCTV footage was available but chose not to wait for it. It was likely to have cast important light on A's alleged change in behaviour at the poker table and in what way A had become unwell. She did not wait for important evidence in a decision that was going to be career-ending if taken against the Claimant: that seems to me to be wholly unreasonable. There had been a delay already, yet no willingness to delay to seek information that might have been in the Claimant's favour. Nor Ms Washington-Jones she take an even-handed approach to the only medical evidence she did have: that from the Claimant. She gave no reasons for rejecting as unreasonable the well-evidenced alternative cause of A's illness on the night and she did not investigate it with A. While the Respondent's investigation is not to be held to the standards of a police investigation it was not reasonably adequate or even-handed. It did not look for or assess evidence supporting the Claimant in what was a potentially career-ending decision for him. Mr Howick was right not to uphold the decision.

Other Matters Concerning the Investigation Raised in the Claim Form

133. I find there were no notes of the first time A raised her concern with her manager's deputy. It is not unusual for initial meetings to be informal and not noted. The lack of notes does not undermine the later notes taken of the A's meetings with her line manager.
134. I do not consider that the initial incorrect recording of the text message 'x' disadvantaged the Claimant because the decision makers had full copies of the texts themselves before they made their decision.
135. That Ms Washington-Jones could not read the Claimant's hand written amendments to the minutes was not an issue because there was a further disciplinary meeting at which he had the opportunity to inform her of them.
136. As for the CCTV transcript. Given that the spiking allegations were not upheld, partly because Mr Howick could not see on the CCTV any evidence of the Claimant tampering with a drink, I do not accept the transcript was ignored.
137. Likewise the issue over where the Claimant's coat was and wasn't overall was not relevant because the codeine allegation was upheld. The Claimant had also not recalled this accurately before he was able to refresh his memory from the CCTV.

Reasonable Grounds

138. Were there reasonable grounds for the allegations upheld by Mr Howick? I have decided, on the evidence, that his decision was more limited than that of Mr Washington-Jones. That he decided there was a non-accidental kiss, which was harassment because A did not want physical contact. And it was inappropriate to stay in her hotel room after the party.
139. It seems to me there were reasonable grounds for these decisions.
 - 139.1 The Claimant had admitted that his kiss had touched A's lips and that he had had to apologise for this, showing he knew it would not have been

wanted. It was an invasion of privacy and crossed the line between friendship and intimacy.

139.2 A had complained about the kiss, as Mr Evans understood it. This also showed it to be unwanted.

139.3 The Claimant had admitted that he had stayed in the room for up to 30 minutes. Was it unreasonable to find this inappropriate when A herself thought it was normal for the Claimant to enter her room? I have decided there were reasonable grounds for Mr Howick's decision because, from the point at which the Claimant sat on A's bed, there was evidence before him that she became uncomfortable. In addition there was evidence that A had had to ask the Claimant to leave more than once, which suggested she was uncomfortable with his continued presence. A hotel room is an intimate place and it was reasonable for Mr Howick to decide that the length of stay had crossed the line between friendship and had become an invasion of privacy. While the fact that A was unwell might have explained the Claimant's entry, it was reasonable to decide that it did not explain the length of stay.

139.4 I have had more doubt about whether it was reasonable for Mr Howick to find that the kiss was not accidental. After all, A had initially described it to Ms Lucas and Mr Evans as a kiss on the cheek and had not regarded the later text to be anything but innocent. But I have concluded that there was evidence that allowed him reasonably to reach that conclusion: the length of time the Claimant had stayed in the room; that he had been prepared to sit on her bed, that this had made her uncomfortable and that she had asked the Claimant to leave after the kiss and that she had told Mr Evans she felt 'tested'.

140. For completeness I have considered Ms Washington-Jones' other finding as to the pre-party drink and whether it was based on reasonable grounds. In my view Ms Washington-Jones reached a conclusion no reasonable employer could have reached on the accounts obtained in the investigation.

140.1 Any reasonable view of the timings given to her were that the parties had at least 30 minutes, for a pre-party drink: they were not in a hurry at that point.

140.2 Mr Evans' investigation report had described the pre-party drink as normal behaviour between the two.

140.3 A had thought his visit was normal, they had done the same before, she called it 'fine'. A was not allowed any agency in this choice by Ms Washington-Jones' decision. This seems to me unreasonable and was probably wrongly influenced by Ms Fleming's intervention.

140.4 There is no evidence that the Claimant plied her with drink or that A had any more than the one drink she chose. The quantity of alcohol was, on both their accounts, about choice, and not brought with the intention of drinking it all. A was consistent in her recollection that the Claimant brought 1 bottle of wine and went back for the other because it was not

her choice. They were both consistent in stating they drank little in the room.

140.5 It is as well, that on appeal, the pre-party drink does not feature in Mr Howick's reasoning at all.

141. Further, I have no doubt that Mr Howick's conclusions were genuine: he put a lot of care into his preparation for the appeal and had no other reason for his decision.

142. I have considered two other matters: whether it was unreasonable not to reappraise the evidence after the codeine allegation was not upheld; and whether Ms Fleming improperly influenced the decision.

143. Like Mr Howick, I too, read A's account of her discomfort as having been influenced by her belief, reached the following morning, that she had been drugged. She stated she would not have made a complaint without thinking she had been drugged. This made her suspicious of the Claimant's motives for behaviour that she had thought was fine between them before, given their close friendship, namely him entering her room and kissing her on the cheek. She now said it made her feel tested. She also stated clearly that the belief that she had been drugged had made her go from feeling comfortable to violated. Given these statements, was it unreasonable for Mr Howick not to reappraise her accounts after not upholding the codeine allegation, bearing in mind that consent is vital to the question of whether conduct is harassment?

144. I have reached the conclusion that it was reasonable for Mr Howick to continue to decide the two further allegations. His oral evidence made it clear that he had tried to rely on what was admitted as fact rather than to consider opinion. Mr Howick did look carefully and with a sceptical eye at what both parties had said during the investigation and on that basis it was reasonable for him to reach the conclusions about the two further allegations I have set out above.

Ms Fleming's Intervention

145. It was probably reasonable for Ms Fleming to suggest further questions to be asked because they concerned the context of the allegation, even though matters had been gone over pretty thoroughly by the end of July. But in the second part of Ms Fleming's email she stated: '*we are challenging his behaviour*' and that A's response to it '*was not mitigation*'. This suggests two things to me:

145.1 that she was seeking to influence Ms Washington-Jones about what the behaviour was and that it needed to be challenged;

145.2 plus, Ms Fleming was stating that A's response to the conduct was somehow irrelevant. This is plainly wrong, one of the key elements of harassment is whether the behaviour was unwanted.

146. While the Respondent has not called Ms Washington-Jones to give evidence, doing the best I can with her letter of dismissal, in my judgment she was influenced by this second intervention by Ms Fleming.

146.1 Because she ignored A's statement that the drink in the room beforehand

was normal and fine and that she had only had one drink and she ignored Mr Evans assessment of this that it was a prior agreement. However, given that this was not the decision of Mr Howick, it does not affect the overall reasonableness of the decision.

- 146.2 And Ms Washington-Jones did not take into account A's statement that it was after believing that she had been drugged that she went from feeling comfortable to fine; nor she take into account A's interpretation of the text I'd keep you company as being innocent and that A had been nice.
147. Mr Howick too thought that the A's feelings were to a degree immaterial. But I have no evidence that he saw Ms Fleming's letter and cannot decide therefore that her intervention influenced him in this. Further it is clear from his assessment of the evidence that he did actually consider what conduct was unwanted by A and concentrated on that. Therefore, because I have to look at the decision that Mr Howick made, I do not consider that Ms Fleming's intervention rendered the grounds for the decision unreasonable.

Range of Reasonable Responses

148. In my judgment some employers would not have dismissed for this single incident. There were mitigating features that would have led some employers not to dismiss: in the investigation A had described the kiss as a kiss on the cheek and that was how the investigator saw it; A was comfortable with A entering the room; A described her text responses to him later as being something you would write when someone had been nice to you and herself interpreted his text as innocent; the codeine allegation had not been upheld and A's sense of what she was comfortable with was influenced by her belief that she had been drugged; at the appeal, the Claimant expressed some remorse, while maintaining his innocence; the Respondent's disciplinary procedure provided that not all harassment was gross misconduct; and the Claimant had a very long, unblemished service record. Mr Howick described an error of judgment: some employers would, in that context, have allowed him one in so many years.
149. Nevertheless, that is not the same as deciding that no reasonable employer would have dismissed. I have concluded that there is a range of reasonable responses to the conduct Mr Howick relied upon, including dismissal. In doing so I have taken the following factors into account:
- 149.1 the Respondent expected very high standards of conduct of its employees. It made staff well aware of these standards through effective communication of its policies and values statement. The Claimant knew about them;
- 149.2 its policy expressly included work-related social events;
- 149.3 in its values document it adopted a zero-tolerance approach to harassment;
- 149.4 the conduct it found was unwanted by A, on her account, and could properly be classed as harassment: an invasion of A's personal space in the intimate surroundings of a hotel room and a deliberate attempt to kiss

A when that was not what their friendship allowed. The Respondent could reasonably decide that her complaint was that the Claimant had crossed the line from friendship to intimacy, which she had not wanted;

149.5 the Claimant had not shown any insight, until late in the day, as to why his actions could be perceived as inappropriate;

149.6 the Claimant's seniority and longevity were reasons for expecting high standards from him.

150. My decision in this case has been unusually long, and I have found myself descending in to the detail more than I would normally have done in assessing an unfair dismissal case. This is because the decision has been potentially career-ending for the Claimant and because he took a great deal of care in setting out his case at the hearing. But I am bound by a set of principles that limits my assessment to that of a review against what is reasonable. I have identified criticisms of the Respondent, but it did not act unfairly in dismissing the Claimant.

Wrongful Dismissal

Findings of Fact on the Evidence at Tribunal

151. For the wrongful dismissal claim, I must reach my own view of what is more likely to have occurred. I have not heard from A. I have the minutes of the meetings she had with the Respondent as evidence of her account, but those minutes are of less weight evidentially than that of the Claimant, because they have not been given under oath/affirmation and tested under cross-examination by skilled counsel.

152. I have applied this approach to credibility:

152.1 Whether a person is unreliable in respect of one fact does not automatically mean they are unreliable in respect of another.

152.2 If a person is wrong about a fact it does it mean they are dishonest or that they have given 'false' evidence. I expect memories of an event to vary to some extent. Memories do not work like CCTV. If our focus is not on something, we might not notice a remarkable feature. If something is not important to us at the time, we might not remember it afterwards.

152.3 Where an account of something has become exaggerated in each retelling then that can indicate a lack of reliability in the exaggerated account.

152.4 Where a person admits some facts against himself that may well indicate an attempt to be honest.

152.5 Upset is not necessarily sound indicator of honesty, just as coolness is not necessarily sound indicator of unreliability.

153. The Claimant and A arranged to meet in A's room before the party for a drink together. This was probably his idea but they had done it before and A found it to be normal and was fine with it. She told the Claimant she would only have one

drink and he did not press more upon her. They met at about 6.30pm. After having a drink they joined the group at the casino at about 7.30pm, when the party was due to begin. They were in A's room together for about 45 minutes. From the point at which they arrived at the hotel, they were therefore not late and in no hurry.

154. The Claimant brought 2 bottles of wine that clients had given him. He said he had another in his room, Prosecco, and she said that was the one she preferred, so he went back to his room to get it. I do not find that the Claimant 'insisted' they have a drink in the room. Nor that this set of events showed that he was 'very determined' that A should have a drink alone with him. I find the Claimant to have been genuinely perplexed at this interpretation. What is missing from it is the context that the Claimant and A were close and good friends. They had had drinks out before and stayed over in hotels before. She thought it was fine to meet up in her room. A was comfortable enough in the Claimant's presence in her room to apply her make-up. It is not unusual for good friends to get together before a party to have pre-party drinks in a hotel room or bar.
155. That A recalls him initially bringing 1 bottle to the room, supports this. In my view it is likely she did not remember how much alcohol he brought because it was not worth remembering because it was not something she was bothered about. The Respondent made great play on the number of bottles the Claimant had brought. That might have looked suspicious if he had attempted to ply A with wine or get her to drink more than she wanted, but there is no evidence at all that he did. She did not complain that he forced drink upon her. (Given her later belief that he drugged here, it is likely she would have made this complaint if he had done so.) She told him she would have one drink and that is what she had. The number of bottles led to her choosing one that she preferred. A had agency here: she told the Respondent numerous times how close their friendship was and how comfortable she had always been in his presence: this pre-dinner drink was no different.
156. The Respondent also refer to A's request of the Claimant to bring tea bags to her room. I do not find that this meant she was saying she wanted to drink tea at that point in the text. Again, if that had been the case A would undoubtedly have pointed this out herself. I accept the Claimant's evidence was that she had run out of tea bags and they were likely for the morning.
157. During the drink in her room, A told the Claimant that she was planning to meet a male friend after the party. He did not therefore expect to return with her to her room after the party.
158. The friendship between the Claimant and A was such that he had before kissed her on the cheek goodbye.
159. A told the investigation that the Claimant dropped tablets when he gave his coat in. The Claimant told the investigation that he had had to go and get lozenges from the pocket of the coat he had checked in. Once he had seen the CCTV he realised that he had not even checked his coat at the cloakroom. He realised that it must have been A's coat that he got the lozenges from (a fact she also remembered). That he changed his evidence about this in my judgment is not a sign that he gave 'false' evidence as Ms Bone suggests. He was being asked about something that had happened 5 months before. He was not bound to have

perfect recall. He was able to refresh his memory by looking at the CCTV and then able to say to the Respondent: I didn't even check my coat and that makes her statement look unreliable. I find nothing remarkable in that and certainly do not consider it to undermine the Claimant's reliability.

160. The Claimant did not sit next to A at dinner. After dinner, he arrived at the poker table first and she, following, sat next to him. She was carrying 2 glasses of wine one in each hand. Upon leaving the poker table she definitely did not have both drinks as she moved her chair with one hand. After the poker game, those in the party that were left moved to the bar. At the bar, A had a drink in her hand. Originally there were 15 in the group but folk left over the course of the evening. The few left in at the party then went back to the roulette table. The last 4 were Mr Lawley and Mr Thackray who left shortly before the Claimant and A who left at around 12.50am.
161. During the evening A started coughing. Texts show she had had a viral infection and sore throat some 10 days earlier. The medical evidence shows that alcohol can irritate a sore throat. Her cough worsened as the evening progressed. At one point she asked the Claimant to find a lozenge that she had brought, and he did so. A recalled this in her account. That A had lozenges with her suggests she was likely still coughing from the effects of the viral infection. At some point she texted her friend and cancelled their planned meeting afterward because she did not feel well enough. On the walk back to the hotel her cough worsened as did her breathing in the cold air.
162. I accept the Claimant's evidence that A was not drowsy at the casino, this is supported by Ms Lucas's early statement; and by my observation of A in the section of the CCTV of the evening at the bar late on in the evening. There A looks alert because she was able to talk to others, use her phone, and stand unaided: that much is apparent even with her face pixellated. I also accept Mr Dalby's evidence from his viewing of the CCTV that at 23.40 she walked normally when going in and out of the ladies' toilets. He explained that that part of the CCTV had been kept because of A's original request but not shown to the Claimant on his request because he was not in the picture.
163. I do not accept that Mr Dalby came to the Tribunal to give inaccurate evidence to support the Claimant. If anything, the Claimant had caused him more bother than he was happy with. He commented that he did not think his company's involvement should have lasted this long. He was ordered to attend. He gave his evidence in a straightforward way. The letter the Respondent relies on to suggest collusion simply reads that the Claimant was confident the CCTV would show his version of events at the poker table was to be believed.
164. I also find that A was not so unwell that she could not stay at the party. Indeed she was the last to leave. Her cough and breathing did not cause her to give up on the evening and go back to her room as she could easily have done at any time. This again supports my findings that she had a cough during the evening and her breathing worsened in the cold air.
165. The Claimant accompanied A back to her hotel room with her consent. Because her cough and breathing were worse in the cold air, he went into her room with her, helped to wrap her in a duvet, while she was still clothed, rubbed her back

and stayed for about 20-30 minutes. He sat on the bed. I accept his evidence that he did not lie on the bed or put his feet on the bed: most of A's various accounts to the investigation are that he sat on the bed. He recalls A sort of sitting up in the bed and texting: I accept that recollection. Given that A texted with the Claimant after he left, I think likely she was texting while he was present in the room and not lying down.

166. Nevertheless, his sitting on the bed risked making A feel uncomfortable: they were friends, not intimates. A told the investigation she felt uncomfortable by his being on the bed and I find this is likely to have been the case as she told the investigation this from the start.
167. At this point she asked the Claimant to leave. He got up to leave and went to kiss A on the cheek. This kiss went wrong and he accidentally caught the side of her mouth. He apologised for this. He left and returned to his room.
168. I accept that the kiss was a kiss on the cheek gone wrong. This was also accepted by Mr Evans during the investigation. I note that, at times in this hearing, the Claimant has talked about an 'air kiss' as well as a kiss on the cheek. This is not what he told the investigation he was aiming to do. I find he intended to kiss A on the cheek. By talking about an air kiss I believe the Claimant was trying to convey its lack of significance and I do accept that the Claimant had not intended to kiss A on the lips. The Claimant had said goodbye to A previously with a kiss on the cheek but nothing more. He apologised to her because it had gone wrong and he had touched her lips: his apology shows that he knew that went beyond friendship, even if accidentally, and that A would not have wanted that.
169. Soon after, they exchanged the friendly texts set out in my unfair dismissal findings. I interpret those texts as the Claimant and A did during the investigation and because they did, as friendly and innocent.
170. I do not find that A had to insist that the Claimant left several times over, or that she raised her voice or that she became angry with him or became frightened. Her evidence to the investigation became exaggerated over time on this subject and therefore less reliable. Her texts afterwards certainly do not show any anger or having been frightened by him. Her texts go further than mere politeness. Crucially she interpreted her text 'I know x', as one that you would sent when someone had been nice. This completely contradicts her suggestion that the Claimant had made her angry and scared.
171. It seems to me that the most that can be said on the evidence I have heard is that A was uncomfortable by the Claimant sitting on her bed and had not wanted him to touch her lips. I find that from what has been said about their close friendship that a kiss on the cheek would not have been unusual.
172. In my judgment the Claimant did not drug A. He brought a tablet of codeine to prepare for a bad head the morning after the party: he had a child's football match to go to. This fell accidentally out of his pocket in her room. He says, and I accept, that A leapt to the worst case scenario in therefore he had drugged her. Her behaviour at the casino bar does not support that she had been drugged. She was not drowsy, but alert.

Law on Wrongful Dismissal

173. The Claimant's claim for notice pay is brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, article 3. It is, in general, for the Respondent to show on the balance of probabilities that the Claimant was in fact guilty of the misconduct alleged to amount to a repudiatory breach of contract entitling it to dismissal without notice or pay in lieu.
174. To be sufficient, the conduct must so undermine the trust and confidence inherent in that particular contract of employment that the employer should no longer be required to retain the employee: relevant factors are the nature of the employer, the role of the employee and the degree of trust required. In Neary v Dean of Westminster [1999] IRLR 288 (para 23-4) it was held that:

The focus is on the damage to the relationship between the parties. Dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category, but so in an appropriate case can an act of gross negligence.

The judgment cautioned that:

...it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or undermine the employer's policies constitutes such a grave act of misconduct as to justify summary dismissal.

175. Despite the wording of the original contract, when the Claimant received the updated conduct, harassment policies, they all explicitly stated they were no incorporated into the contract of employment. In my judgment therefore, this expressly amended the original contract provisions, so that the rules of conduct were no longer incorporated into the Claimant's contract of employment at the time of his conduct leading to his dismissal.
176. On reading the Harassment and the Disciplinary policy together, it seems to me the Respondent defined harassment in a very similar way to the Equality Act. Harassment is defined as unwanted conduct that created an offensive environment (among other matters) for the recipient. It could include unintentional conduct and unwanted physical contact. I agree with Ms Bone's submission, that the Respondent, however, did not regard all harassment as gross misconduct. This depended upon the seriousness of the matter.
177. I note too, that the Respondent applied a high standard of behaviour to its employees, including at work related social events: employees were told they must not engage in intimate or inappropriate physical conduct or personal behaviour. And that Barclays had a zero-tolerance approach to harassment. In deciding what was a fundamental breach of this contract, I take into account those high standards Barclays set for its employees.

Application of facts and law to wrongful dismissal claim

178. I repeat my judgment on whether the Claimant was acting in the course of employment in the hotel room after the party.
179. On the facts that I have found, the Claimant did harass A. While he did not intend

to kiss A on the lips, his kiss gone wrong was unwanted physical contact that made her feel uncomfortable. His sitting on the bed was an invasion of her personal space in the intimate surroundings of a hotel room and made her feel uncomfortable.

180. I do not accept counsel's assessment that any of the other conduct that was 'uninvited' by A was unwanted by her. A great deal more of the context is required than this and attention to what A actually said she thought. A thought it normal that the Claimant entered her hotel room both before and after. Just because she did not extend an express invitation to the Claimant to do this after the party, did not make it unwanted behaviour. A thought the texts afterwards were innocent: again they were not unwanted behaviour. A did not complain about the rubbing of her back or that the Claimant helped to wrap her up in her duvet: the nearest account I have from A about this is her statement that the Claimant had been nice to her as an explanation for her later text. She did not complain of feeling uncomfortable about this behaviour. That does not surprise me: it was the behaviour of a close friend. It was not therefore in my view unwanted. The line here is subtle: close friends do not demand invitations from each other for acts of kindness between them or acts that they are used to doing.
181. Plainly, the harassment that I have found was misconduct. While they might normally have kissed on the cheek he should have taken into account the more intimate context of the hotel room and the fact that A was not well and not attempted to do so. He should have complied with the high standards the Respondent expected of him by not touching A. He should also have realised that sitting on a bed was in itself an act that could easily have crossed the line from friendship to intimacy and made A feel uncomfortable because it entered A's personal space in intimate surroundings. The Claimant did realise that the kiss gone wrong was unwanted because he apologised for it.
182. But not all harassment is gross misconduct, even in the Respondent's policy. I have to decide whether this single incident was serious (as the Respondent's policy puts it), and so fundamental a breach of trust with his employer as to render it gross misconduct. In my judgment it was not for the following reasons:
- 182.1 it was unintentional and not a sexual advance;
 - 182.2 it was in the context of a close friendship in which a kiss on the cheek was acceptable;
 - 182.3 it was a single incident that was likely in hindsight worse in A's mind because she thought she had been drugged (when she had not);
 - 182.4 A's discomfort can be judged, to some extent, by her friendly texts afterwards and her explanation of them to the Respondent as her response when someone had been nice. While she was uncomfortable, this was not to a serious degree;
 - 182.5 the Claimant did not stay in the room after she had asked him to leave;
 - 182.6 the matter was not made worse by alcohol: the Claimant had not encouraged A to drink too much.

183. Even therefore taking into account the Respondent's high standards, on the facts I have found, it seems to me this conduct is not so serious as to be gross misconduct under this contract.
184. The wrongful dismissal claim therefore succeeds.
185. The Claimant did not look for work immediately after his dismissal: he was confident in his appeal, and to some extent that confidence was justified by the codeine allegation not being upheld. I find that, even if the Claimant had looked for work in the first 12 weeks from his dismissal, it would have been reasonable for him to look for work at about his level and in accordance with his experience and skills i.e. in the same field. If the Claimant had searched for work, I do not consider he would have been successful: his job search since has shown that his dismissal for gross misconduct has put a blight on his applications. I do not consider that in the first 12 weeks it would have been reasonable for him to look for casual work: it was appropriate for him to put all of his efforts into a search for work and only later to set his sights lower.
186. I set out in the appendix attached how I calculate the damages due to be paid to the Claimant to compensate him for not being given notice. Loss of pay is calculated using net pay. In respect of the remaining figures, I have adopted those from the Respondent's counter-schedule, except for loss of medical insurance: the correct measure of damages is that which it would have cost the Claimant to obtain the equivalent cover and his evidence shows this is £66.87 per month. I have not deducted new style jobseekers allowance as this was only obtained in February 2019.
187. The success of the wrongful dismissal but failure of unfair dismissal claims may appear to the parties to be oddly inconsistent but the outcomes reflect the different evidence and legal principles I have had to apply to each claim.

Employment Judge Moor

10 February 2020

Calculation of Loss Wrongful Dismissal

Remedy hearing date 31/01/2019	
Contractual notice period 12 weeks	
Gross weekly pay at termination	£923.00
Net weekly pay at termination	£695.69
Loss of earnings ^[1] damages period (12) x net weekly pay (695.69)	8,348.28
Plus Territorial Allowance for 12 weeks	173.00
Plus Incentive plan for 12 weeks	1,180.00
Plus Private Medical Insurance for 12 weeks (£66.87 per month closest equivalent cost of cover)	185.18
Plus loss of pension	2,395.93
Total damages	£12,282.39