

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4102368/2017

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Held at Glasgow on 20, 21 and 22 December 2017

Employment Judge: W A Meiklejohn (sitting alone)

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Mr Edward Alistair Woolley

**Claimant
In Person**

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Sky Subscribers Services Limited

**Respondent
Represented by:
Mrs L Lilburn -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the Claimant was not unfairly dismissed by the Respondent and his claim of unfair dismissal is dismissed.

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REASONS

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1. The Claimant alleged that he had been unfairly dismissed by the Respondent. The Respondent admitted dismissal but denied that it was unfair. The Respondent contended that the Claimant had been fairly dismissed for gross misconduct.

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2. For the Respondent I heard evidence from Mr M P Birkin, Sales Manager, and Mr D H Holmes, Head of Sales Operations, Glasgow. Mr Birkin had been the dismissing officer and Mr Holmes had heard the Claimant's appeal. I also

E.T. Z4 (WR)

heard evidence from the Claimant. There was a joint bundle of documents and also a separate bundle of documents from the Claimant.

3. A number of other employees (or former employees) of the Respondent were mentioned in the course of the Hearing. Their names and positions and the nature of their involvement were as follows:-

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- Mr M Green, Sales Manager – he received, investigated and dealt with A's grievance and also investigated A's allegations against the Claimant; he was also interviewed by Mr Birkin

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- A, Customer Adviser – she was a member of the team managed by the Claimant and made allegations of sexual harassment against the Claimant

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- Ms N Barratt, Customer Adviser – she was a member of the team managed by the Claimant and was interviewed by Mr Green and Mr Birkin

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- Ms L Adamson, Customer Adviser – she was a member of the team managed by the Claimant and was interviewed by Mr Green

- Ms M Livingston, Customer Adviser – she was a member of the team managed by the Claimant and was interviewed by Mr Green

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- Mr P McKay, Customer Adviser – he was a member of the team managed by the Claimant and was interviewed by Mr Green

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- Mr D Tonner, Senior Sales Manager – he was Ms Colquhoun's line manager and was interviewed by Mr Green

- Ms J Colquhoun, Sales Manager – she was the Claimant's line manager and was interviewed by Mr Green

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Evidence and Findings in Fact

4. The Claimant was employed by the Respondent as a Customer Experience Leader (for ease of reference referred to above and below as a team leader). His employment commenced on 10 May 2010 and transferred from Webhelp to the Respondent (under the Transfer of Undertakings (Protection of Employment) Regulations 2006) on 1 July 2016. He managed a team of fourteen Customer Advisers which included Ms Barratt, Ms Adamson, Ms Livingston, Mr McKay and A. His line manager was Ms Colquhoun and her line manager was Mr Tonner. Mr Tonner's line manager was Mr Holmes. Pages 257-268 were payslips evidencing the Claimant's income.
5. A intimated her resignation from the Respondent's employment by her letter dated 15 March 2017 (page 68 of the joint bundle). She was interviewed by Mr R McColl and Mr Green on 17 March 2017. She alleged that she had not been supported by the Claimant in relation to her mental health and also that she had been sexually harassed by the Claimant. She produced a letter which she said she had found when clearing her locker on 17 March 2017 (page 85). She was asked by Mr Green to submit a formal complaint. She did this in terms of an email which she sent to Mr Green on 20 March 2017 (pages 69-72).
6. A said in her email to Mr Green that the letter, which she believed was from the Claimant, detailed some of the things she alleged the Claimant had said to her and which she described as written evidence of sexual harassment. She stated that she had been working on 27 January 2017 and was dressed to go out for the evening with friends. She alleged that the Claimant had sat opposite her and had stared at her for long periods of time. The letter included the following:–

"I can't take my eyes off you and have loved looking at your lovely legs. I really want to hug & kiss you and explore your legs further. I hope you make my wishes come true."

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The letter was signed "A xxx".

7. A's email to Mr Green referred to a phonecall from the Claimant's daughter to the Respondent alleging that the Claimant had been inappropriate towards A. Her email did not specify the date of the phonecall but it was apparent from the evidence that it occurred on 7 February 2017. A's email stated that Ms Colquhoun had decided to take this no further because it was not a Sky employee who made the complaint, but subsequently Mr Tonner and Ms Colquhoun met with the Claimant and this was recorded as an Informal Documented Discussion ("IDD"). A stated in her email that the Claimant had told her about this and had said that the IDD was *"to protect him"*. A described herself as *"completely astounded"* by this and complained that no one from the Respondent had spoken to her – *"I was not asked if I was alright, or if the allegations were true"*.

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8. A's email also alleged that the Claimant had spent several months sexually harassing her. She referred to herself as a *"homosexual woman"* and alleged that she had asked the Claimant to stop but that he would not do so. A stated in her email:-

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"What developed through him sitting closer to me, staring at me and licking his lips, to writing things on my white board to post it notes stuffed into my bag and the letter in my locker."

30 9. The Respondent dealt with A's email under their grievance procedure. Mr Green conducted a grievance meeting with A on 24 March 2017. Pages 74-83 were the notes of this meeting. These recorded A as alleging that her partner kept finding post it notes saying *"I want you so fucking bad"* and that

A knew the notes were from the Claimant because it was his handwriting and "he would put "A" and kisses". A stated that she would always sit next to the Claimant and that the Claimant was the only person with access to her bag. The notes recorded A as alleging that the Claimant started to write things on her board and to sit close to her. She alleged that she had asked the Claimant to stop "lots of times" and, later in the meeting, "about 30 times". A alleged that the Claimant had given her gifts including a teddy bear and alcohol (mango sourz) and also a Rotary watch at Christmas. She alleged that on 27 January 2017 the Claimant had "kept staring and mouthing "Wow". A described herself as "borderline personality disorder" and said that she had spoken to the Claimant about this.

10. Mr Green met with the Claimant (on the Claimant's return from a period of sickness absence) on 29 March 2017. Pages 88-95 were the notes of this meeting. According to these notes (at page 89), when Mr Green asked the Claimant if he had ever written anything on a post it note and put it in A's bag, the Claimant replied –

"Not that I can think of. I can't think of anything. Struggling to remember what I did yesterday due to the stress and anxiety. So I'm not going to say that that I haven't done it but I don't think I remember writing anything and putting it in A's bag or anyone's bag. It's not something I feel I would need to do."

11. When Mr Green asked the Claimant about the letter (page 85), the notes record (at page 89) the Claimant's responses as:-

"I don't know."

and

"Can't remember. I can't think of a reason to write the letter" (when asked if he had written the letter).

and

5 *“Can’t think of any reason why I would write something to [A]. Due to my own mental health issues over the last few years. Loss of memory, loss of recall, struggle to concentrate. I would like to say no but I can’t definitely say no when I can’t remember”* (when asked about being unable to remember certain events).

10 12. When Mr Green asked the Claimant about staring at A and licking his lips, the notes record (at page 90) the Claimant’s response as:-

“I look at people, I may lick my lips if they are dry. I can’t think of a reason why I would do this in a lewd way.”

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When asked by Mr Green later in the meeting whether he had ever mouthed the word “Wow” to A, the notes record (at page 92) the Claimant as saying:-

20 *“Wow? I have no idea, wow you got a sale. I have no idea. I can’t understand why I would say it, it could be used in so many different ways, it is a word in common use.”*

25 13. The notes record (at page 90) that Mr Green showed the Claimant a card which A had submitted as evidence of the Claimant’s handwriting and that the Claimant’s response, when asked by Mr Green if the handwriting looked similar to the letter which A alleged was from him, was:-

30 *“I can see there are some similarities. There are other letters that don’t look like my handwriting. I can’t explain this. But if someone has an example of my handwriting then they have opportunity to copy it.”*

14. When asked by Mr Green about his relationship with A, the notes record (at page 90) the Claimant as saying:-

"Father daughter I suppose."

15. When asked by Mr Green whether he had he had ever given A a post it note
5 that said *"I want you so fucking bad"* the notes record (at page 91) the
Claimant as saying:-

"I can't think of a reason I would do that."

- 10 When pressed by Mr Green as to whether the Claimant was saying that he
could not remember or that he did not do it, the notes record (at page 91) the
Claimant as saying:-

15 *"You're trying to put words in my mouth. Again, I can't remember. I
just know that my memory is progressively getting worse. I was off
and was feeling happier about coming back to work, but coming back
to this has sent me back to where I was months ago, a really dark
place. I can't stand to think that someone I thought I was helping would
say this kind of thing."*

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16. When asked by Mr Green whether he had ever purchased A any gifts, the
notes record (at page 92) the Claimant as referring to the watch at Christmas.
When asked by Mr Green whether he had ever bought A a teddy bear and a
bottle of mango sourz the notes record (at page 92) the Claimant as saying:-

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"Not that I can recall."

17. The notes record (at page 92) the Claimant for a second time alleging that Mr
Green was *"putting words in [his] mouth"* and the Claimant making reference
30 to his *"documented condition"* and his three Occupational Health reports
(pages 59-67). The most recent of these reports was dated 21 March 2017
(pages 65-68) and referred to the Claimant's absence since 15 February
2017 *"due to a flare up of a longstanding psychological condition"* and to the

Claimant having “*struggled with low mood and anxiety for the last 2 years*”.
The report also stated:-

5 “*Alistair has made good progress with his recovery and feels that his
mental health status is better than it has been in the last couple of
years. Alistair also has a cardiac condition, arthritis of both knees,
episodes of back pain with sciatic pain and a gastrointestinal condition.
All of these conditions are well controlled and not posing a concern at
this current time.*”

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18. At the end of their meeting on 29 March 2017 Mr Green told the Claimant that
he was being suspended for a period of two weeks “*without prejudice to
continue the investigation*”. Mr Green subsequently wrote to the Claimant on
4 April 2017 (page 117) to confirm his suspension. The first paragraph of this
15 letter read as follows:-

 “*Following our recent meeting on 29th March 2017 when I advised you
that allegations had been made that you had been involved in an
inappropriate relationship with a member of your team.*”

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19. In the meantime Mr Green had held meetings with Ms Barratt, Ms Adamson,
Ms Livingston, Mr McKay and Mr Tonner on 30 March 2017 and subsequently
with Ms Colquhoun on 20 April 2017.

25 20. Ms Barratt told Mr Green that the Claimant treated A differently – “*He makes
a difference with her, but the whole team sees it.*” She had not seen the
Claimant write on A’s whiteboard nor put post it notes into her bag nor give A
gifts. She said that the Claimant and A would “*carry on*”:-

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 “*...he would grab her ear and she would grab her [sic] leg silly things
like that. The behaviour was inappropriate between the 2 of them. I
just see an older man carrying on with a younger girl, it doesn’t look
right. He’s her manager. We the team noticed it.*”

Ms Barratt also told Mr Green that the Claimant could sometimes be crude but "*it's not something that everyone is offended by*". She referred to "*sexual comments*" but described it as "*banter between the whole team*". The notes of Mr Green's investigation meeting with Ms Barratt formed pages 97-98.

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21. When Mr Green spoke to Ms Adamson, she referred to the Claimant treating A more favourably than other members of the team. She said that the Claimant "*would keep a seat for her next to him every day, even if she wasn't in and someone else had to sit at another pod*". She said that A "*would just sit beside [the Claimant] and not do anything, just chat to him*". She also said that the Claimant could be "*crude in a jokey way*" but "*not inappropriate, it's just banter.*" When asked if she had seen the Claimant write on A's whiteboard Ms Adamson said "*I've seen her write stuff. They would email each other a lot, or Whats App.*" Ms Adamson told Mr Green that she could not remember the Claimant putting post it notes in A's bag, that she had not seen or heard the Claimant making inappropriate gestures or comments to A, and that she had not seen the Claimant give A gifts. She commented that the Claimant and A "*would always go on break together*". The notes of Mr Green's investigation meeting with Ms Adamson formed pages 100-102.

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22. Ms Livingston told Mr Green that A "*makes sure she gets a seat next to*" the Claimant. She said that she had heard stories about A "*going with everyone in her previous teams*". She told Mr Green that she had not seen or heard the Claimant make any inappropriate gestures or comments to A, nor had she seen the Claimant write on A's whiteboard, nor had she seen the Claimant write or put post it notes into A's bag, nor had she seen the Claimant give A gifts. She commented on A sitting beside the Claimant all the time. The notes of Mr Green's investigation meeting with Ms Livingston formed pages 104-105.

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23. Mr McKay told Mr Green that the Claimant's coaching of A was different:-

“...they go to a pod rather than side by side at his desk. She gets treated differently. Nothing gets mentioned when she is off or late but the rest of the team don't get that.”

5 Mr McKay said he had been told that at a team brief a few months earlier there were “*rumblings*” within the team and the Claimant had said “*Don't talk about A*” and “*There was nothing going on*” between A and the Claimant. Mr McKay told Mr Green that he had not seen the Claimant write on A's whiteboard nor give her gifts. The notes of Mr Green's investigation meeting
10 with Mr McKay formed pages 107-108.

24. Mr Tonner told Mr Green that he had a conversation with the Claimant about six months earlier in connection with a rumour that he was “*too close to a girl in his team*”. The Claimant had told Mr Tonner that he was “*helping her with mental health issues*” and Mr Tonner said to Mr Green that he had no reason
15 to disbelieve what the Claimant was telling him. Mr Tonner also told Mr Green about Ms Colquhoun speaking to him about a phonecall allegedly from the Claimant's daughter stating that the Claimant was being inappropriate with a member of his team. Mr Tonner said that he had spoken to the Claimant who
20 had said that nothing was going on and that he had to support A with her mental health issues. The notes of Mr Green's investigation meeting with Mr Tonner formed pages 110-111.

25. On 8 April 2017 the Claimant sent an email to Mr Green (page 119) detailing
25 the result of some research he had done on the internet into borderline personality disorder (“BPD”) which he described as “*A's condition*”. He referred to BPD sufferers seeing themselves as “*always being the victim*” and that they constantly “*accuse the people closest to them*”. He referred to “*the tremendous number of lies they tell and the theatrical emotionality of their stories.*”
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26. On 11 April 2017 Mr Green wrote to the Claimant (page 120) extending his suspension until 21 April 2017. He told the Claimant that his investigation was *“still ongoing at present”*.

5 27. When Mr Green held his investigation meeting with Ms Colquhoun on 20 April 2017 she referred to a conversation which she and Mr Tonner had had with the Claimant on 7 February 2017 *“due to a phone call alleging his daughter and alleging an inappropriate relationship with one of [the Claimant’s] advisers”*. The Claimant had referred to a *“personal situation”* relating to *“an allegation of inappropriate relationship”* between himself and A. He said that there was *“nothing going on”* and *“assumed rightly or wrongly a father figure for A”*. Subsequently Ms Colquhoun had obtained from the Claimant his daughter’s phone number which matched the number of the caller. She had called and left a voicemail but received no reply. She had issued an IDD to the Claimant but she told Mr Green that this was not to *“protect”* the Claimant but related to inconsistent timing of and inappropriate and unprofessional content in RTWs (which I understood to refer to records of return to work interviews). The notes of Mr Green’s investigation meeting with Ms Colquhoun formed pages 113-115.

20 28. Mr Green prepared an investigation summary dated 21 April 2017 (pages 122-124) in which he summarised his investigation meetings with the Claimant and with the six witnesses to whom he had spoken. He recommended that the Claimant should be invited to a conduct hearing to answer the following allegations:-

“Inappropriate conduct directed towards A which could be considered as sexual harassment, specifically:-

- *Placing a letter within her locker which contained content of a sexual nature between 27th January 2017 to 20th March 2017.*

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- *Mouthing the words “wow” multiple times, in relation to the clothing worn by A on 27th January 2017 which was deemed to be sexual in nature.*

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- *Making comments of a sexual nature towards A despite her asking you to stop on numerous occasions.”*

29. Mr Green wrote to the Claimant on 21 April 2017 (page 125) extending his suspension to 4 May 2017. He again referred to the investigation as “*still ongoing at present*” which was not strictly accurate as by this date he had prepared his investigation summary recording his recommendation of disciplinary action.

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30. Mr Green approached Mr M Whan to conduct the Claimant’s disciplinary hearing but Mr Whan declined as he had previously been the Claimant’s line manager. Mr Green then approached Mr Birkin and passed to him a pack of information which included the investigation summary, the investigation meeting notes, A’s email containing her formal complaint, the notes of A’s grievance meeting, the letter found by A in her locker and the Claimant’s occupational health reports. Mr Green wrote to the Claimant on 2 May 2017 (pages 126-127) inviting him to attend a conduct meeting on 12 May 2017 (subsequently rescheduled to 15 May 2017) and enclosing all of the items in the pack of information given to Mr Birkin. The allegations were expressed in the same terms as in paragraph 28 above. The letter also enclosed a copy of the Respondent’s Conduct Policy (pages 48-51).

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31. Mr Birkin had been trained by the Respondent in the conduct of disciplinary hearings and had experience of such hearings both as the disciplinary officer and as notetaker. He was familiar with the Respondent’s Conduct Policy and also with their Diversity & Inclusion Policy (pages 52-53) and their How Do I guide (pages 54-58) relating to discrimination, harassment and victimisation, and reminded himself of the terms of these documents as part of his preparation for the Claimant’s disciplinary hearing. The Conduct Policy

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5 provides for suspension. It includes in the examples of gross misconduct
"Discriminatory behaviour or harassment of Sky people, a customer or
supplier of Sky on the grounds of race, sex, age, religious belief, sexual
orientation or disability". The Diversity & Inclusion Policy lists the protected
10 characteristics found in the Equality Act 2010 ("EqA") (strangely, omitting sex)
together with working patterns as the areas where people should not be
treated less favourably. The Policy states that Sky does not "tolerate
discrimination or harassment at work in any form". The list of examples of
behaviours which go against the Policy includes "discrimination against or
15 harassment of colleagues". The How Do I Guide refers to the EqA list of
protected characteristics (this time including sex) and defines harassment (in
the same terms as the EqA) as "unwanted behaviour related to a protected
characteristic which has the purpose or effect of violating an individual's
dignity or creating an intimidating, hostile, degrading, humiliating or offensive
environment for that individual".

32. Mr Birkin reviewed all of the documents in the information pack provided by
Mr Green. These were the documents listed in Mr Green's letter to the
Claimant of 2 May 2017. He was not concerned about the length of time Mr
20 Green's investigation had taken, and believed that Mr Green had taken "the
required time to complete the investigation". Mr Birkin said that the Claimant
was facing serious allegations and that it was important to give him every
chance to give his side of events.

25 33. The Claimant's Conduct Meeting took place on 15 May 2017. The Claimant
was accompanied by Mr H McSorley. The notetaker was Ms T Halliday. The
meeting notes formed pages 131-164 (including screenshots of text
messages and photographs provided by the Claimant to Mr Birkin). I was
satisfied that the notes were a fair and accurate summary of what took place
30 at the meeting. The meeting lasted some six hours.

34. Mr Birkin asked the Claimant about the letter A had found in her locker, and in particular whether he had written it. The Claimant's response is recorded in the meeting notes as:-

5 "*Categorically I can't, I did say at the time I didn't want to say I did when I didn't because of my health issues and anxiety things stick and things don't. I would have loved to have been able to say I did but I don't know. I have tried to rack my brains to why but it's difficult and I don't really know. I can't think of any reason why however when you*
10 *look at something that looks like your handwriting you have to question yourself.*"

35. In response to a question from Mr Birkin about using the words "*I love you*" the meeting notes record the Claimant as saying:-

15 "*I have said I love you to people in the past but not sure to A, am quite close to her so possible I did say to her.*"

and

20 "*...I got fairly close to A over a period of time, as I said to Martin [Mr Green] at the time it was like a father daughter relationship and I felt sorry for her.*"

25 The Claimant said that he felt he was "*damned if I do and damned if I don't*". He referred to the difference between the allegation of an "*inappropriate relationship*" in the suspension letter and the three allegations set out in Mr Green's investigation report and in the letter inviting him to the Conduct Hearing. He also referred to picking A up in Cumbernauld and taking her to
30 Kilbirnie for driving lessons – he said that he was helping A because he felt sorry for her.

36. Mr Birkin asked the Claimant if he had mouthed the word “wow” at any stage to the Claimant in work. The Claimant’s reply is recorded in the notes as:-

5 *“Not that I can recall. I may have used the words WOW in the past that is something we are groomed to do by the woman in their lives when their woman look nice. I can’t see why I would use these words in a threatening or sexual way.”*

10 Mr Birkin described this reply as “odd”. Mr Birkin asked the Claimant if it was appropriate for a team leader to say to someone in their team that they looked nice. The Claimant replied that he could not see that as a problem, which concerned Mr Birkin. Mr Birkin believed that the Claimant’s comment matched up with A’s allegation.

- 15 37. Mr Birkin asked the Claimant about buying a watch for A. The Claimant was able to recall that it had been a Rotary watch which had cost £70 in Argos. Mr Birkin asked the Claimant about other presents and the Claimant replied that he:-

20 *“...might have given [A] daft things from time to time I just can’t recall them.”*

The notes record that the Claimant described it as an “*impulse buy*”.

- 25 38. Mr Birkin asked the Claimant, under reference to the comments from other team members, about how he conducted himself. He mentioned Ms Barclay’s reference to the Claimant flicking A’s ear and Mr McKay’s reference to the Claimant having a different coaching style with A. The Claimant said that not all coaching was side by side. When Mr Birkin asked the Claimant about
30 coaching in pods, he said that this was only with A.

39. The Claimant acknowledged to Mr Birkin that he had told his team during a team brief not to talk about himself and A. The Claimant described this as

5 helping A back to work. He said that he had told A about this. Mr Birkin believed that it had not been appropriate for the Claimant to discuss this at a team brief and that, if the Claimant thought there were “*rumbblings*” about himself and a team member, he should have spoken to Ms Colquhoun as his line manager.

10 40. Mr Birkin asked the Claimant about his conversations with Mr Tonner and Ms Colquhoun. The Claimant said that after his conversation with Mr Tonner in November 2016 he had not spent as much break time with A. Mr Birkin asked the Claimant if, in hindsight, it had been appropriate to spend break time with C. The Claimant replied that he did not see the relevance of the three questions (which I understood to be a reference to the three allegations against him) as it was not related to work but “*only as a friend*”.

15 41. Mr Birkin said in evidence that the Claimant saw nothing wrong, in contrast to Mr Tonner’s and Ms Colquhoun’s view that he was spending too much time with A and that it was an inappropriate relationship. Mr Birkin believed that there was something wrong and that the Claimant should have taken on board the feedback from Mr Tonner and Ms Colquhoun. Mr Birkin did not agree with the Claimant’s assertion that it was not work related. He believed there were “*blurred lines*”.

25 42. Mr Birkin’s perception was that the Claimant was acting differently towards A and that his team were noticing. It had not been appropriate for A to touch the Claimant’s leg nor for the Claimant to flick A’s ear. The Claimant’s role was to manage and such contact was not appropriate.

30 43. Mr Birkin asked the Claimant about the messages between himself and A which he had provided. The Claimant had referred to A as “*a woman scorned*” in an email he sent to Mr Green on 2 April 2017 (C2 of the Claimant’s bundle). When asked by Mr Birkin what he meant by this, the Claimant said that A believed “*that something was going to happen with us*”. He said that when he had gone back to his wife (after a short period of separation in February

2017) A had gone “*down that route*” which I understood to be a reference to A’s allegations against the Claimant.

5 44. The Claimant told Mr Birkin that he believed Mr Green’s investigation had been “one sided”. He referred to his past relationship with Mr Green, who had at one point been his line manager, and said that Mr Green would “*exclude me from things*”. He referred to his email to Mr Green on 2 April 2017 and to Mr Green’s reply of 3 April 2017 (C3) in which Mr Green had said that he would look at the Claimant’s points “*and make sure they are include* 10 *in my investigation*”. The Claimant pointed out to Mr Birkin that the points he had raised had not been included by Mr Green.

15 45. After an adjournment there was discussion about three pictures which A had sent to the Claimant and which he had provided to Mr Birkin. These showed A in her underwear, holding her breast and wearing a mud face mask. Mr Birkin was shocked and surprised by these. They did not evidence a father/daughter relationship. The Claimant asked “*Why would I be sexually harassing [A] if she is sending explicit photos to me?*” Mr Birkin asked the Claimant when he had received these. The Claimant could not say when 20 they had been sent, except that it was recent but before A’s allegations against him. Mr Birkin considered that the pictures were at odds with what the Claimant had said about his relationship with A.

25 46. The Claimant also provided Mr Birkin with screenshots of messages between himself and A. These were dated after the Claimant’s meeting with Mr Tonner and Ms Colquhoun on 7 February 2017. Mr Birkin noted that the Claimant had not reverted to Mr Tonner and Ms Colquhoun to discuss these. In Mr Birkin’s view “*It did not feel right*”.

30 47. Mr Birkin did not believe that the Claimant’s evidence (ie what he had said to Mr Birkin in the course of the Conduct Hearing) countered A’s allegations against him. He had not confirmed or denied the allegations. He had not spoken to his line managers or the Respondent’s HR team. It was in Mr

Birkin's view inappropriate for the Claimant to have on his phone the photos of A which he had produced. The Claimant should have reported this, to protect A if she had a problem and also to protect himself, and yet he had chosen to do nothing. Mr Birkin believed that the Claimant having and keeping these pictures of A was indicative of sexual harassment.

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48. Mr Birkin was particularly concerned about the language used in the letter alleged to have been written by the Claimant and which A had found in her locker. In his view the words quoted at paragraph 6 above indicated that the Claimant wanted to do something sexual towards A and amounted to sexual harassment.

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49. Mr Birkin was also concerned that there was evidence of the Claimant using crude language. That was not something he would expect from a team leader. It did not create an appropriate environment. It could amount to sexual harassment. The Claimant had said that he did not remember if he had made crude comments but that was contradicted by the other evidence.

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50. Mr Birkin said that the Claimant had chosen which messages to send to him. They were undated and the Claimant could not be specific on dates. Mr Birkin understood that the Claimant's purpose in providing him with the messages was to demonstrate that the Claimant and A were having father/daughter type conversations. One of the messages from A to the Claimant read "*I'm gonna shag the manager of Burger King*" and the Claimant's reply was "*Good I hope that you enjoy*". Mr Birkin did not believe that the messages demonstrated a father/daughter relationship between the Claimant and A. The Claimant indicated that he did not want the photos and texts to be used (as confirmed in his subsequent email to Mr Green on 23 May 2017 – page C14), which Mr Birkin understood to mean that he should not investigate them further. Mr Birkin did consider whether A should be interviewed but decided against doing so.

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51. At the end of the Conduct Hearing Mr Birkin decided that he needed more time and wanted to carry out some additional investigation. The Claimant had argued that Mr Green was emotionally attached to the case and had been influenced by his previous relationship with the Claimant, for example organising nights out where the Claimant felt left out, prior to their transfer to the Respondent.
52. Mr Birkin held an investigation meeting with Mr Green on 23 May 2017. Pages 165-167 were the notes of this meeting. Mr Green explained how he had become involved in the case (as described in paragraphs 5/6 above). He denied that he had any emotional connection to the case. He confirmed he had organised nights out when he was a team leader and that he had briefly managed the Claimant in late 2013/2014. Mr Birkin concluded that Mr Green had no bias towards the Claimant and that his investigation had been fair and transparent.
53. Mr Birkin also held an investigation meeting with Ms Barratt. Pages 169-170 were the notes of this meeting. He asked her about her statement to Mr Green that the Claimant and A would “*carry on*”. Ms Barratt told Mr Birkin that A would carry on as much as the Claimant and did not take offence. She described it as “*kidding and banter*”. She said that the Claimant did try and help A a lot and that A had issues in her personal life.
54. Mr Birkin wrote to the Claimant on 6 June 2017 (page 172) inviting him to a reconvened Conduct Meeting to be held on 12 June 2017. At the meeting on 12 June 2017 the Claimant was accompanied by Mr McSorley and Ms Halliday was again notetaker. The outcome was that Mr Birkin dismissed the Claimant for gross misconduct.
55. Pages 173-177 were the notes of the outcome meeting on 12 June 2017. On page 176, after setting out the three allegations against the Claimant (as detailed in paragraph 28 above) Mr Birkin recorded his decision in these terms:-

5 *“I am upholding the allegations for point 1 as there is factual evidence of the letter and have reason to believe it is your writing. For points 2 and 3 I have reason to believe those issues did take place based on the investigations and the findings of these investigations that lead me to believe these acts were committed.”*

10 56. In respect of the first allegation relating to the letter, Mr Birkin stated in evidence that he believed that the Claimant had placed this in A’s locker. The Claimant had not denied doing so. It looked like his handwriting. The language used, particularly in the closing paragraphs of the letter (as quoted in paragraph 6 above), could be considered to be sexual harassment. It was an expression of what the Claimant wanted to do to A.

15 57. In respect of the second allegation relating to mouthing “Wow” multiple times on 27 January 2017, Mr Birkin noted that the Claimant could not remember or did not recall doing this. However, based on the complaint by A and the other evidence (including the purchase of the watch, the evidence from other members of the Claimant’s team and the photos and messages produced by the Claimant) Mr Birkin decided that it was reasonable to assume that this did happen.

25 58. In respect of the third allegation of making comments of a sexual nature towards A despite her asking him to stop, Mr Birkin noted that the Claimant did not confirm or deny this. However, Mr Birkin regarded the messages provided by the Claimant as evidence of inappropriate conversations between a team leader and a team member. He also noted the evidence from members of the Claimant’s team that he would make crude comments. This led him to believe that the Claimant had made comments of a sexual nature towards A.

30 59. Mr Birkin wrote to the Claimant on 13 June 2017 (pages 178-179) confirming his decision. This letter advised the Claimant of his right of appeal to Mr

5 Holmes. Mr Holmes was experienced in dealing with disciplinary and grievance processes having been involved in at least one hundred of these since joining the Respondent in August 2016. He was familiar with the Respondent's Conduct Policy (pages 48-51), Inclusion & Diversity Policy (pages 52-53) and How Do I Guide (pages 54-58).

60. The Claimant submitted an appeal to Mr Holmes by email (pages 181-182). His grounds of appeal can be summarised as follows –

10 • He was having a relationship with A. They would message each other with some content being of a sexual nature. These were two way conversations and did not constitute harassment. He had previously denied the relationship because he was married and did not want his wife to find out.

15 • He did not disclose his relationship with A at the Conduct Hearing as he believed he would be dismissed for that but, having been dismissed anyway, he now had nothing to lose.

20 • He had written the letter to A because she had asked him to do so. It was fully consensual and not harassment.

25 61. Mr Holmes wrote to the Claimant on 21 June 2017 (pages 185-186) inviting him to an Appeal Meeting on 27 June 2017. This was originally scheduled for 3pm but the start time was changed at the Claimant's request to 9.30am. Prior to the Appeal Meeting Mr Holmes read through the documents provided to him (as listed in the letter of 21 June 2017). At the Appeal Meeting the Claimant was again accompanied by Mr McSorley. The notetaker was Ms S Fraser. Pages 193-202 were the Appeal Meeting notes.

30 62. Mr Holmes asked the Claimant about his assertion that he had been in a consensual relationship with A for two years. The Claimant said that he had not wanted to admit to this at the Conduct Meeting. He had told Mr Birkin

that he and A did meet outside of work. They had been for coffee. He had bought her gifts. He had taken her to Kilbirnie for driving lessons. It was not sexual harassment. There had been "*banter, texting, sexting, conversation*" and "*physical contact through kissing and cuddling*".

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63. The Claimant told Mr Holmes that he had not shared this information because (a) of the detrimental effect on his home life and (b) he did not trust members of the Respondent's management team. In relation to trust, the Claimant said that he felt his previous dialogue with Mr Green had influenced his thinking regarding the investigation. He also said that because Mr Tonner and Ms Colquhoun had spoken to him about his relationship with A, they would be thinking of him detrimentally.

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64. Mr Holmes said in evidence that it was not logical that the Claimant, if he believed he was in a consensual relationship with A, had not disclosed this. People (a reference to Mr Tonner and Ms Colquhoun) had approached the Claimant to try and help. Why had he not taken that opportunity? However, Mr Holmes said that he had kept an open mind as to why the Claimant did or did not do so. His role was to look at matters in line with the Respondent's policies and to make sure that the appeal was conducted fairly. He said that this was important to him on a personal level.

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65. The Claimant told Mr Holmes that he had had an issue with Mr Green before they had transferred to become employees of the Respondent. This was why he had not consented to the photos he had provided to Mr Birkin being shared with Mr Green. The Claimant told Mr Holmes that Mr Green "*threw me out of the 4th floor to the 6th floor and took my team off me*".

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66. Mr Holmes said that the Claimant, having provided the screenshots of photos and text messages to Mr Birkin, believed that it should have been obvious to Mr Birkin that it was a consensual relationship. Mr Holmes asked the Claimant why he had assumed this when he could have told Mr Birkin about it. The Claimant accepted that he had not been truthful with Mr Birkin.

67. Mr Holmes believed that it was a “*big shift*” from a father/daughter, supportive relationship to a consensual sexualised relationship. He considered that it was “*unusual*” that the Claimant had not mentioned this before. The Respondent had no formal policy about relationships between a team leader and a member of his/her team but Mr Holmes said that in such circumstances the Respondent would look to move one of those concerned to avoid a conflict of interest. The relationship could impact on a team leader’s judgment. The team leader could influence the team member’s incentive bonus. He/she also conducted their return to work interviews and had access to their occupational health reports. In the present case Mr Holmes was concerned if the Claimant had a consensual relationship with a colleague who had mental health issues when he had access to her occupational health reports. In his view, this was not appropriate.

68. The Claimant told Mr Holmes that he had not wanted to disclose his relationship with A to Mr Green or Mr Birkin because it would impact on his home life. However, Mr Holmes found this difficult to understand as the Claimant’s family were already aware of the relationship. It was not new information.

69. The Claimant told Mr Holmes that 6 February 2017 was the last time he and A were together. At or about that time a previous partner of A had contacted his family and “*everything blew up at home*”. He was asked to leave the house. His eldest daughter did not speak to him. He said that he had ceased contact with A in February 2017.

70. Mr Holmes asked the Claimant about the watch he had given A. The Claimant said that he thought it would be useful for A and would cheer her up. His explanation was similar to the one he had given Mr Birkin. Mr Holmes thought it was unusual for a team leader to buy a gift in this way. He understood the value was over £50. He compared this with the £10-15 he would expect people to spend on a “*Secret Santa*” gift.

71. The Claimant had spoken to Mr Holmes about his own wellbeing, referring to his anxiety and his heart condition. Mr Holmes had seen the Claimant's occupational health reports. He read these as indicating that the Claimant suffered from anxiety and managed illnesses. There was nothing affecting his ability to make decisions or judgments. Mr Holmes said that he was looking for mitigating factors and, had he found any, he would have had no qualms about overturning the decision to dismiss the Claimant.

72. The Claimant provided Mr Holmes with additional screenshots of messages between himself and A (pages 217-223). These were selected by the Claimant and were dated between 20 February 2017 and 7 March 2017. The Claimant told Mr Holmes that these would support his assertion that his relationship with A had been consensual.

73. Mr Holmes noted that Mr Birkin had found that Mr Green's investigation had been professional. Mr Holmes could find no evidence of any absence of professionalism on the part of either Mr Green or Mr Birkin. However, he decided that he wanted to speak to Mr Green and Mr Birkin before determining the outcome of the Claimant's appeal.

74. Mr Holmes spoke to Mr Green on 3 July 2017. Pages 204-206 were the notes of this meeting. Mr Green told Mr Holmes that he had no issues with the Claimant, but he thought the Claimant might have an issue with him. Mr Holmes asked Mr Green about various aspects of his investigation and concluded that due process had been followed and a proper investigation carried out. He believed that Mr Green had acted in good faith.

75. Mr Holmes spoke to Mr Birkin on 3 July 2017. Pages 213-216 were the notes of this meeting. Mr Holmes asked Mr Birkin if he felt Mr Green had been "*emotionally attached*" or carrying a grudge against the Claimant. Mr Birkin told Mr Holmes that Mr Green was "*nothing but professional and fair*". Mr Holmes asked Mr Birkin about various aspects of the disciplinary process. Mr

Birkin was clear that the Claimant had made no reference to a consensual relationship with A during the Conduct Meeting.

5 76. Mr Holmes took time to consider the appeal outcome. He wanted to address not only the Claimant's appeal points but also other matters raised by the Claimant in the course of the Appeal Meeting. He decided to uphold the decision to dismiss the Claimant. His decision letter was dated 13 July 2017 (pages 229-233).

10 77. Mr Holmes did not believe that the evidence provided by the Claimant supported his assertion of a consensual relationship with A. Mr Holmes was satisfied that the Claimant had written the letter (page 85) containing content of a sexual nature and had placed it in A's locker. He was not satisfied that A had asked the Claimant to do so. He agreed with Mr Birkin's finding that
15 *"this could be deemed inappropriate conduct, which could be considered sexual harassment"*. Although expressed in this way, Mr Holmes was in fact finding that the Claimant's actions did constitute sexual harassment of A.

20 78. Mr Holmes believed that the Claimant had taken a calculated risk in not revealing to Mr Birkin his relationship with A. He had demonstrated *"a high level of untrustworthiness"* throughout the disciplinary process. Mr Holmes noted the Claimant's belief that he would have been dismissed if he had admitted the relationship but stated in evidence that *"people are not usually dismissed for a consensual relationship"*.

25 79. Mr Holmes did not accept the Claimant's assertion that he could not trust his line managers, noting that the Claimant could have approached Employee Relations, HR, another member of management or Mr Holmes himself. Mr Holmes did not believe that the Claimant's health issues meant that his
30 decision making was impaired. Mr Holmes also did not believe that the Claimant's perceived issue with Mr Green had adversely affected the fairness of the disciplinary process. He concluded that Mr Green had acted *"professionally throughout"*.

80. Mr Holmes did not believe that it was clear from the screenshot evidence provided by the Claimant that his relationship with A had been consensual, nor that this was proof of a consensual relationship. His outcome letter stated:-

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“It is clear text correspondence has taken place and what you have provided gives proof of this correspondence but it does not, in my opinion, help Mark Birkin make a conclusion that you were in any type of consensual relationship. It is not possible to ascertain the validity of the flow of messages either from the way they have been presented and at the time of your hearing with Mark you did not give consent for further investigation. A’s formal complaint and testimony is clear in that your attention was unwarranted and unsolicited. A has left Sky which means I have taken her last testimony as fair and reasonable view of her feelings as she gave these both verbally and in writing.”

Mr Holmes did not find any evidence that A had been forced to make a complaint.

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81. Mr Holmes considered but rejected the Claimant’s assertion that his meeting with the Claimant in Kilbirnie on 6 February 2017 was evidence of a consensual relationship. It did not in Mr Holmes’ view change the fact that the Claimant had placed a letter which contained sexual content in A’s locker nor the outcome of Mr Birkin’s Conduct Meeting.

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82. Mr Holmes referred to the Claimant’s concern about the difference in the language used in Mr Green’s suspension letter of 4 April 2017 (page 117, paragraph 18 above) and in the letter of 2 May 2017 from Mr Green inviting him to a Conduct Meeting (pages 126-127, see paragraphs 28 and 30 above). Mr Holmes believed that the change in language reflected how the investigation had evolved, and that the Claimant had fair notice of the allegations against him.

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83. Mr Holmes was critical of the efforts made by the Claimant to secure fresh employment after his dismissal and indicated that there were always vacancies with the call centre industry. However I was satisfied from the Claimant's evidence that he had made reasonable efforts to secure alternative employment. With effect from 29 October 2017 the Claimant had been working as a self employed courier, earning £110 per day. From his earnings he had to pay £174 per week for van hire and insurance, and he also had to pay for fuel. Pages C6-C13 contained details of his income and outgoings.

84. The Claimant pointed out that several of the interview notes produced by the Respondent had not been signed in the way which the forms they had used provided for. Mr Holmes acknowledged this and put it down to oversight.

Submissions

85. Mrs Lilburn submitted that the Respondent had shown that the reason for the Claimant's dismissal related to his conduct which was a potentially fair reason. The Respondent had believed that the Claimant was guilty of sexual harassment. She referred to **British Home Stores v Burchell [1978] IRLR 379**. The Respondent did not require to prove that the Claimant had been guilty of sexual harassment. What was needed was a genuine and reasonable belief held on reasonable grounds.

86. Looking firstly at the question of belief, Mrs Lilburn submitted that the evidence showed that Mr Birkin had a reasonable belief that the Claimant had been guilty of the three allegations he faced. Looking next at the question of reasonable grounds for that belief, Mrs Lilburn submitted that these were as stated in the Conduct Meeting outcome and dismissal letter. Looking finally at whether the Respondent had carried out an adequate investigation, Mrs Lilburn acknowledged that this was the main thrust of the Claimant's argument.

87. Mrs Lilburn reminded me that the Claimant had not given consent for the screenshots and photos which he provided to be passed to Mr Green. Mr Green had held investigation meetings with the Claimant and with six other employees. A lengthy disciplinary meeting had been held and, following further investigation by Mr Birkin, had reconvened. This, she submitted, met the requirement for adequate investigation.
88. Mrs Lilburn submitted that the Respondent's dismissal of the Claimant satisfied the requirements of Section 98(4) of the Employment Rights Act 1996 ("ERA"). The correct approach was not to "second guess" but to assess objectively if the Respondent's decision to dismiss the Claimant for gross misconduct fell within the band of reasonable responses. She referred to **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439.**
89. Mrs Lilburn reminded me that the Tribunal should not substitute its own view for that of the Respondent. It was the reasonableness of the employer's actions that had to be judged, not whether a lesser sanction was appropriate. She referred to **Grundy (Teddington) Ltd [1976] ICR 323**, **London Ambulance Service NHS Trust v Small [2009] IRLR 563** and **British Leyland (UK) Ltd v Swift [1981] IRLR 91.** Sexual harassment was one of the examples of gross misconduct in the Respondent's Conduct Policy. That remained the case even if there had been a consensual relationship.
90. The procedure adopted by the Respondent had, Mrs Lilburn submitted, been fair. An investigation had been carried out by Mr Green in line with the Respondent's Conduct Policy. Both Mr Birkin and Mr Holmes were comfortable that Mr Green had been thorough. Any delay in carrying out the investigation had not been unreasonable and had not prejudiced the Claimant. It had taken some time but this was due to the complexity and seriousness of the allegations. Mr Green had required to speak to witnesses and review papers.

91. Mr Birkin had been a fair and impartial disciplinary officer. He did not know the Claimant well. Mr Holmes had undertaken further investigation as part of the appeal process. He had asked questions about the additional information the Claimant had presented to him. He had asked the Claimant about his
5 change of position. The Claimant had been given full details of the allegations against him. During the disciplinary process the Claimant had been given ample opportunity to put forward his version of events and to contest the allegations. Any procedural imperfections which might be found by the Tribunal should not render the Claimant's dismissal unfair. Mrs Lilburn referred to **Taylor v OCS Group Ltd [2006] EWCA Civ 702**.
92. Turning to remedy and compensation, Mrs Lilburn submitted that any award to the Claimant should be reduced to reflect his failure to mitigate his losses following his dismissal, under reference to Section 123(4) ERA. His attempts
15 to secure fresh employment were inadequate at a time when the call centre market was buoyant. He had not produced documentary evidence of his efforts to secure fresh employment.
93. Under reference to **Polkey v A E Dayton Services Ltd [1987] IRLR 503** Mrs
20 Lilburn submitted that if the procedure adopted by the respondent was found to be unfair, the Claimant would have been dismissed anyway had a fair procedure been followed. Any compensatory award to the Claimant should be reduced accordingly.
- 25 94. Mrs Lilburn submitted that there had been contributory fault on the part of the Claimant. The Claimant had, she argued, caused his own dismissal. She referred to Section 123(6) ERA and submitted that any compensation should be reduced to nil. She referred to **Nelson v British Broadcasting Corporation (No2) [1979] IRLR 346**. The relevant factors were (a)
30 blameworthy conduct by the employee, (b) which contributed to the dismissal and (c) what was just and equitable.

95. The Claimant's conduct had been inappropriate. He should have declared his relationship with A. He had ample opportunity to do so. It was also a factor that the Claimant's position had changed substantially. He had only disclosed the consensual relationship at the appeal stage. He had been untruthful in stating to Mr Green and Mr Birkin that his relationship with A had been a father/daughter one. He had admitted only at the appeal stage that he had placed the letter in A's locker. He had allowed an environment to exist within his team which involved crude comments.
96. Mrs Lilburn referred to **Devis & Sons Ltd v Atkins [1997] AC 931** and **Nelson v Clapham and another UKEATS/0037/11**. These cases demonstrated that misconduct by an employee discovered after dismissal could be reflected in the amount of compensation awarded. In this case the Claimant had lied and his lies had come to light after his dismissal. To reflect that any compensation the Tribunal was otherwise minded to award should be reduced to nil.
97. The Claimant submitted that there had been errors in the procedure followed by the Respondent. In addition to the failures to have interview notes signed, both Mr Green and Mr Birkin had failed to revisit the evidence relating to the Claimant's meeting with A on 6 February 2017. The length of time the Respondent had taken with the investigation had adversely affected the Claimant's health. Mr Green should, in accordance with ACAS guidelines, have had no further part in the process after receiving A's formal complaint.
98. The Claimant had said that he was "*damned if I do and damned if I don't*" and reinforced this by pointing out that Mr Birkin had said that it would have made no difference if he had been truthful from the start (about his relationship with A).
99. The Claimant also focussed on what he perceived as inadequacies in Mr Green's disciplinary investigation by reference to Mr Green's conclusions in respect of A's grievance. He was critical of Mr Green's finding that there had

been failures on his part (in relation to management of A's absence) when in fact he had made representations to Mr Tonner and Ms Colquhoun about this which had not been heeded.

5 **Applicable Law**

100. Section 98 ERA provides as follows:-

10 “(1) *In determining ...whether the dismissal of an employee is fair or unfair, it is for the employer to show –*

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

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

 (2) *A reason falls within this subsection if it –*

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 (b) *relates to the conduct of the employee...*

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

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

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

Discussion and Disposal

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101. I was satisfied that the Respondent had shown that the reason for the Claimant’s dismissal related to his conduct. It was not disputed by the Claimant that this had been the reason for his dismissal. The allegations of misconduct are detailed in paragraph 28 above. Mr Birkin’s belief of the Claimant’s guilt of these allegations led to his dismissal. The question I had to decide was that posed by Section 98(4) ERA as quoted above.

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102. I reminded myself of the approach to be taken in line with **British Home Stores Ltd v Burchell**, quoting from paragraph 2 of the judgment:-

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“First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly...that the employer, at the stage at which he formed that belief on those grounds...had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.”

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103. I was satisfied that Mr Birkin did believe that the Claimant had been guilty of the allegations of misconduct made against him. The Claimant’s answers to Mr Birkin’s questions during a lengthy disciplinary hearing were equivocal and evasive. Examples are quoted at paragraphs 34, 36 and 37 above. His answers to Mr Green had been similar – see paragraphs 10, 11, 12, 15 and 16 above. I understood the Claimant’s “*damned if I do and damned if I don’t*” point – at the time of his suspension the allegation had related to an “*inappropriate relationship*” and although the actual allegations of misconduct had changed by the time the Claimant was called to a disciplinary hearing it was understandable that the Claimant did not run his “*consensual*

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relationship” defence initially. It was clear that he felt the Respondent would have regarded the relationship, whether consensual or not, as inappropriate.

5 104. However, Mr Birkin was entitled to form the view, based on the Claimant’s responses to the questions put to him at both the investigative and disciplinary stages, that the Claimant was not denying the allegations of misconduct. This, almost inevitably, led Mr Birkin to uphold those allegations.

10 105. I was also satisfied that Mr Birkin had reasonable grounds upon which to sustain his belief of the Claimant’s guilt of the allegations against him. Mr Birkin had before him the letter found by A in her locker and the sample of the Claimant’s handwriting. The Claimant acknowledged that there were similarities. While it was not impossible that the letter could have been written by someone copying the Claimant’s handwriting, it could not be said that no
15 reasonable employer would have come to the view that Mr Birkin did, namely that the Claimant had written the letter.

20 106. In relation to other two allegations, there was little in the statements taken by Mr Green from other members of the Claimant’s team and from Mr Birkin’s subsequent investigation meetings with Mr Green and Ms Barratt to support these beyond the references to the Claimant treating A differently, being “*too close*” to A and making “*crude*” comments. Mr Birkin acknowledged that his
25 “*reason to believe those issues did take place*” was based on his preference of what A had said in her formal complaint over the Claimant’s responses to the allegations. Given the way in which the Claimant had answered both Mr Green and Mr Birkin, that was hardly surprising. While the Claimant may have perceived that he was doing the right thing by trying to avoid telling lies during the investigation and disciplinary meetings, he was unfortunately giving the impression of being reluctant to answer a direct question in a
30 straightforward way and I have no doubt that this contributed to Mr Birkin’s belief of the Claimant’s guilt of the allegations against him. It could not be said that no reasonable employer would have come to that view.

107. I was also satisfied that the Respondent had carried out as much investigation as was reasonable. The Claimant was critical of Mr Green for not including in his investigation report any reference to the matters contained in the Claimant's email to him of 2 April 2017 (relating to the Claimant having met with A on 6 February 2017) despite Mr Green having emailed the Claimant on 3 April 2017 saying that he would "*make sure they are included in my investigation*". However, the difficulty for the Claimant in making that criticism is that he had deliberately not disclosed to Mr Green that he considered his relationship with A to be consensual.

108. I believed that Mr Birkin and Mr Holmes had been entitled to conclude that Mr Green had carried out an investigation that was "*nothing but professional and fair*". Mr Green spoke to four members of the Claimant's team. He spoke to the Claimant's line managers. He had of course also received A's formal complaint having spoken to A. The information he gathered supported the original allegation of an "*inappropriate relationship*" between the Claimant and A. It could not be said that no reasonable employer would have refined that general allegation into the three specific allegations which the Claimant had to answer.

109. I then considered whether the decision to dismiss the Claimant fell within the "*band of reasonable responses*" under reference to **Iceland Frozen Foods Ltd v Jones**, quoting from paragraph 24 of the judgment:-

"(4) *in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*

(5) *the function of the [Employment] Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might*

have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair.”

5 110. I decided that the Respondent’s decision to dismiss the Claimant did fall within the band of reasonable responses. I reminded myself of the terms of Section 98(4) ERA - had the Respondent acted reasonably or unreasonably in treating the Claimant’s misconduct as a sufficient reason for dismissing him? The Respondent is a substantial organisation with significant
10 administrative resources. That justifies a higher expectation, in terms of what might be judged to be reasonable, than a smaller enterprise with limited resources. I was satisfied that the Respondent had brought those resources to bear on the present case.

15 111. The Respondent had followed a comprehensive investigative and disciplinary process. They had acted in line with their own procedures and policies. The investigative, disciplinary and appeal officers had approached their respective tasks in an appropriate way at each stage. The Claimant criticised Mr Green for alleged bias against him but Mr Birkin and Mr Holmes took
20 account of this and investigated this allegation before reaching their respective decisions. It could not be said that no reasonable employer would have acted as the Respondent did in this case in deciding to dismiss the Claimant for gross misconduct.

25 112. I was satisfied that the procedure adopted by the Respondent was fair. The Claimant was critical of the fact that Mr Green, having received A’s formal complaint, was also involved in investigating this (a) as a grievance and (b) as a disciplinary issue. However, it could not in my view be said that no reasonable employer would have proceeded in this way. There was an
30 obvious link between the grievance and the disciplinary issue. There was also a degree of urgency as A had intimated her intention to leave the Respondent’s employment. It was not unreasonable in the circumstances of this case to have the same person deal with both aspects.

113. The Respondent made things more difficult for itself by changing the allegation from “*inappropriate relationship*” to the three allegations of sexual harassment made against the Claimant. The explanations provided by Mr Birkin and Mr Holmes as to why it was inappropriate for someone in the Claimant’s position to have a relationship with someone in the team of which he was line manager were reasonable and sensible. However, given the detail of the policies upon which the Respondent relied in this case, it was surprising that the Respondent’s expectation of a team leader, that a relationship with a team member should be disclosed so that it could be managed to avoid conflicts of interest and inappropriate access to personal data, was not committed to writing.

114. Having said that, the Claimant was the architect of his own misfortune in this case. When questioned by Mr Green and Mr Birkin about his relationship with A, the Claimant tried not to lie but deliberately avoided telling the truth. It was not surprising, given the evidence of the letter and the statements from his team, that the Claimant’s assertion that his relationship with A was of a father/daughter nature was not believed. The Claimant’s production to Mr Birkin of messages and photos in the belief that they would be seen to demonstrate a consensual relationship with A was misconceived. The messages and photos were not indicative of a father/daughter relationship and their production served only to taint the Claimant’s credibility.

115. The evidence of Mr Birkin was that he decided not to make further enquiry of A in the course of the disciplinary process. A had left the Respondent’s employment, having been interviewed and having made a formal complaint. She could not be compelled to participate further. The Respondent was aware that she had mental health issues and was regarded as vulnerable. I did not consider that the decision not to involve her further in the disciplinary process was one that no reasonable employer would have taken.

116. The Respondent had been entitled, on the evidence available to it after undertaking a reasonable investigation, to make the decision that the Claimant had been guilty of sexual harassment of A and that this amounted to gross misconduct. Accordingly the dismissal was not unfair and the claim of unfair dismissal had to fail.

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Employment Judge: WA Meiklejohn
Date of Judgment: 12 January 2018
Entered in register: 15 January 2018
And copied to parties

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