Case Number: 1400002/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Adam Cripps	**v**	**Marquis Motorhomes Ltd.**

Heard at: Bristol ET (by video) **On: 20 & 21 July 2022**

Before: **Employment Judge Hogarth**

Appearances

For the Claimant: Mr Cripps in person
For the Respondent: Mr J Tunley Counsel

JUDGMENT

1. The claimant was not unfairly dismissed by the respondent. The claim for unfair dismissal fails.

2. The claim for payment of annual bonus for the respondent's financial year 2020-21 succeeds. The respondent must pay the claimant £19, 402.05.

REASONS

Introduction

1. The claimant was employed by the respondent as manager of its Tewkesbury branch when he was dismissed by the for gross misconduct on 8 September 2021. He claims for unfair dismissal and also for payment of two bonuses for the respondent's financial year 2020-21 (ending in August 2021) in the sum of £19, 402.05. Both claims are contested.

Form of hearing and appearances

2. The hearing was conducted by video (CVP). There were no significant connection difficulties.

3. The claimant was present throughout the hearing and represented himself. He gave sworn evidence. No witnesses were called on his behalf. The respondent was represented by Mr Tunley, who called as witnesses Mr Graham Davidson-Bowman (Commercial and Services Director), Mr Andrew Riley (Northern Group Service Manager) and Mr Alan Buckwell (Sales and Marketing Director)

employees of the respondent and Ms Kate Wilkins (HR consultant), who all gave sworn evidence.

4. I had before me an agreed 209-page Bundle and, separately, witness statements from the claimant, Rebecca Courtenay (a former colleague of the claimant), Mr Davidson-Bowman, Mr Riley, Mr Buckwell and Ms Wilkins.

Procedure

5. There were no preliminary or procedural matters raised by either party. There were no requests for reasonable adjustments.

6. At the hearing I took evidence and submissions from the parties on (a) liability and related issues relating to the unfair dismissal claim and (b) on the claim for bonuses. Judgment was given orally at the end of the hearing. In view of my judgment on the unfair dismissal claim it is not necessary to consider issues relating to remedy.

7. As the two claims involve different issues, I address each below separately.

A) The unfair dismissal claim

Issues

8. I set out the issues to be decided at the start of the hearing and Mr Tunley agreed they were the correct ones. These are as follows:

Issue 1 *– was the claimant unfairly dismissed?*
1.1 What was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996?
1.2 Did the respondent genuinely believe that the claimant had committed the alleged misconduct?
1.3 If so, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular the Tribunal must decide whether—

> *1.3.1 there were reasonable grounds for the respondent's belief;*
> *1.3.2 when the belief was formed, the respondent had carried out a reasonable investigation;*
> *1.3.3 the respondent had otherwise followed a reasonably fair procedure; and*
> *1.3.4 dismissal was in the range of reasonable responses by an employer.*

9. The respondent says that the reason for the dismissal was misconduct consisting of inappropriate sexual language and behaviour, that after a fair investigation and disciplinary process it formed a genuine belief he committed

that misconduct, and that it acted reasonably in treating that as a sufficient reason to dismiss summarily for gross misconduct.

10. The claimant's general position at the hearing was that he did not commit any misconduct and he told me he did not really understand how he had ended up being dismissed for gross misconduct. However, it is not the function of the Tribunal to decide for itself whether or not he committed misconduct, but rather whether or not the respondent acted reasonably in dismissing him for misconduct on the basis of a reasonable belief that he had committed it. The claimant does not think he was treated fairly and he raised a lot of points and complaints during the hearing. It was not always easy to identify the issue to which some of his points related, so in view of his general position I will address each of the above issues in my conclusions.

    The issues below arise only if I hold that the dismissal was unfair.

    Issue 2 *- breach of ACAS Code of Practice*
    2.1 Did the respondent unreasonably fail to comply with the ACAS Code on Disciplinary and Grievance Procedures?
    2.2 If so, is it just and equitable to increase any compensatory award payable to the claimant? By what proportion, up to 25%?

11. The ACAS Code applied. The claimant asserts the respondent breached paragraph 8 of the Code in relation to his suspension and makes complaints about the investigation and disciplinary process which could potentially involve breaches of the Code. The respondent denies any breach of the Code.

    Issues 3 and 4 *- Polkey reduction and reduction for contributory conduct*

    3.1 If the dismissal was procedurally unfair, is there a chance the claimant would have been fairly dismissed anyway if a fair procedure had been followed?
    3.2 If so, should the claimant's compensatory award be reduced in accordance with the principles in Polkey v AE Dayton Services Ltd [1987] UKHL 8 and subsequent cases? By what proportion, up to 100%?

    4.1 If the dismissal was unfair, did the claimant cause or contribute to his dismissal by blameworthy conduct before he was dismissed on 8 September 2021?
    4.2 If so, would it be just and equitable to reduce the claimant's basic or compensatory awards? By what proportion, up to 100%?

12. The respondent's position under the rule in Polkey (if there was procedural unfairness, which it denies) is that the claimant would have been fairly dismissed anyway, so the reduction should be 100%. The claimant's position is that there should be no Polkey reduction. The respondent also asserts that that the claimant was guilty of culpable and blameworthy behaviour which contributed to his dismissal, that he was as a result entirely to blame for his

dismissal, and that the reduction for contributory conduct should therefore also be 100%. The claimant denies that he was guilty of any such behaviour.

Findings of fact

13. The respondent company is a dealer in caravans and motorhomes. The claimant joined the respondent as a sales executive on 11 December 2017 and was promoted to sales manager on 1 November 2018. He became branch manager at the respondent's Tewkesbury branch on 1 November 2019 and worked there until his dismissal on 8 September 2021. There were some 15 staff employed at the branch at the time of his dismissal and the respondent employed around 284 staff in the UK.

14. The statement of terms of the claimant's employment contract includes a warning (in paragraph 8.3) that he could be dismissed summarily for gross misconduct consisting of a "serious breach of your obligations as an employee". Until his summary dismissal on 8 September 2022 the claimant had a clean disciplinary record.

15. Mr Andrew Riley's evidence as to how events leading up to the dismissal started was as follows. On Monday 23 August 2021 he was told by Mark Hodgson (an employee who was attending training at the Tewkesbury branch) that the claimant had made inappropriate comments to members of staff which made them uncomfortable. The next day he carried out an annual review of Claire Anderson (a staff member at Tewkesbury) in person, after which he asked her about relationships at Tewkesbury. The claimant's name came up and Ms Anderson appeared uncomfortable, and then told him that he had behaved inappropriately towards her and others. She said she would like Mr Riley to take action, so he asked her to put her complaint in writing which he forwarded to Ms Wilkins at Brave Human Capital, a company that acted as the respondent's HR consultant. He spoke to the individuals Ms Anderson had mentioned and invited them to do the same.

16. While I understood the claimant to dispute whether that was how things happened, there was no evidence to contradict Mr Riley's account. In any event, I found Mr Riley evidence convincing and I accept that his account of those events as set out in paragraph 15 above is true.

17. Ms Wilkins evidence, which I also accept, was that an email from Ms Anderson making a complaint was received on Thursday 26 August 2021. So were written complaints from Kerry Jones and Andrew Clack, employees at the Tewkesbury branch. The complaints related to inappropriate sexual language and behaviour.

18. Mr Riley left it to Ms Wilkins to investigate matters as she thought fit, as an experienced HR consultant. His evidence (which I accept) was that his role in the investigation was limited to providing contact details for her, as he expected to be the senior manager who would conduct any disciplinary hearing.

19. Mr Davidson-Bowman's evidence was that he decided (after discussing the matter with Ms Wilkins and another colleague, Mike Crouch) to suspend the claimant pending conclusion of the disciplinary process. He informed the claimant by phone at about 8.45 am on Tuesday 31 August 2021 that he was suspended with immediate effect. Before ringing the claimant Mr Davidson-Bowman asked Dean Waters (another manager at Tewkesbury) to escort the claimant off the premises and take his keys. The call to the claimant was short, and he told the claimant to leave immediately, to hand his keys to Mr Waters and not to contact any staff members until advised otherwise. Before the call ended the claimant confirmed he had received notice of suspension by email. I accept Mr Davidson-Bowman's evidence on all this, which broadly tallies with the claimant's own account.

20. The letter notifying the claimant of his suspension referred to an allegation of sexual harassment against him, the serious nature of which meant he was suspended on full pay pending the outcome of an investigation. The claimant's evidence, which I accept, was that he was given no details of any allegation.

21. It was common ground that on the same day Mr Riley addressed staff at the Tewkesbury branch and told them that the claimant had been suspended, that the matter was confidential and that they should not discuss it between themselves. Mr Riley said he did not say anything about the complaints made about the claimant. The claimant had left the premises beforehand. Ms Courtney's written statement said that staff were not given any explanation for the suspension, but one of the "valeters", Steve Graham, told her that members of the service department had been told the claimant had been suspended and that it was to do with sexual harassment. Although that might suggest Mr Riley had mentioned sexual harassment, it is not clear from her statement that (on the assumption that it was otherwise accurate) Mr Riley was his source for the reference to sexual harassment. There are other possibilities, such as office gossip (given that several members of staff had already been invited to make statements). There is a note from Dean Waters dated 7 September which indicates that the source of the information was "Ed" (presumably Edward Peck) which supports that possibility. As Ms Courtenay did not give oral evidence there was no opportunity to explore this matter further. I find, on the balance of probabilities, that Mr Riley did not tell the staff any details of why the claimant was suspended. He was acting with expert HR advice (from Ms Wilkins) and I consider it unlikely that he would have given staff the details.

22. Ms Wilkins' statement sets out what happened in the course of her investigation. I accept her evidence on these matters, which was not disputed (although the claimant does dispute the truth of any accusations by staff that he had committed misconduct). Her method was to follow up the complaints made by contacting both the complainants and anyone mentioned to her as a possible witness. Accordingly, she took statements by phone and by email from individuals mentioned in the written information supplied by Ms Anderson, Ms Jones and Mr Clack (the staff members who had originally complained). These

were Elaine Davies, Mark Hodgson and Edward Peck. She obtained further information from Ms Anderson and Ms Jones.

23. Ms Wilkins also sought information from Ms Courtney, whose name had come up. Her response was that the office environment at the branch was relaxed, that there was some banter but that she had had no situations or conversation with Mr Cripps that made her feel uncomfortable. Nor had she witnessed anything. Ms Courtney repeated this in her witness statement. However, Ms Wilkins's evidence (which I accept) was that at the time she did not regard anything Ms Courtney said as relevant to the specific allegations, as there was no evidence that she was present or which linked her to any of them.

24. Ms Wilkins concluded that there was sufficient evidence of misconduct to justify a disciplinary hearing with the claimant. She discussed the matter with Mr Davidson-Bowman and it was decided that Mr Riley would act as the disciplinary manager supported by Ms Wilkins.

25. Mr Riley sent a letter (drafted by Ms Wilkins) to the claimant on Friday 3 September 2021, accompanied by a copy of the company handbook. This letter stated that he was required to attend a formal disciplinary hearing at 11 am on Tuesday 7 September to discuss "*several issues relating to alleged inappropriate behaviour in the workplace, specifically relating to the sexually harassment of your female colleagues*". It informed him of the risk of dismissal, that Mr Riley would be accompanied at the meeting by Ms Wilkins, that the complainant had the right to be accompanied by a colleague or union official and that he should notify them in advance if he wished to be accompanied. It referred him to the disciplinary procedure set out in the company handbook. Although Ms Wilkins' statement asserts that the letter set out the allegations, it can be seen from the quotation above that they were only described in very general terms.

26. Ms Wilkins stated (and I accept) that she was following the respondent's usual process of carrying out a preliminary investigation before a disciplinary meeting took place to give the employee concerned a chance to respond. If issues arose that require more investigation, this would be done and the meeting adjourned. In this way points made by the employee would be looked into, in the same way that would follow had there been an investigation meeting with the employee as part of the investigation.

27. In the early evening on Sunday 5 September 2021, redacted copies of the written evidence that Ms Wilkins considered substantiated the allegations were sent to the claimant. It appears that this did not include the information supplied by Ms Courtney, which Ms Wilkins did not consider relevant. However, given the close relationship between the claimant and Ms Courtney, who supported him at the various hearings, I am sure he would have been aware in advance of the hearing of what she had told Ms Wilkins.

28. A disciplinary hearing took place on 7 September, and the claimant was accompanied by Rebecca Courtney. The claimant agreed in cross-examination that he did not ask for more time and that at the meeting he did not object when he was asked if he had had a chance to review the evidence against him and was happy to proceed. He also said that Ms Courtney took notes, but if she did these were not shared with the respondent or placed in the bundle.

29. Ms Wilkins evidence was that the meeting was chaired by Mr Riley supported and guided by herself, and that she was there to ensure the meeting followed the right process (as she saw it) and to take notes. She did step in from time to time when she considered it necessary to keep the meeting on track. In advance of the meeting she provided Mr Riley with guidance as to the key steps for him to take, which included a suggested script for some of the things he needed to say. I was convinced by her evidence on these matters, which was supported by Mr Riley's evidence, and I accept it.

30. The allegations put to the claimant at the hearing related to seven separate incidents, as follows:

    (a) He told a member of staff who was coughing that she could "use some of his special semen" and that "special spunk would be good medicine".
    (b) He approached a member of staff from behind and massaged her shoulders without invitation.
    (c) He wiggled his bottom at a member of staff and then asked her to "stop looking at his bum".
    (d) He commented to a female member of staff "fuck me you're short, you'd be even shorter without clothes on".
    (e) He referenced a member of staff's "shaky hand" and suggested he join her in the toilets.
    (f) He commented that a sticky mark on the floor looked like a "snail trail".
    (g) He had been present when another employee asked a female colleague whether she "spat or swallowed" during a work night out and when she said "swallow" he commented that she was a "good girl" and had not taken steps to address the original comment in his position as a senior manager.

    These were the allegations of specific instances of misconduct on the claimant's part. The witnesses contacted by Ms Wilkins also referenced wider concerns about the claimant's behaviour and use of innuendo and how this affected the work culture at the Tewkesbury branch.

31. The evidence of Ms Wilkins and Mr Riley (supported by Ms Wilkins' notes of the meeting) indicate that during the hearing the specific allegations were put to the claimant in turn, and he denied all of them. His position was that he did not do or say any of the things alleged or that, possibly, he had been misheard or misunderstood. For example, he considered allegation (d) above to be absurd because the thing he was alleged to have said made no sense – and that if he had said something he probably used the word "shoes" rather than "clothes".

32. In the case of the "bum wiggling" allegation (see allegation (c) above) the claimant appears to have accepted that he did wiggle his bottom and that he did make the remark alleged. He confirmed this in cross-examination. But he maintained (and has always maintained) that there was nothing sexual in this, and that he did not regard it as wrongdoing.

33. The meeting was adjourned because Ms Wilkins considered she needed to investigate some additional points further. In particular it had emerged that allegation (f) may have been misconceived because someone else had made the remark. Ms Wilkins' evidence, which I accept, was that she spoke by phone to Dean Waters, Kerry Jones, Edward Peck and Martin White. The claimant had also complained during the hearing about the way colleagues at Tewkesbury had come to know about the allegations against him, which Mr Riley said would be investigated thoroughly.

34. The meeting reconvened on 8 September, and again the claimant attended accompanied by Ms Courtney. As a result of the further investigation, allegation (f) was dropped as the claimant was not the person who made the comment. Mr Riley fed back on the additional information received and the claimant was given the opportunity to respond and did so,

35. At the end of the meeting the claimant was informed of the findings made by Mr Riley. The notes of the findings use the word "we" which I consider refers to the respondent rather than to Mr Riley and Ms Wilkins. Mr Riley was clear in his evidence that the decisions were his, and I accept his evidence and that of Ms Wilkins on this point. The claimant asserted during the hearing that Ms Wilkins was in fact running the meeting and making (or participating in) the decisions. Apart from his own oral evidence he had no other evidence to support his assertions, such as his own or Ms Courtney's notes of the meeting. I have found that she did the things mentioned in paragraph 29 above, but in my view they well short of "taking over the meeting" or making the decisions on the allegations and the dismissal.

36. I accept Mr Tunley's submission that all the allegations (bar allegation (f) above which had been dropped) were found by Mr Riley to have been proved. Although the findings as recorded in the meeting notes do not specifically mention allegation (b) or (g), both parties appear to have proceeded subsequently on the basis that all bar (f) were found proved.

37. The claimant was then informed that his employment was being terminated with immediate effect on the ground of serious misconduct. He was informed of his right of appeal. On the same day he was sent a letter confirming the outcome and his dismissal. This said:
"*We discussed with you the allegations that were raised and with the exception of the snail trail reference which we understood was made by Dean we are satisfied, either through confirmed witness statements or the balance of probability where it is more likely than not, that you have acted inappropriately on numerous occasions and whether with intent or not, you have caused an increasingly uncomfortable and*

potentially unsafe environment for your female colleagues. The specific incidents considered in this decision (which have been verified by independent witnesses) are:

- *The offer of you "special semen/spunk" to an individual when coughing*
- *Asking a female colleague to join you in the toilet with a shaky hand*
- *The wiggling of your bum when bent over with female colleagues present*

In addition to the above, there are additional statements referencing general inappropriate behaviour, sexual innuendos, massaging an individual without consent and a general unease amongst a number of your colleagues.

Due to the seriousness of this matter and considering the seniority of your role, the decision has been made to summary dismiss you meaning that your employment with Marquis will terminate with immediate effect. The reason for this is recorded as serious inappropriate behaviour – including that of a sexual nature."

The letter was accompanied by the meeting notes, dealt with outstanding holiday pay and mentioned his right of appeal. He was invited to inform James Fleming at Brave if he wished to appeal, within one week.

38. Mr Riley's statement explains that he decided to dismiss because of the nature of the allegations that were proved and that he did not consider a final written warning or alternative employment to be the right response. He considered that the claimant's actions had destroyed any trust and confidence in him as an employee. He also references the claimant's "lack of any kind of acknowledgement" which I read as referring to the claimant's failure to accept he had done anything wrong. I accept Mr Riley's evidence as to his thinking.

39. The claimant appealed in an email sent to Mr Alan Buckwell (a director of the respondent) citing various grounds. He referred in his email to his right under the respondent's disciplinary process to appeal to a director. He raised a number of matters, including the fairness of the investigation and in particular the failure to ask female colleagues more widely if they had concerns about his behaviour; the delay in suspending him; the office meeting at which his suspension was announced; the unsuitability for various reasons of Andrew Riley as decision manager; errors in the notes (with "AR" and "AC" being muddled in places); inadequate information about the allegations given at short notice before the meeting; and the character of the main complainer against him (who he asserted was not someone who would be offended by innuendo, judging by her social media account) . He also continued to deny the factual allegations against him.

40. An appeal hearing was held on 22 September 2021 conducted by Mr Buckwell who was supported by James Fleming a partner at Brave (another HR consultant). The claimant was again accompanied by Rebecca Courtney.

41. At the appeal hearing the claimant was given the opportunity to raise his complaints about his dismissal, on the basis that if anything he said required further investigation a decision would not be made at the meeting. As a result of what the claimant said Mr Buckwell decided to adjourn the meeting so he

could speak to Mr Riley and Elaine Davies (one of the witnesses to one of the alleged incidents) and Ms Wilkins.

42. In this regard I note that the respondent's disciplinary policy (at paragraph 2.46) states that "You will be given a reasonable opportunity to consider any new information obtained before the hearing is re-convened".

43. During the gap after the adjourned hearing there is some email correspondence in the bundle between the claimant and Mr Fleming regarding progress (or rather the lack of it, in the claimant's view). Although in an email dated 24 September Mr Fleming indicated that the meeting would be re-convened as soon as possible, a later email from him dated 3 October indicated a change of approach as it said "We will be in touch with our conclusion early next week". In his reply the claimant pointed out that on the previous day Mr Buckwell had sent an email attaching the decision letter on the appeal (described below). The claimant also asked to see a summary of the investigation and all of the new statements obtained in it.

44. In fact Mr Buckwell did not re-convene the meeting (although he accepted in cross-examination that the impression had been given to the claimant at the meeting that it would be re-convened) or share any of the further information with the claimant. It appears that he considered that nothing in what his further investigations had thrown up added anything of any significance and that the claimant had said all he wanted to at the meeting. Instead, he made his findings and sent a letter dated 30 September to the claimant confirming them and giving his decision on the appeal. He rejected the appeal.

45. That letter addressed the main grounds of complaint as to the investigation and disciplinary process. As with the dismissal letter the letter uses the word "we" to refer to the respondent, but I find that the decisions were Mr Buckwell's on behalf of the respondent. The letter informed the claimant that:

    (a) The respondent was satisfied a reasonable investigation took place (rejecting the claimant's complaint that it was insufficient and not impartial).

    (b) It was accepted that communications to the office around his suspension were not handled well and that Mr Riley should not have accepted a lift from Ms Anderson to the re-convened disciplinary meeting on 8 September. But the respondent did not consider that these lapses fundamentally impacted the decision to terminate.

    (c) Allegations he made about Mr Riley's conduct and management of the Service Centre would be taken seriously and investigated. But the respondent found that any alleged misconduct by Mr Riley did not impact on the claimant's situation or the outcome of the disciplinary process against him.

    (d) James Fleming and Mr Buckwell had reviewed the statements made against the claimant in the light of his categorical denial that he had made any inappropriate statements. The respondent had found that each comment alleged to have been made was witnessed by an independent

third party, and that there was a variety of witnesses to the comments alleged. The respondent therefore felt that the decision to dismiss was a reasonable one.

46. It is clear from the way the appeal was conducted and from the conclusions in this letter that Mr Buckwell treated the appeal as a review of the fairness of the decision to dismiss rather than a complete rehearing of the facts. Paragraph 2.44 of the respondent's disciplinary policy gives the respondent the choice between these two options.

Relevant law on unfair dismissal

47. Section 94 of the Employment Rights Act 1996 confers on employees with at least two years' service the right not to be unfairly dismissed. Section 98 (which deals with the fairness of dismissals) includes the following provisions:

> **"98 General.**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> …
>
> (b) relates to the conduct of the employee,
>
> . . . .
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

48. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent does that the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted reasonably or unreasonably in dismissing for that reason. In this case the claimant exercised his right of appeal to a director, so the appeal is part of the disciplinary process the fairness of which falls to be considered by the Tribunal under section 98(4).

49. In misconduct dismissals, the decisions in *Burchell* 1978 IRLR 379 and *Post Office v Foley* 2000 IRLR 827 give well-established guidance on the correct approach when considering fairness within section 98(4). The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then

the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation.

50. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones* 1982 IRLR 439, *Sainsbury's Supermarkets Limited v Hitt* 2003 IRLR 23, and *London Ambulance Service NHS Trust v Small* 2009 IRLR 563.

51. In view of my determination that the claimant was not unfairly dismissed, the other issues listed above do not arise for determination. Accordingly, it is not necessary to set out the law governing them in any detail. As for Issue 2, section 207A(2) of the Employment Rights Act 1996 allows an award of compensation to be increased by up to 25% if the employer has failed unreasonably to comply with the ACAS Code of Practice on Grievance and Disciplinary Procedures. As for Issue 3, the case of *Polkey v AE Dayton Services Ltd [1987] UKHL 8* and later cases establish that a compensatory award for future loss may be reduced to reflect the chance that an employee dismissed unfairly because of an unfair process would have been dismissed fairly in any event had a fair process been followed). As for Issue 4, sections 122(2) and 123(6) require the reduction of the basic and compensatory awards if the Tribunal considers that culpable or blameworthy conduct of the claimant caused or contributed to the dismissal.

Conclusions on the unfair dismissal claim

52. The claimant's witness statement raises a very large number of points critical of what happened between the start of the investigation and the decision on the appeal. Not all of them appear to be relevant to the issues in this case, which is not a criticism as he is a litigant in person. In his final submissions he helpfully identified the specific grounds on which he claims his dismissal was unfair, which I address below in my conclusions. I also mention some of his other points where I consider them potentially relevant to the issues.

Issue 1.1

53. The reason for dismissal was given to the claimant by Mr Riley at the end of the re-convened disciplinary meeting and was set out in writing in the dismissal letter (see the extract quoted in paragraph 38 above). This was misconduct in relation to comments of a sexual nature made to members of staff and other inappropriate behaviour. The respondent considered this to be gross misconduct that justified summary dismissal. The decision to dismiss was confirmed by Mr Buckwell's decision not to uphold the appeal.

54. There was written evidence before Mr Riley (and subsequently Mr Buckwell) to support the allegations made against the claimant. Although the claimant submitted that the reason given cannot have been the real reason for his dismissal, there was no evidence that that any other reason played a part in Mr Riley's decision to dismiss, let alone evidence that anything else constituted the "principal reason" for dismissal. No other plausible reason was put forward by the claimant.

55. The claimant asserted that some at least of those complaining of his language or behaviour were motivated by hostility to him or some other improper motive. But this is not, in my view, relevant to Issue 1.1. I did not understand the claimant to be asserting that Ms Wilkins or Mr Buckwell had any improper motive behind their actions in the investigation or disciplinary process. He did, however, claim that Mr Riley had had inappropriate dealings with, or even a relationship of some kind with, Ms Anderson (one of the complainants against him) and that somehow this affected his decisions. But the evidence he put forward about this was in my view wholly inadequate to substantiate his case (if I understood it correctly) that this meant Mr Riley had an improper motive for making his decision. This evidence related largely to the giving of lifts, and I did not see anything in it as undermining the respondent's case that the reason for dismissal was the reason given at the time.

56. I conclude for those reasons that the reason for dismissal was Mr Riley's belief that the claimant had committed the misconduct described in the decision letter.

57. That reason is a reason related to the claimant's conduct and so is a potentially fair reason under section 98(1) and (2) of the Employment Rights Act 1996.

Issue 1.2

58. I have not identified any evidence (other than some rather general assertions by the claimant to the contrary) to suggest that Mr Riley did not genuinely believe the claimant had committed the misconduct. I consider that the evidence, taken as a whole, shows that Mr Riley was aware of what the claimant said at the disciplinary hearing in response to the allegations and decided that, despite the claimant's denials of wrongdoing and his submissions on the allegations and witnesses, the misconduct was proved.

59. I note also that the question whether Mr Riley's belief was genuine was not raised on the claimant's appeal. He did maintain his denials of any wrongdoing, but the issues he raised related mainly to the fairness of the investigation and the disciplinary process. He clearly considered Mr Riley's decisions to be wrong, but that is a different matter.

60. I conclude that Mr Riley did genuinely believe that the claimant committed the misconduct set out in the decision letter.

Issue 1.3

61. Before reaching a conclusion as whether the respondent (in the person of Mr Riley) acted reasonably in all the circumstances in treating the reason given for dismissal as a sufficient reason to dismiss the claimant, I must consider Issues 1.3.1 to 1.3.4. In relation to each of these my task is to decide whether what the respondent decided, and did, was in all the circumstances reasonable (i.e. within the band of reasonable responses). I must not substitute my own view as to what was the most reasonable thing to decide or to do.

62. In reaching my conclusions on these matters I have taken account of the statutory consideration mentioned in section 98(4)(a) of the Employment Rights Act 1996 – the size of the respondent's undertaking and the administrative resources available to it. The respondent is evidently a sizeable business with resources available to it, as borne out by its use of HR consultants in the investigation and the disciplinary process and appeal. It was also able to provide Mr Riley and Mr Buckwell (senior managers not based at the Tewkesbury branch) to act as decision managers on the disciplinary hearing and the appeal. This is not a case where the standards expected of an employer are in some way reduced by its small size or limited resources.

Issue 1.3.1

63. The question is whether Mr Riley had reasonable grounds for his belief that the claimant had committed the misconduct in question, based on the information he had at the end of the disciplinary meeting on 8 September 2021.

64. Each allegation was supported by at least two witnesses to the incident in question. The claimant denied the allegations and, for some of the allegations, he put forward possible explanations and other arguments to support his case there was no wrongdoing (for example he suggested that a comment he made could have been misheard). In my view it was open to Mr Riley to conclude, as he did, that the claimant had committed the relevant misconduct, despite the various matters relied on by the claimant by way of defence. It was for him to weigh up the evidence and make a decision on each allegation, which he did.

65. The claimant submitted that the written evidence was inconsistent as to exactly what was said or done by him and inaccurate. For example, there appears to have been some disagreement between the witnesses as to whether (in relation to allegation (a) in paragraph 30 above) the claimant used the word "sperm" or "spunk". However, in my view it is not unusual for different witnesses' statements about the same incident to vary, and it is for the decision maker to decide how significant, if at all, such variations are and whether, for example, they cast doubt on the truth or accuracy of the evidence. Mr Riley had every opportunity at the disciplinary hearing on 7 and 8 September 2021 and the subsequent appeal hearing to raise whatever points he wished to raise, and appears to have done so. There is no evidence to suggest that Mr Riley did not consider the evidence with the claimant's points and submissions in his mind when he made his decisions.

66. The claimant submitted that there was a relationship between some of the complainants and that some of them had reasons to be hostile to him. In particular one witness, he said, was at the time in danger of losing her job. These are not matters for me to decide as a question of fact, but they were matters he was entitled to put forward in his defence at the disciplinary hearing and again on appeal, as he did. Mr Riley and Mr Buckwell each appear to have considered that on the evidence before them there was nothing in these matters, or at least nothing in them to demonstrate some sort of collusion or improper motivation for making complaints about the claimant. In my view that was a position that it was open to them to take.

67. The claimant objected to the findings against him made by Mr Riley which he said had simply accepted the allegations as proved. He maintained that he had not committed any wrongdoing. However, there is no evidence to suggest that Mr Riley did not do what he said he did in his witness statement, namely to make decisions on the allegations based on the evidence and in the light of the claimant's representations and denials.

68. The claimant said that he was not the sort of person to make inappropriate sexual remarks. He gave an example during the hearing of the sort of thing he might have said when going to use the toilet (going to "shake hands with the unemployed") which is perhaps not an appropriate remark for the workplace. However, this issue is not a matter for me to judge in this case – it was something for him to raise in the disciplinary proceedings and appeal if he wished.

69. One of the claimant's grounds of appeal before Mr Buckwell mentioned a failure by Mr Riley to take account of what Ms Courtney had said to Ms Wilkins in her investigation. This does not appear to have been pursued by the claimant at the appeal or, indeed, at the disciplinary hearing, judging by the notes of what was said at the various meetings. Nor was it raised specifically with Mr Riley in cross-examination. However, Ms Wilkins' witness statement says that she did not consider Ms Courtney's assertions (that she had not seen anything inappropriate involving the claimant) to be relevant to the specific allegations against the claimant, because she was not a witness to the incidents or able to give evidence about them. It appears from his decision that Mr Riley shared that view. The evidence from Ms Courtney was, in my view, of some potential relevant to the wider criticism mentioned in the decision letter of the uncomfortable work environment for female employees encouraged by the claimant's behaviour. However, I consider that it was open to Mr Riley to base his decisions on each specific allegation of misconduct on the evidence directly relevant to the allegation. In any event, there was evidence before Mr Riley to support the criticism mentioned in the letter and it was also for Mr Riley to weigh that evidence against any contradictory evidence. I did not identify any evidence to suggest that he had failed to do so.

70. I conclude that Mr Riley did have reasonable grounds for the belief he formed that the complainant had committed the misconduct he found to have been proved. I must emphasise that this does not mean I have reached my own view as to whether the claimant did or did not commit the acts in question. That is not my function under the legislation. The question for me is whether, objectively, there were reasonable grounds in the evidence available at the time for the belief. I consider that there were.

71. The claimant had the opportunity to question the grounds on which the belief was formed on appeal and did so, at least in his written grounds. Nothing in what was said or produced in the appeal process casts doubt on my conclusion that Mr Riley had reasonable grounds for his belief that the claimant had committed the misconduct described in the dismissal letter.

Issue 1.3.2.

72. The issue here is whether Ms Wilkins carried out a reasonable investigation in all the circumstances. In assessing this I accept Mr Tunley's submission that a fair investigation does not have to be a forensic or quasi-judicial one.

73. She interviewed the original complainants and followed up on references to other potential witnesses, including in relation to matters raised at the disciplinary meeting on 7 September 2021. She did that in an open way that did not constitute "leading" the witness to produce particular answers. She also invited evidence from Ms Courtney. She kept records. There was no evidence to suggest that she had failed to contact anyone who was a potential witness of the incidents behind the allegations against the claimant made at the disciplinary hearing or had kept anything from Mr Riley or the claimant. When a doubt arose as to one of the alleged incidents of misconduct during that hearing she promptly investigated further and it was withdrawn.

74. The claimant complained that Ms Wilkins did not seek to disprove the allegations and in particular that she did not seek information from more of the female staff to get a fuller picture of the claimant and how he was perceived. This complaint was not, in my view, entirely consistent with another complaint he made (discussed further below) that the respondent had not respected his confidentiality around his suspension and the allegations against him. Also, it is not clear to me how (as the claimant saw things) she could have "disproved" specific allegations other than by following up any suggestions in the information she had that there were other potential witnesses to the incidents on which the allegations were based.

75. Ms Wilkins' witness statement explains that she thought she needed to investigate specific allegations against the claimant and that that a wider investigation involving staff members who had not witnessed the incidents involved would not have thrown light on them. She could have widened the investigation of course (which would have taken longer), and it is possible that the views of other staff members about the claimant might have been of some

relevance to consideration of the office culture at the Tewkesbury branch, but I do not consider that her failure to do this makes the investigation as a whole unfair. There were specific serious allegations against the claimant and I consider that it was open to Ms Wilkins to take the view she did that she needed to act promptly to establish the facts by seeking out the relevant evidence for each of them, rather than seeking evidence on other matters that in her view would not to throw any light on the specific allegations. Her role, according to paragraph 5 of the ACAS Code, was to establish the facts and this is what she set out to do.

76. The claimant complained of the failure by Ms Wilkins to take account of the evidence about him given by Ms Courtney. Ms Wilkins obtained this evidence in her investigation and did consider it, but she did not regard it as relevant to the specific allegations about incidents she had not witnessed or had information about. I consider that it was open to her to take that view. There is in my view nothing in this complaint in terms of the fairness or otherwise of the investigation.

77. I understood the claimant to assert that Ms Wilkins should have looked for reasons why the witnesses might have been hostile to the claimant or had some other reason for fabricating or exaggerating their evidence. He pursued this with her in cross-examination. Her response was that if she had felt there was something to investigate in that regard she would have done so. But she was asking questions as to what individuals had witnessed and received the answers she recorded. She considered her investigation to be balanced and fair. I do not consider there is anything in the claimant's point on this matter in terms of the overall fairness of the investigation, which elicited direct evidence from witnesses as to what they said they saw or heard. In my view her approach was a reasonable one to take. It is immaterial that some other employers might have taken a different approach.

78. The claimant submitted that there was insufficient investigation by the respondent on matters arising in his appeal to Mr Buckwell. The matters he referred to were things that he regarded as demonstrating some sort of improper relationship or collusion between Mr Riley and one of the witnesses. The question for me is whether there are grounds for determining that this failure (if it was a failure) was unreasonable and so impacts on the fairness of the investigation as a whole. I do not consider there to be any basis for reaching that conclusion. On appeal the claimant was able to, and did, raise his concerns about the investigation and it was open to Mr Buckwell supported by Mr Fleming, in line with respondent's disciplinary policy, to consider whether or not anything raised required further investigation. Some matters were pursued further, but not the allegations about Mr Riley and Ms Jones. I do not consider that to be an unreasonable position for the respondent to take,

79. I conclude that the investigation of the matters relevant to the decision to dismiss was a reasonable one, within the band of reasonable responses by the respondent.

Issue 1.3.3

80. The question here is whether the disciplinary procedure adopted by the respondent, taken as a whole, was reasonably fair. The standard is certainly not "perfection" and it is not unusual for there to be aspects of a disciplinary process that could have been done better or differently.

81. After Ms Wilkins' investigation, the claimant was summoned to a disciplinary hearing in the correct way, was given redacted copies of the written statements in advance, was at a hearing over two days taken through each allegation and the evidence for it and given a chance to answer the specific allegations and make representations, was notified correctly of the outcome and was given the opportunity to appeal, which he did.

82. On the face of it the respondent did the things that are expected of an employer in a disciplinary proceeding. However, the claimant raised a number of specific matters that, in his view, rendered the procedure unfair.

83. The claimant complained that he was not given sufficient notice of the case against him. He received redacted copies of the written evidence in the early evening of 5 September in advance of a meeting that started at 11 am on 7 September. That is a short interval. It might have been better to allow a greater interval, not least because the respondent's disciplinary policy says that usually two to seven days would be allowed to prepare for the hearing based on the information provided. This does not necessarily mean that the procedure was unfair as a result. The written evidence the claimant was sent was not lengthy, complex or difficult to understand. He could have asked for more time if he needed it (for example to consult a solicitor or union or to try to obtain his own evidence) but he did not do so. He did not raise this objection at the hearing when given the opportunity to do so and said he was happy to proceed. Nor was there any evidence that he was unable to do anything that he wished to do in preparation for the hearing. He also had the chance to make representations on the second day of the disciplinary hearing and, if he wished, to raise new matters in his appeal. In these circumstances I do not consider that the short time interval was itself something that made the procedure unfair.

84. The complainant also complained he was not given a report of the investigation or more information about the case against him. In my view what he was given complied with paragraph 9 of the ACAS Code. I understood his reference to a report to be to the "summary of relevant information gathered during the investigation" referred to in paragraph 2.20(a) of the respondent's disciplinary policy. Although it is correct that under the policy this summary appears to be a document distinct from the copies of the relevant witness statements mentioned in paragraph 20.2(c), it is not clear to me in this relatively straightforward case what a summary would have added to the redacted statements. It would have been wrong in advance of the hearing for Ms Wilkins to have expressed any views on the evidence. In these circumstances I do not consider the absence of a "summary" to be a material failure on the part of the respondent that

significantly affects the overall fairness of the process. In any event, at the hearing the claimant was taken through the specific allegations and given the chance to respond as he wished, which was to deny the allegations and make submissions as to why the evidence should not be accepted.

85. The claimant complained that his suspension had been badly handled, in three respects.

86. First, he complained of the delay in suspending him 5 days after the original complaint was made. He said it was unfair for him to be working with staff who had complained about him and when Mr Riley was aware of the allegations and evidence against him. He mentioned the fact that complaints were made about his behaviour during that 5-day period, I do not consider there to be anything in this point. The respondent was under no obligation to suspend him and, as Mr Tunley submitted, they are separate processes. Even if I am wrong on that and there was some sort of obligation to act, it takes time for an organisation to act in response to complaints of misconduct and make necessary decisions and in my view the delay was not unreasonable, especially as there was a bank holiday weekend during the 5-day interval. Nor can I see any credible basis on which the delay complained of (even the respondent was at fault in some way) could have significantly affected the overall fairness of the disciplinary process adopted by the respondent.

87. Secondly, the claimant criticised the way in which he was escorted off the premises on being told he was suspended. Suspension was clearly an option open to the respondent and I do not consider the manner of his suspension to have been unreasonable or unfair in the circumstances of allegations of serious misconduct, whether or not some other employers might have handled things differently. Again, I cannot see any credible basis on which the behaviour complained of could have affected the fairness or otherwise of the procedure,

88. Thirdly, the claimant objected to the way staff were informed of his suspension. This was accepted by Mr Buckwell in the claimant's appeal as a mistake that should not have happened. I do not consider that this mistake to have been that significant in practice, given that the sudden absence of the manager at the Tewkesbury branch was bound to cause speculation and several members of staff were aware of some of the circumstances involved in Ms Wilkins' investigation. There was every chance that office gossip would result in most staff members becoming aware of those circumstances. This put Mr Riley in an awkward position as he may reasonably have thought he needed to instruct staff not to discuss the matter. In any event, I do not consider that informing staff of the fact of suspension alone had any impact on the fairness of the disciplinary procedure.

89. The claimant submitted that informing the staff of his suspension constituted a breach of the ACAS Code. He was not able to identify a provision of the Code that covered this point and Mr Tunley submitted there was no such provision. I agree, and conclude there is nothing in the point.

90. The claimant was able to raise his concerns about his suspension at the disciplinary meeting and the appeal. I note that Mr Buckwell reached similar conclusions to me as to the possible impact on fairness of the proceedings, but I have reached my own view on the claimant's complaints.

91. The claimant submitted that Mr Riley was not an appropriate person to act as decision manager and to chair the disciplinary hearing. If true, that is capable of being a reason to consider the disciplinary process to be unfair. But I have concluded that it was not unreasonable for Mr Riley to act as decision manager, for the following reasons.

92. Mr Riley was a regional manager based outside the Tewkesbury branch. The fact that as a result he knew the people involved did not in my view make it unreasonable for him to act.

93. The claimant objected to the fact that Mr Riley had some involvement in the investigation, but there is little if anything in this point as his involvement was limited to initiating the disciplinary process once complaints had been made to him as a manager. There was no evidence of further involvement until Ms Wilkins recommended that a disciplinary hearing be convened, which was done by him with her assistance.

94. The claimant asserted that Mr Riley had some sort of relationship with two of the witnesses and this made it improper for him to act. I found his assertions on this point difficult to follow.

95. In one case he relied on the fact the witness had given Mr Riley a lift to the hearing venue on the second hearing day. This was the complaint which Mr Buckwell upheld, but did not consider material in terms of the fairness of the procedure. While I agree that this was a lapse of judgment, I do not consider that it impacted on the fairness of the procedure.

96. In the other case he claimed Mr Riley was too close to the witness concerned, referring to him giving her lifts home (when she could walk) and on the day of his suspension giving her a lift to the sales department and then home, to her giving him food from home and to his communicating with her on occasion directly rather than through her line manager. He raised this matter on appeal but evidently Mr Buckwell did not consider there was anything in the point. In his witness statement Mr Buckwell explained that he considered the allegations against Mr Riley to be mudslinging, and not a main ground of appeal worth addressing in his letter informing the claimant that the appeal was not upheld. In my view nothing in the claimant's allegations regarding this supposed relationship are sufficient to show that there was a close personal relationship between Mr Riley and the witness such that it would be unreasonable for him to act as decision manager.

97. The claimant also complained during the hearing that in reality Ms Wilkins was in charge of what happened at the disciplinary hearings. He does not appear to have raised this on his appeal. I have found that she was not in charge and that the decisions on the outcome were Mr Riley's. I do not consider her involvement (recommending that a disciplinary meeting be held, participation in Mr Riley's appointment as decision manager, briefing Mr Riley on the procedure to follow, attending to keep notes and intervening on occasion to ensure things kept on track) was in any way unreasonable or inappropriate. She is an HR consultant and it was part of her role to assist Mr Riley to proceed properly.

98. Finally, although he did not refer to the matter in his final submissions the claimant did during the hearing refer to the fact that (a) the appeal hearing was not reconvened after being adjourned to enable some further enquiries to be made and (b) he was not given any of the information elicited in those further enquiries. He requested this information, although that request appears to have been made after he was sent Mr Buckwell's decision on his appeal.

99. On this point I agree with the claimant that by failing to reconvene the appeal and by not supplying the information the respondent had not acted consistently with paragraph 2.46 of its own disciplinary policy. However, the reason for this appears to be because Mr Buckwell considered that the claimant had said everything he wanted to say about the fairness of the decision to dismiss and that the further enquiries he had adjourned to make (arising from things the claimant had said) had not produced anything new or of any significance.

100. In my view, based on the evidence about the information he was given (specifically, the notes made at the time), the decision Mr Buckwell made to proceed to a decision was not an unreasonable one to make. In any event, I do not consider that the failures in question (ie. not reconvening the appeal hearing and not sharing the information) had any impact on the overall fairness of the procedure adopted by the respondent in this case. They arose at the end of the appeal process, taking place after the disciplinary process resulting in the dismissal. There was a full appeal hearing in which the claimant appears to have raised all the matters and points he wished. And the claimant did not claim that there was anything in the information elicited from the further enquires that was significant or that would have led him to make new submissions to Mr Buckwell.

Issue 1.3.4

101. The question is whether, in the light of my conclusions above, dismissal was within the range of reasonable responses in this case. Those conclusions are, in summary, that after a reasonable investigation and following a fair procedure, the respondent formed a belief, on reasonable grounds, that the claimant had committed six acts of misconduct constituting harassment. The decision letter indicates that Mr Riley regarded three of those acts (the acts referred to in paragraphs (a), (c) and (e) of paragraph 30) as particularly serious. The conclusion reached by Mr Riley was that those three acts, taken

with the other things he refers to in that letter, constituted misconduct serious enough to justify summary dismissal.

102. I did not understand the claimant to dispute that those acts (if they took place) did constitute gross misconduct that could justify summary dismissal. He did not make any submissions to that effect, presumably because his case has always been that the acts never took place. He agreed in cross-examination that he was aware of the respondent's disciplinary and harassment policies as set out in the respondent's employee handbook, and that he understood that even a single incident could constitute harassment under the relevant policy. I would expect a senior manager to be aware of those matters.

103. In my view it was reasonable for Mr Riley to decide that the misconduct he had identified, taken together, was gross misconduct justifying summary dismissal. Summary dismissal was in the range of reasonable responses for an employer.

Issue 1.3: general

104. It follows from my conclusions on Issues 1.3.1 to 1.3.4 that the respondent acted reasonably in treating the reason for dismissal in this case as a sufficient reason to dismiss the claimant. Accordingly, the claim for unfair dismissal fails, and I do not need to consider issues 2, 3 or 4 or any issues relating to remedy.

B) **Claim for payment of bonuses for the respondent's financial year 2020-21**

The issues

105. The issues in relation to this claim are whether the claimant is entitled under his "pay plan" for the respondent's 2020-21 financial year entitled to receive from the respondent both (or either) of the following bonuses for the year, namely—

(a) an "Annual Bonus"; and

(b) an "Over Achievement Profit Bonus".

106. The claimant claims that he earned those two bonuses (as part of his remuneration) by meeting the conditions applicable to them under his "payment plan" for the year. He also relies on the fact that a colleague at the Tewkesbury Branch was paid the same two bonuses for the year.

107. The respondent denies any liability to pay the two bonuses on the following three grounds:

a. There were three annual bonuses available for the year under the pay plan and under the terms of the plan none of them were payable unless the claimant met the conditions applicable to all three of them.
b. The claimant's employment terminated before the bonuses became payable under the terms of the payment plan.

c. The claimant had committed a fundamental breach of the employment contract as a result of which the respondent was released from its obligations under the contract, including any obligation to pay bonuses.

108. The question whether the claimant is entitled to the bonuses in question depends on the proper interpretation of the relevant provisions of his employment contract and, where relevant, the case law on implied terms. There is no legislation relevant to the determination of the issues in the claim.

Findings of fact: the contract terms relevant to the claim

109. For the 2020-21 financial year there was a one-page "pay plan" in the bundle which applied to the claimant. In my view it was plainly intended to have contractual effect in relation to the year and I find that it did form part of the claimant's contract of employment. This was not disputed by the respondent. I was not referred to any contract terms specifically relating to the bonus payments other than (a) the payment plan and (b) the targets to which the payment plan refers. I infer from this that the terms set out in the plan are the only express contract terms relevant to the claim.

110. The payment plan sets out the claimant's salary and identifies eight kinds of bonus that could be earned by meeting or exceeding a target of some kind. These payments, taken together, constitute the claimant's remuneration package for the year. The bonuses described in the plan appear to have been designed to incentivise and reward good performance in different areas of the claimant's work over the year.

111. The payment plan document begins with an eight-column table consisting of three rows. The first column deals with salary (£28,275 for the year). The next six columns each deal with a particular kind of bonus payment. The bonuses are described in the first row as "Profit bonus", "AS bonus", "Web" "Motorhome Unit bonus" "Health & Safety" and "Annual Bonus". The final eighth column is headed "Total OTE" and gives a figure of £50, 275 which appears to be the total amount achievable by the claimant if he earned all the payments covered by the table.

112. The second row of the table indicates the period over which payments are earned. The salary column indicates that the salary relates to the year, as does the seventh column relating to "Annual Bonus" which says "£4000 100%" which I understand refers to a single payment for the year on meeting the relevant target. The entries in the second row for the other bonuses indicate an amount payable per month.

113. The third row of the table contains the sum, or the maximum sum, that could be earned over the year for each category of payment in the table.

114. Following the table are two lines of text each dealing with one further kind of bonus, an "Over Achievement Profit Bonus" payable at "5% of profit up and above target" and an "Over Achievement Unit/profit Bonus" payable at "£25 per Unit if above Profit and unit Target". It is not entirely clear to me why these bonuses are dealt with separately from the table, but it is probably because (a) they are opne-ended with no maximum and (b) each is dependent on achieving the profit target to which the "Annual Bonus" relates. Each refers to that target.

115. The rest of the document comprises 11 numbered paragraphs containing specific provisions about the various bonuses. Paragraph 1 says "Branch Profit is payable in accordance with the accounts produced in A/S Group accounts and will be paid at the end of the month in which the accounts are issued. Whatever this means, it does not appear to be relevant to the claim. Paragraphs 2 to 7 relate to the monthly bonuses and are not material to the claim. Paragraphs 8 and 11 relate to the calculation of bonuses.

116. The other two paragraphs, which are relevant to the claim, are as follows:
"9. The annual bonus of £4000 is based on achievement of annual profit as per terms and conditions above.
10.The annual bonus is paid the month following the completed accounts verifying the achievement of all set targets."

Other findings of fact

117. The parties were agreed that the relevant annual profit for the year exceeded the target relevant to the year for the "Annual Bonus" of £4000 and that as a result the "Over Achievement Profit Bonus" amount would (if the claimant was entitled to it) be £15, 402.05.

118. It was also agreed that he was not entitled to the "Over Achievement Unit/profit Bonus". I was told this was a near miss, and documents in the bundle show that a total of 153 units were sold in the year against an annual target of 175. It appears to have been unexpected for this target not to be met in a year where the profit target was met, and Mr Tunley suggested that this was due to the peculiar effects of the Covid pandemic during the year leading to the sales department being closed for several months. A document showing monthly unit sales bears this out as there is a three-month period in 2020 in which only one unit was recorded as sold. The claimant might justifiably feel somewhat aggrieved by his failure to qualify for this bonus, given the level of sales that was achieved despite the lockdown. But there was, understandably, no provision in the payment plan to cater for the unexpected effects of a forced closure of the building and the furlough scheme.

119. The claimant asserted that his case on the effect of the payment plan was supported by the fact that a colleague, Dean Waters, was paid the equivalent bonuses for the year under his similar payment plan. There was some support for this in Mr Davidson-Bowman's witness statement which stated that the likely reason for these payments was that Mr Waters was employed when the bonuses became payable. However, that statement uses the word "likely" which indicates some uncertainty on his part as to the precise circumstances. In his oral evidence Mr Davidson-Bowman said that the bonuses were in fact paid to Mr Waters on an ex-gratia basis to mark his increased responsibilities after the claimant's dismissal. This indicates that the respondent did not consider that Mr Waters was entitled to the payment. While paying an annual bonus the respondent did not think was due to Mr Waters appears to me to be a rather odd way of rewarding performance in the next year, the claimant did not offer any evidence as to the circumstances in which Mr Waters received the payment. So I accept Mr Davidson-Bowman's uncontroverted oral evidence on this point, which means that the payment to Mr Waters does not assist the claimant.

120. The evidence from Mr Davidson Bowman stated that the completed accounts emerged at the end of September or the beginning of October. This was not disputed, and I accept that was the case. It was unclear to me whether the Annual Bonus would have been paid in October or November 2021. It is clear though that the payment would have been made some weeks after the claimant's employment was terminated on 8 September.

Conclusions

Does the payment plan require the conditions for earning all three bonuses for the year to be met for any of them to be payable?

121. Mr Tunley submitted that the conditions for all three of the bonuses for the year had to be met before any of them were payable. For this he relied mainly on paragraph 10 of the payment plan, which says "*The annual bonus is paid the month following the completed accounts verifying the achievement of all set targets"*.

122. Remuneration is a key part of any employment contract and employees need to be able to understand what the terms governing their remuneration mean. In this case the payment plan provisions are not as clear as one might wish for provisions of an employment contract. It may be that whoever drafted them assumed that if the annual profit target was exceeded the other two bonuses would inevitably be payable. But that is speculation and, in any event, an unexpressed assumption of that kind is not the same as an intention expressed in the contract terms that all three bonuses must be earned before any of them are payable.

123. I must do my best to interpret the provisions as they stand.

124. I make the following observations about each of the bonuses which could be earned for the year:

Generally

126.1 The three bonuses are plainly presented in the plan as three separate things, rather than as three components of one thing.

The "Annual Bonus"

126.2 The table at the top of the plan calls the bonus in column 7 of the table "Annual Bonus". According to paragraph 9 of the plan the "annual bonus" is earned by achieving "annual profit as per terms and conditions above". The lower case "annual bonus" must refer to the "Annual Bonus" in column 7 of the table, given the reference to £4,000. Also, the term cannot be referring to either or both of the "Over Achievement" bonuses because, as their name suggests, they relate to achieving more than the annual profit target.

126.3 It is not clear exactly what "as per terms and conditions above" in paragraph 9 of the plan refers to. The words may be otiose or a rather grand reference to the very few words in column 7 of the table. In any event. I do not consider these words to be material to the claim.

127.4 In my view the annual bonus is earned, under paragraph 9 read with the words in column 7 of the table, by achieving the relevant profit target for the branch. It is not necessary to over-achieve on the profit target or to achieve the unit sales target in order to earn it. It would be surprising if that were the case and is not what paragraph 9 says. So if, for example, the profit target was met exactly (and no more) the £4000 would be earned, but not the Over-Achievement bonuses.

127.5 I say more about paragraph 10 below, the effect of which is disputed. But whatever it means I do not consider that there can be much doubt about the interpretation above that paragraph 9 provides that the "Annual Bonus" referred to in the table is earned by meeting the profit target, whether or not that target is exceeded and the unit target is met. That appears to me to make practical sense for a fixed amount.

The "Over Achievement Profit Bonus"

126.5 My reading of the term setting out the amount of the bonus ("*5% of profit up and above target*"), taken with the reference to "Over-Achievement" in the label, is that if there is over achievement of the branch profit target (ie the target is exceeded), the sum earned is 5% of the full profit, not just the excess profit. In other words, I would read "up and above target" as "up to and above target". There is no specific target

set for the Over-Achievement Profit Bonus so the "target" referred to must be the annual profit target governing the Annual Bonus.

126.6 In practice I would expect the chances of achieving exactly the annual profit target to be low. If the target is met it is likely to be exceeded, in which case "Over Achievement Profit Bonus" is apparently earned. But this does not mean it was the intention that the latter bonus must be earned in order to earn the Annual Bonus. That would contradict the express and explicit words of paragraph 9 and would not be consistent with the way the two bonuses are presented at the beginning of the payment plan as distinct things governed by their own terms.

126.7 The way this bonus is calculated is presumably designed to incentivise the claimant (and others with similar terms in their payment plan) to do their best to maximise profits. While that can be achieved by more sales, there are presumably other ways of doing that, such as cutting costs and, perhaps, finding other sources of income.

126.8 It is not obvious to me why it should also be necessary to meet the unit target in order to qualify for the 5% payment. That would not in my view make much sense given the apparent purpose of the Over Achievement Profit Bonus and the apparently complete proposition describing the bonus as 5% of the whole profit. For this reason, I consider that if that was the respondent's intention in setting the plan terms it is a matter that should have been expressed clearly.

126.9 The unit target is specifically addressed in the description of the "Over-Achievement Unit/profit Bonus" as one would expect from its name. But it is not mentioned in the provisions at the start of the plan describing the other bonuses, and there is no equivalent of paragraph 9 spelling out that the unit target must be met for the 5% to be payable.

The "Over Achievement Unit/profit Bonus"

126.10 The description of this bonus at the top of the plan ("£25 per Unit if above Profit and unit Target") indicates that this is earned by exceeding both the profit target (ie. the target applying to the "Annual Bonus") and a separate unit target". Documents in the bundle indicate this target was to sell 175 units. I read the description as applying the bonus to all the units sold (if the targets are met), not just the excess over the target.

126.11 In my view that description provides a complete proposition. Clearly both the targets must be exceeded. In practice this means, in my view, that if the bonus is earned, the other two bonuses will also have been earned. But it does not follow from that that this bonus, based on units sold, has to be earned before the other bonuses can be earned. To

me that would be a surprising result that, if intended, should have been made clear.

125. Mr Tunley asserted that paragraph 10 of the plan requires all three bonuses to be earned before any of them are payable. I do not agree with his submission, for the following reasons:

(a) The words "The annual bonus" at the start of the paragraph are the same as the words at the start of paragraph 9. I consider them to be referring to the same thing, that is to say the "Annual Bonus" of £4000.

(b) The provision is on its face about the time at which "the annual bonus" is to be paid, rather than the terms on which it is earned. Those terms appear in paragraph 9. Paragraph 9 serves a useful purpose to inform the employee when they can expect to receive payment. This is after the relevant accounts have verified the facts that demonstrate what (if anything) has been earned.

(c) The terms governing how the three separate bonuses are earned appear earlier in the plan and are on their face more or less complete in terms of indicating how the bonus is earned. As mentioned above, if the respondent's intention was to make the Over Achievement Profit Bonus dependent on both the other bonuses (and not just the annual profit target mentioned in the description of that bonus at the top of the plan) that should in my view have been made clear, perhaps in a paragraph equivalent to paragraph 9.

(d) My reading of it means that paragraph 10 refers only to the "Annual Bonus" and not the other two Over Achievement Bonuses. I accept that that means the words "all set targets" are not quite right because there is, it appears, only one target for the Annual Bonus. But that may simply have been a drafting error in the respondent's document. I do not consider it right to read those words as requiring the paragraph to be read as applying to all three bonuses at once so that they must all be earned for any of them to be payable.

(e) Paragraph 10 refers to "achieving" (ie. meeting) "all set targets", rather than exceeding them. Achieving is not the right word for the Over Achievement bonuses, which are only paid for exceeding the relevant target. But it is the right word for the Annual Bonus.

126. In my view paragraph 10 is somewhat obscure but should be read as referring only to the "Annual Bonus" and verification of achievement of the relevant annual profit target. That would make the most sense, in my view, which is a relevant consideration in the case of an obscure contractual provision. There was a basic annual bonus to be achieved by meeting a profit target, together with two supplementary bonuses earned where that target is exceeded (and in the case of the Profit/unit bonus where the unit target is also exceeded). There is no obvious reason why the two supplementary bonuses should be conditional on each other, as well as meeting the conditions

applicable to each of them. If that was what the respondent wanted the position to be, the terms would need to be clearer on the point in the provisions how the bonuses are earned, rather than left to be inferred from an obscure sentence that appears on its face to be about something else (the timing of payments by reference to the production of accounts).

127. The two "Over-Achievement" bonuses are clearly dependent on exceeding the profit target, and so could not be paid before the figures for annual profit are verified. I would infer that the contractual intention is that those bonuses would be paid either when the Annual Profit bonus is paid or, if later, when the unit sales have been verified.

128. It is possible that in drafting the payment plan terms the author may have simply assumed as a matter of fact that if the annual profit target was reached, the other bonuses would be earned too (despite the need to meet the Unit target for the Unit/profit bonus), but that is not the same as an intention to formally link the two bonuses so that each is legally dependent on the other. However, this is speculation on my part as to a possible explanation for the wording and does not form part of the reasoning for my interpretation.

129. My analysis of the contract leads me to the following specific conclusions:

(a) Whatever the position in relation to the other bonuses, the Annual Bonus of £4000 was "earned" for the 2020-21 year. There is no necessary link to the other bonuses for the year - it could have been earned had the profit target been met exactly.

(b) The Over Achievement Profit Bonus was also earned for the year, because it is dependent only on exceeding the profit bonus, and not on meeting the two express conditions for earning the "Over-Achievement Profit/unit Bonus".

(c) The "Over-Achievement Profit/unit Bonus" was not earned (as the parties agreed), but only because the unit target was not exceeded. If it had been earned the other two bonuses would inevitably have been earned as a matter of fact, but only because exceeding the profit bonus would meet the conditions for both the Annual Bonus and the Over Achievement Profit Bonus. It is not because the contract requires all the bonuses to be earned if the conditions for all of them are met.

Does paragraph 10 of the payment plan prevent the bonuses becoming payable because it refers to a time after the claimant's dismissal?

130. Mr Tunley's second submission was that even if the two bonuses in question were "earned" for the year (as I have concluded they were), they never became payable to the claimant because he had ceased to be employed before the time identified in paragraph 10 as the time when they would be paid (after verification in the relevant accounts). He relied on what he described as a

practice or custom in the respondent's business or of the trade (by which I understood Mr Tunley to refer to the motorhomes retail/service trade) and said the amount of the bonuses were not liquidated until the accounts were produced around the end of September 2021.

131. I have found that it is not clear from the evidence whether the completed accounts referred to in paragraph 10 were produced at the end of September or the beginning of October. As the claimant was dismissed early in September this uncertainty is academic in this case. I should add that the words "the month following the competed accounts …" appear to me to be somewhat ambiguous. I think they probably mean that payment will be made in the month after the month in which the accounts are completed, although it does not say when in the month payment will be made. One might expect this to be the end of the month (with salary) but there appears to be some discretion left to the employer on this matter. Most employees are now paid by bank transfer and it presumably takes time to process the information so that the right payment is made with the necessary pay slip. My reading would also enable the rule in paragraph 10 to work when accounts are completed towards the end of a month.

132. Mr Tunley appeared to submit that the bonus amounts became payable at the time when the accounts were completed, rather than at the end of the month following the month in which that event happens (which is when paragraph 10 says the Annual Bonus is to be paid). I am not sure exactly why he opted for that time, but as will become apparent I do not consider that I need to decide whether his choice was correct.

133. As set out above, I read paragraph 10 of the payment plan as being about when the Annual Bonus will be paid, rather than about the terms on which it is earned. As that leaves the payment date for the Over Achievement Profit Bonus in limbo under the terms of the plan, I would also imply into the payment plan a term to the effect that the Over Achievement Profit Bonus is to be paid at the same time, given that it depends on exceeding the same target and can presumably be calculated by reference to the same accounts.

134. It appears to me that under the express terms of the plan the two bonuses in question are earned by the claimant if the profit target is exceeded for the 2020-21 financial year ending in August 2021.

135. I would be prepared to imply into the contract a condition that the employee must be in post at the end of the year, in order to earn a bonus relating to performance for the whole year. Otherwise, the employee would benefit from other people's performance for at least some of the year. There was some discussion about this during the hearing and I understood it to be accepted by the claimant that if he had ceased to be an employee before the

end of the 2020-21 year he would not have been entitled to anything. His point was that he was in post at that time and it was wrong to deny him his two bonuses.

136. So the narrow question on this aspect of the claim boils down to whether the claimant, by ceasing to be employed during the relatively short interval between the end of the financial year and the payment date under paragraph 10, loses the right to be paid the two bonuses in question.

137. In my view the answer is that, according to the contract terms, he is entitled to be paid the two bonuses. In my view all paragraph 10 is doing is making clear (as one might expect) that payment will not necessarily be made immediately after the year end. Instead, it provides that it will be made after the completion of the relevant accounts. The bonuses were earned, in my view, at the end of 31 August 2021 when the profit target was exceeded. The claimant worked for the whole of the year and exceeded the profit target. That was after all the very purpose of the bonuses as an incentive to better performance for the year.

138. It appears to me that an interpretation that reads paragraph 10 as excluding from the bonuses an employee who leaves after the year end but before the date the accounts are completed could have capricious effects if, for whatever reason, there is delay in the preparation of completed accounts. That very issue is demonstrated in the circumstances of this case, given the uncertainty as to the exact date on which the relevant accounts were completed. If the accounts were finalised in October that potentially increases the gap between the year end and the payment date by up to a month. Also, the completion date could be manipulated by delaying the accounts so that an employee who ceased to be employed during the delay would lose out. The capricious effect of that interpretation is in my view another reason to support my view that the bonuses were earned at the end of the year, so that by 1 September 2021 the claimant had earned the two bonuses.

139. The terms of the payment plan were determined by the respondent and it was open to them to be clear in the contract terms if they wished to exclude employees in the claimant's position.

140. Mr Tunley asserted, I understood, that there is some sort of practice in the respondent's business that employees in the claimant's unusual position would not receive a bonus. The only evidence for this appears to be a statement by Mr Davidson-Bowman in his written statement that "*we don't pay bonuses to any ex-employees and … commissions and bonuses are only payable when matters are completed prior to the employee's leaving date*". He said more or less the same thing in his oral evidence. The difficulty with this is the generality of what he said and the fact that he was not focusing on the

actual contract or the possible difference between an employee who leaves before the year end and one who leaves after it. He may well have been under the impression that the contract reflected the position he set out. But whether it did so is another matter.

141. I do not regard that evidence as anywhere near sufficient to justify me in holding that there is an implied term of the contract to the effect that a person who leaves employment after the year end but before the completion of the accounts is not entitled to a bonus that he or she has otherwise earned. Specifically, I have not been presented with any evidence giving examples of other employees who had been denied a bonus in similar circumstances to the claimant. For these reasons I cannot accept Mr Tunley's submission in relation to respondent's business practice.

142. Mr Tunley also asserted there was a custom in the trade of not paying bonuses to employees in the claimant's circumstances. For that I understood him to be relying on what Mr Davidson-Bowman said orally about the respondent's "practice". I was not entirely sure whether his statement was referring to a wider trade custom or practice or not. But even if it was, I do not regard it as anywhere near sufficient to establish a custom of the kind that might conceivably be given contractual effect through an implied term in the claimant's contract of employment. There was no evidence as to the behaviour of the respondent's competitors in relation to paying bonuses to employees in the claimant's position or what their employment contracts say on the point. For these reasons I cannot accept Mr Tunley's submission on this point.

143. If I had identified sufficient evidence to support Mr Tunley's submissions about the respondent's business practices or the trade custom or practice, it would have been necessary for me to consider how, if at all, that affected the claimant's contract of employment, given my interpretation of the express terms of the payment plan. But as I have not identified any such evidence, I do not need to do that. There might well be issues as to the principles applicable to the implication of terms into employment contracts on the basis of such practices or customs and as to the effect of the legislation on an employee's right to written particulars of the terms of their contract.

Was the respondent released from payment by the claimant's fundamental breach of the employment contract: rule in Photoproduction v Securicor?

144. Mr Tunley's final, though brief, submission was that if I found against the respondent on his other submissions (as I have done) the respondent was, nonetheless, relieved of liability to pay the annual bonuses to which he would otherwise be entitled, because of his fundamental breach of contract in committing the misconduct which the respondent had relied on in dismissing the claimant. He did not develop this argument in any detail.

145. For this submission he relied on the case of *Photo Production Ltd v. Securicor Transport Ltd [*1980] 1 All ER 556, a leading case on the subject of fundamental breach that is familiar to commercial lawyers and students of contract law. That case related to the operation of a contract for services where a security guard in a factory deliberately set a fire which destroyed the factory and stock stored in it. The circumstances of that case are a long way from the circumstances of this case involving an employment contract.

146. Ingenious though Mr Tunley's argument is, he did not refer me to any authority to suggest that in the context of an employment contract the concept of "fundamental breach" as explained in that case could apply to deny an employee the right to remuneration otherwise due, whether generally or in the circumstances of the claimant's case. On the contrary (and as happened in this case) employees who have been dismissed, even if dismissed summarily, will receive back pay and holiday pay, for example. I see no reason why earned bonuses should be treated any differently. In the absence of any authority establishing and explaining the application of *Photo Production* to remuneration due under employment contracts I am unable to accept Mr Tunley's submission that the rule in that case applies in the circumstances of the claimant's case.

147. I should add that if the rule did apply in those circumstances, it would appear to be necessary for me to consider and determine whether there had been a fundamental breach by the claimant, such as to relieve the employer of any liability to pay the bonuses. The claimant has always maintained that he did not commit any wrongdoing, so the existence of facts demonstrating a fundamental breach would need to have been established by evidence and submissions in the usual way. I doubt whether it would be right for the Tribunal to simply infer a fundamental breach by reference only to the employer's findings and conclusions in their disciplinary process.

148. For all the above reasons I conclude that the claim is well-founded and so the respondent is liable to the claimant for the agreed sum of £19, 402.05. At the conclusion of the hearing, after I gave oral judgment, Mr Tunley asked me to confirm that this is a gross amount and I did so.

Employment Judge Hogarth
Date: 6 January 2023

Sent to the parties: 17 January 2023

For the Tribunal