



EMPLOYMENT TRIBUNALS

Claimant: Djamshid Rustambekov

Respondent: Fieldfisher LLP

Heard at: London Central Employment
Tribunal (by CVP)

On: 30, 31 July and 1 August
2024

Before: Employment Judge Anthony

REPRESENTATION:

Claimant: Mr Z Sammour (Counsel)

Respondent: Mr M Egan (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant's claim for unfair dismissal is well founded and succeeds.

REASONS

Preliminary Matters

1. There is an anonymity and reporting restriction order in place pursuant to the Order of Employment Judge Stewart dated 25 July 2024. Under Rule 50 (3)(b) and (d) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, it is ordered that:
 - a) The individuals listed in Confidential Annexe A to the Tribunal's Order dated 25 July 2024 shall be referred to only as Colleague 1 and Colleague 2 respectively during the course of any hearing in these proceedings or in its listing or in any documents entered on the Register or otherwise forming part of the public record.
 - b) Until the expiry of 12 months from the date of promulgation of the full merits judgment in these proceedings, it shall be prohibited for any person in the United Kingdom to publish the names of Colleague 1 or Colleague 2, in connection with these proceedings.

Introduction

2. The numbers in brackets refer to the page numbers in the joint hearing bundle.
3. The claimant claims unfair dismissal. There is no dispute the claimant was dismissed from his employment on 6 November 2023 because the respondent held a genuine belief of the following:
 - a) in January 2023, the claimant had sexually harassed Colleague 1 (also referred to as C1) by repeatedly inviting her to cancel her Uber and return with him to the office following a party organised by another employee of the respondent; and
 - b) on 20 July 2023, the claimant had acted inappropriately toward Colleague 2 (also referred to as C2) at a work party by following her to the toilets, placing his arm around her waist and waiting for her outside the toilet.

The Evidence

4. The Tribunal heard evidence from Ramatu Banga (Partner) and John Cassels (Partner) on behalf of the respondent. The claimant gave evidence on his own behalf.
5. The Tribunal was provided with:
 - a) a separate index and a joint hearing bundle totalling 663 pages;
 - b) a separate index and additional joint hearing bundle totalling 22 pages;
 - c) a separate index and bundle of witness statements totalling 57 pages;
 - d) respondent's skeleton argument totalling 12 pages;
 - e) claimant's written closing submissions totalling 14 pages;
 - f) respondent's written closing submissions totalling 11 pages;

The Issues

6. It was agreed by both advocates that the question of remedy would not be dealt with at this hearing. The issues before the Tribunal were as follows:
 - a) Whether the respondent's belief was based on reasonable grounds, i.e. the view that there was misconduct is a view within the band of reasonable responses;
 - b) Whether the respondent had followed a reasonably fair procedure;

- c) Whether it was within the band of reasonable responses to dismiss the claimant rather than impose some other disciplinary sanction.

Relevant Law

7. The relevant law of unfair dismissal is set out in section 98 of the Employment Rights Act 1996:

“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—

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
- (b) relates to the conduct of the employee,
- (c) is that the employee was redundant, or
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

- (a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
- (b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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.”

8. It is for an employer to show the reason for dismissal and that it was a potentially fair one that falls within the scope of section 98(1) and (2) of the Employment Rights Act 1996 and was capable of justifying the dismissal of the employee.

9. The reason for dismissal is the “set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee” (*Abernethy v Mott Hay and Anderson* [1974] ICR 323, CA at [330]).
10. The test to be applied is set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379 (“*Burchell*”). The essential questions for the Tribunal are as follows:
- a) Did the respondent believe that the claimant was guilty of misconduct?
 - b) Did the respondent have reasonable grounds for that belief?
 - c) Did the respondent carry out such investigation into the matter as was reasonable in the circumstances?
 - d) Was the respondent's decision to dismiss the claimant within the range of reasonable responses?
11. The test to be applied, at each stage of the analysis, is whether the employer’s conduct fell within the range of reasonable responses open to the reasonable employer (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439). The correct approach to the above is set out in *Trust Houses Forte Leisure Ltd v Aquilar* [1976] IRLR 251 (*per* Phillipps J at [24]):

"It has to be recognised that when the management is confronted with a decision to dismiss an employee in particular circumstances there may well be cases where reasonable managements might take either of two decisions: to dismiss or not to dismiss. It does not necessarily mean if they decide to dismiss that they have acted unfairly because there are plenty of situations in which more than one view is possible."

12. In *British Leyland UK Ltd v Swift* [1981] IRLR 91, Lord Denning MR expressed the approach as:

"The first question that arises is whether the Industrial Tribunal applied the wrong test. We have had considerable argument about it. They said: "... a reasonable employer would, in our opinion, have considered that a lesser penalty was appropriate." I do not think that that is the right test. The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him."

13. Therefore, the mere fact that the employer could have imposed a sanction lesser than dismissal does not render the dismissal unfair. It is only unfair if no reasonable employer would have dismissed.

14. Employers are not required to undertake exhaustive investigations. The law recognises “common sense limits” on the degree of investigation required (*per* Lord McDonald in *Gray Dunn & Co v Edwards* [1980] IRLR 23 at [11]). Furthermore, an appeal may cure procedural defects prior to dismissal. The question for the Tribunal is whether the process as a whole is fair.

15. In *Sharkey v Lloyds Bank plc* UKEAT/0005/15, Langstaff J held at [26]:

“It will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer’s process. It will be and is for the Tribunal to evaluate whether that is so significant as to amount to unfairness, any prospect of there having been a dismissal in any event being a matter for compensation and not going to the fairness of the dismissal itself. In assessing fairness an overall approach must be taken (see *Taylor v OCS Group Ltd Whitbread plc v Hall* [2006] ICR 1602 and [2001] ICR 699, the former in particular emphasising that procedure and substance run together where the section 98(4) test is being applied). Procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together.”

16. It is not a requirement of a fair process that an investigatory meeting take place before disciplinary proceedings commence. It is important that at the disciplinary meeting stage the allegations made against the employee are known. The employer must put the allegation clearly to the employee so that on a fair and common sense reading of the relevant documentation, the employee could be expected to know what charges he or she has to address. This duty is not satisfied if the employee has to speculate what may be in issue and what may not be (*Sattar v Citibank NA* [2020] IRLR 104 at [51]).

17. If the *Burchell* test is overcome by the respondent, the burden of proving whether the dismissal was fair under section 98(4) of the Employment Rights Act 1996 is neutral (*Boys and Girls Welfare Society v McDonald* [1996] IRLR 129).

Findings of Fact

Respondent’s Investigation

18. On 20 July 2023, members of the respondent’s Dispute Resolution team celebrated a work event at the Savage Garden bar, Hilton in London. The claimant, Colleagues 1 and 2 attended the event.

Colleague 1

19. On 30 July 2023, Colleague 1 alleged to the respondent that the claimant had sexually assaulted her at that event (page 113). At an investigatory meeting conducted by Matt Akin, a HR Business Partner of the respondent, Colleague 1 said the claimant:

“... routinely has tried to come onto me - I've always said no, not interested and he is married. He tried a lot in January to point I had to ask Bhav for help that evening.” [The claimant] was saying to me at drinks how he is angry that I always reject him that he tries so hard and I'm never interested. I said again I'm just not interested and thought that would be the end. He was like “Come on C1 come on you always reject me it's so upsetting”. “Why don't you come in to the bathroom and shag me in there”. I said I'm not going to do that- not interested. I went back to friends didn't pay attention to him.

...

Later in the evening I went to go to the bathroom which was away from the tables. The layout was that it was ladies then accessible toilet next to it. When I opened the door to come out he was waiting for me.

He grabbed me and took me into the disabled cubicle and locked the door. I went for the lock and he pinned me against the wall. I kept trying to reach the lock and he pushed me away from it. He kissed me and I didn't want it to happen. He tried to move his hand under my skirt. I was trying to move away. I don't know how long I was in there for but Jas noticed I was missing and I could hear her calling for me outside. I said “Jas knows I'm in here unlock the door”. He did. Jas could see I was upset and so we went home...”

20. Colleague 1 also recounted an incident earlier in the night where she stated the claimant had taken her phone off her when she was speaking to another colleague:

“Earlier in the night I'd been on phone to Elora (who wasn't at the event). He had taken phone off me and said to Elora how upset he was that I always reject him and I'm not interested.”

21. When asked by Mr Akin whether anyone had overheard the claimant's remarks that he was interested in Colleague 1, Colleague 1 stated that Jas Sembi and Colleague 2 were listening. Colleague 1 also stated that “when we're out he'll tell me if he could pick anyone in team to sleep with it would be me, ask why wouldn't I just do it. I've told him not interested.”

22. In that same interview, Colleague 1 referred to an earlier incident in January 2023 involving the claimant as follows (page 114):

“On a night out in January when I went to leave he kept trying to get me to cancel my Uber and go back to office with him. He had a go at me then and tried to persuade me to go. Bhav then had to help me and stayed with me until I got home.

...

He's never threatened me in any way but I did feel unsafe in January when we left the bar and he came out too- if Bhav hadn't been there I would have felt unsafe.”

23. Colleague 1 also alleged that the claimant had acted inappropriately toward another employee of the respondent, Colleague 2. Colleague 1 said the claimant:

“... has a history of inappropriate behaviour with Colleague 2 - that’s why Jas grabbed her too when we left.

24. In response to a question as to whether the inappropriate behaviour towards Colleague 2 was a “known thing”, Colleague 1 said:

“It’s hard to know. It caught me off guard until it started escalating. C2 has told me things and Bhav has said his behaviour is creepy, but don’t think wider known.”

...

It’s really for Jas to say but I understand she saw him try to follow Colleague 2 to the bathroom earlier in the night so I’m nervous his behaviour is not a one off...”

Jas Sembi

25. Mr Akin held a meeting with Jas Sembi, an Associate in the Dispute Resolution Team on 31 July 2023 (page 121). Ms Sembi told Mr Akin that:

“Colleague 2 had then left to go to the toilet and I noticed [the claimant] followed after her and put his arm around her. I went after both of them and went to the toilet and checked she was ok. I said I noticed [the claimant] had put his arm around you - she said he did but “I told him to f off”.

Some time later, we were chatting and Colleague 1 was chatting to [the claimant] about some other guy she was interested in. We were all just having general chit chat - she was next to me in earshot. I thought nothing was going on – normal chat.

She said she was going to the loo and some time later I realised she hadn’t come back. She was a bit drunk so I thought I’d go and check on her. I checked all the women’s cubicles and she wasn’t in there. I thought maybe I’d missed her and she’d gone back to the table, but I went back and she wasn’t there. I went back to the toilets and checked again, and thought I’d check the disabled in case she was unwell in there. I knocked on the door and called her- I heard some muffled [n]oise but couldn’t hear very well. I then heard “Jas Jas I’m in here”. The door then unlocked and Colleague 1 was looking pale and stunned. [The claimant] then comes out too. I was in shock - didn’t know what was going on.

By her face it was apparent that she was shocked and scared. I told him I didn’t want to hear from him and would deal with him later. Colleague 1 then pulled me into the toilet, and I asked her “Was any of that consensual, I need to know”. She shook her head and was very flustered.

She said he had been waiting outside and dragged her into the toilet and stood in front of the door and made advances at her.

I said right we’re leaving - grabbed her hand and her stuff and Colleague 2 too on the way out. [The claimant] went to stand up and say something to me I said “Don’t you even dare I’ll talk to you later”.

Colleague 2

26. On 1 August 2023, Mr Akin spoke with Colleague 2 (Paralegal). Colleague 2 told Mr Akin the following (page 136):

“I left with Colleague 1 and Jas. Colleague 1 was really upset and told us what had happened - she said she went to the toilet and [the claimant] had followed her, locked her in the disabled toilet and kissed her and wouldn't let her out.”

27. As to the claimant's conduct toward her, Colleague 2 told Mr Akin:

“I got up to go to the toilet and he said he'd come with me walk with me- he put his hand on my waist and I took it off. Jas came to the toilet and asked if I was ok. I said I was.

[The claimant] was waiting when I came out and walked back to the table and he tried to put his hand on my waist again. There was flirty behaviour from him through the night.”

28. Mr Akin asked Colleague 2 whether Colleague 2 was aware of the claimant's behaviour being inappropriate and Colleague 2 replied:

“I'm not aware that he's made advances to anyone - hes been a bit flirty but not overstepping mark or necessarily made me feel uncomfortable. I'm not aware of him acting like that on previous occasions.”

29. Mr Akin spoke with other employees, Bhavul Haria (Senior Associate), Elora Mukherjee (Director), Arik Aslanyan (Partner) and Andrew Sanderson (Partner). The relevant parts of their evidence are summarised here.

Bhavul Haria

30. Mr Haria could not recall any relevant information relating to the 20 July 2023 event. In relation to the January 2023 event, Mr Haria stated as follows (page 133):

“I remember something that happened around January, maybe 6/7 months ago, after we had been out for drinks. At the end of the night, we had ordered Ubers home but [the claimant] was trying to persuade Colleague 1 to cancel her Uber and go home with him. He was pestering her and [the claimant] said he could drive her home, but the Uber arrived and so nothing else happened. I do know that Colleague 1 felt uncomfortable with this.”

Elora Mukherjee

31. In relation to the phone incident with Colleague 1, Ms Mukherjee stated the claimant (page 131):

“... took the phone off her to speak to me. He said something along the lines "I haven't spoken to you for ages, can you believe this guy hasn't messaged Colleague 1 back? She is so hot and so great and I have tried previously with her but she knocked me back, I was really annoyed about it. I can't believe she

knocked me back! This guy is crazy for not responding or wanting anything." I did not really say anything back; in fact, I do not think I said anything. Eventually [the claimant] handed the phone back to Colleague 1."

32. When asked as to what Colleague 1's response was regarding the phone incident, Ms Mukherjee stated:

"She did not really react or say anything about him doing it. I do not believe the incident had taken place yet. It is not my opinion that counts, but I do not think his behaviour is appropriate. [The claimant] has made it very clear that he tried it on with her previously and was disappointed she had not reciprocated this. You know he is married, right?"

33. When asked whether she had witnessed the claimant behaving inappropriately, Ms Mukherjee stated:

"In my perspective, yes. It is a difficult thing to comment on because we do have a lot of banter, and sometimes it is flirtatious. My opinion is that if [the claimant] had the chance to shag anyone, he would. If it is consensual, I do not have a problem with it, but when it is not consensual, that is when I have an issue.

...

I would not go as far as saying I have felt threatened or unsafe, but I do feel as though he is a bit of a pervert. I understand he tried previously with C1 and I also believe he has a thing for someone else in the group and that he had once followed her to the toilet too. I do not necessarily feel unsafe with him, but I would not seek out his company and I would rather not be around him."

Arik Aslanyan

34. Mr Akin interviewed Mr Aslanyan and asked him what Ms Sembi had said. Mr Aslanyan's reply was (page 134):

"She said she saw [the claimant] lock himself in the toilet with Colleague 1 and he was also behaving inappropriately towards Colleague 2 earlier in the night. I said what do you want me to do? She said wait until Colleague 1 or Colleague 2 contact you - it's not my place. I said that's fine.

35. It is clear from Ms Sembi's own account that the version iterated to Mr Aslanyan (or subsequently reiterated by Mr Aslanyan to Mr Akin) was incorrect. I find from Ms Sembi's interview with Mr Akin that she did not see the claimant lock Colleague 1 in the toilet. It is clear that Ms Sembi was told by Colleague 1 that the claimant locked Colleague 1 in the toilet. The only matter which Ms Sembi witnessed was both of them exiting the accessible toilet together.

36. In relation to his conversation with Colleague 1, Mr Aslanyan stated:

"When I woke up I had a missed call from Colleague 1 around 2.30am. I called her back on the next morning and I asked her what happened. She said he locked her in the toilet, she felt intimidated and alarmed. I asked her if anything happened - other than being locked in? She said no, nothing else happened.

I was left with the message there was no sexual contact. Obviously highly inappropriate he locked her in but nothing sexual was mentioned. I asked her what she wanted to do - did she want to raise with HR? She said she wanted me to talk to him to tell him it was highly inappropriate. I said I would do that straight away.”

37. Mr Aslanyan states he spoke to the claimant’s line manager and asked the claimant’s line manager to speak to the claimant. Mr Aslanyan also confirmed he would speak to the claimant. He recounted his conversation with the claimant to Mr Akin:

“I told [the claimant] off – I told him it was highly inappropriate. He did not try to defend himself - he was very contrite, said he was sorry and let everyone down. Because I wasn't aware of anything sexual going on - I told him he was lucky she hadn't gone to HR and he needed to apologise.”

38. Mr Akin asked Mr Aslanyan as to whether the claimant had confirmed or told Mr Aslanyan what happened. Mr Aslanyan’s stated as follows:

“I think he was drunk - he didn't deny he was very drunk and may have been appropriate. I didn't ask him if it did or didn't happen - I told him I understand this is what happened, what were you thinking? He said I'm sorry I drank too much etc - the conversation didn't go to "did you or didn't you?".”

39. Mr Aslanyan went on to suggest Mr Akin speak to the claimant’s line manager whom he stated knew the claimant better than anyone else in the firm.

Andrew Sanderson

40. Mr Akin also interviewed Mr Sanderson. Mr Sanderson stated that Ms Sembli told him the following (page 138):

“[The claimant] was being very 'grabby' and over the top of physical touching/ grabbing.

41. Mr Sanderson observed the following of the claimant and Colleague 2:

I saw that he had his arm around Colleague 2 and was almost lying against her, sort of in a hug with her. It was fairly obvious Colleague 2 felt very uncomfortable with this.”

42. Mr Sanderson stated that he went to speak to the claimant and stayed in the vicinity to keep an eye on what was going on. Mr Sanderson also stated that he noticed the following:

“I had noticed a couple of things that did not seem right for example, I noticed Colleague 2 and Colleague 1 walking in the direction of the toilet and [the claimant] following in that direction shortly after. This was prior to anyone leaving the event.”

43. Mr Sanderson stated that when he was in the back of a taxi on his way home on 20 July 2023, he received a call from Ms Sembi:

“[Jas Sembi] then called me and explained that towards the end of the night, [the claimant] had followed Colleague 1 and Colleague 2 into the toilet and different times. He had waited outside of the female toilets for both of them at separate times. When Colleague 1 had come out of the toilet, [the claimant] pushed her into the disabled toilets and locked the door with them both in there. He would not let Colleague 1 out until she kissed him.”

44. Mr Sanderson told Mr Akin that he also spoke to Colleague 1. It does not appear Mr Sanderson had asked for Colleague 1’s version of what happened on 20 July 2023. When Mr Akin asked what Colleague 1 said, Mr Sanderson replied:

“I told her whatever she wants to do, I would support her. Whether she wanted to make a formal report or to have a chat with Colin Gibson (CG) and me. I let her know it was her decision. said she did not want to make a fuss and [Arik Aslanyan] said that he would deal with [the claimant].”

Respondent’s Investigation Report

45. Mr Akin concluded his investigation on 1 August 2023 and prepared a report summarising the allegations and recommending that the respondent commence disciplinary proceedings against the claimant for potential acts of gross misconduct (page 139-142). The claimant was away from work on annual leave when Mr Akin conducted his investigation. The claimant was not interviewed as part of the investigatory process.

46. The relevant parts of the Investigation Report are set out here:

“Colleague 1 advised that in January 2023 after a “team drinks event”, while she was waiting for a taxi, [the claimant] had told her “to cancel it [taxi]” and insisted she “come back to the office with me [the claimant]”. This was corroborated by Bhavul Haria (Senior Associate) who was present at the time. Bhavul advised that [the claimant] repeatedly pestered Colleague 1 to stay with him, even offering to drive her home and that Colleague 1 was clearly uncomfortable by his advances.

...

Colleague 1 asserts that she made clear to [the claimant] again that she is not interested in pursuing a romantic or sexual relationship with him ... [the claimant] continued and ask Colleague 1 “*why don't you just come in to the toilet and shag me?*” Colleague 1 advises that she made clear that she was not interested. Jas Sembi (Associate) confirmed witnessing [the claimant] make such remarks not just to Colleague 1 but also to Colleague 2 (Senior Paralegal). She suggested [the claimant] had been “*creepy and predatory throughout the evening*”.

...

Later that evening, Colleague 1 stated that she left the table to go to the ladies toilet and that when she came out, [the claimant] was waiting for her. She

confirmed that [the claimant] grabbed her and pulled her into the accessible toilet (which was next to the ladies toilet) and locked the door. Colleague 1 reports that when she reached for the lock to try and leave, [the claimant] pinned her against the wall and started to kiss her. Colleague 1 alleges that he then tried to move his hand under her skirt although she was trying to stop him.

...

Jas [Sembi] reports that [the claimant] also exited the toilet and returned to the rest of the group. Jas [Sembi] recalled asking Colleague 1 if what had just happened was consensual and that Colleague 1 responded by shaking her head (to suggest it was not).

...

Throughout the investigation, there have been repeated references to [the claimant] acting inappropriately towards another colleague, Colleague 2 (Senior Paralegal). Colleague 2 confirmed that [the claimant] had been flirty throughout the evening and had walked with her when she left the table to go to the toilet. She alleges that had placed his hands on her waist and she had had to push him away. Then, when she exited the toilet, [the claimant] was waiting for her and walked her back to the table. She alleges that he tried to place his hands on her waist a second time and she had to push him away again. Jas Sembi confirmed that she witnessed [the claimant] place his hands on Colleague 2's waist and had decided to follow Colleague 2 into the toilet to make sure she was OK. She confirmed that Colleague 2 has said she was fine and had just told him to "*Fuck off*".

...

[Andrew Sanderson] confirmed that he witnessed [the claimant] acting "over to top with physical touching" and "grabbing/putting his arm around Colleague 2" Andrew [Sanderson] noted it was very clear Colleague 2 was uncomfortable."

Claimant's suspension

47. The claimant returned from leave on 7 August 2023. He was notified by Matt Akin that morning that the respondent had decided to commence disciplinary proceedings against him in respect of the allegation of (page 161):

"Unwanted conduct of a sexual nature including inappropriate touching, kissing, persistent sexual advances and flirting (prior to and including on 20 July 2023) as well as intimidating and intrusive behaviour (locking a female colleague in the accessible toilet)."

48. The respondent also made a decision to suspend the claimant pending the outcome of those disciplinary proceedings (page 156-157 and 159-160). The claimant was provided with a copy of the Investigation Report (page 158) but not the notes of the interviews that Mr Akin had conducted with the various employees.

Disciplinary Hearing on 16 August 2023

49. A disciplinary hearing was initially scheduled for 9 August 2023 and then rescheduled to 16 August 2023 at the claimant's request. It was conducted by Ms Banga who was appointed to conduct the disciplinary process.
50. It is accepted by the respondent that the only documentary evidence available to the claimant prior to and during this meeting was the Investigation Report. The transcript for the meeting (page 203 – 210) show that Ms Banga went through the points in the Investigation Report with the claimant.
51. The claimant denied he made unwanted advances towards Colleague 1. The claimant stated there had never been a situation where Colleague 1 told him she was not interested. The claimant denied ever saying he "wanted" Colleague 1. The claimant states that the phrase "if I could pick anyone in the....." was a "sex game" played by employees of the respondent firm at social events. The claimant states that it is a game where one takes it in turns to say three people one would have sex with from the firm. The claimant stated that as a rule, one could not pick anyone at the table. The claimant states he would not have named Colleague 1.
52. In respect of the January 2023 incident, the claimant stated that he recalls asking Colleague 1 to stay as there were others still at the Bar. The claimant denied asking Colleague 1 to come back to the office or that he pestered Colleague 1 and offered to drive her home. The claimant stated he was surprised that Mr Haria corroborated this. The claimant stated there would be others who could corroborate his account namely Anastasia P. The claimant denied he ever suggested sex.
53. Regarding the drinks event on 20 July 2023, the claimant stated that Colleague 1 was flirting with him. He denied saying "come to the toilet and shag me". He stated the slang was not in his vocabulary. The claimant questioned whether Ms Sembi did in fact say she witnessed him using the word "shag" to both Colleague 1 and Colleague 2.
54. The claimant states that during this drinks event, Colleague 1 confided in him that she was in a relationship with three men at the firm and that the one she really liked was married and had not reciprocated (Tommy M). In relation to the phone incident, the claimant denied grabbing the Colleague 1's phone to speak to Ms Mukherjee. The claimant stated he told Ms Mukherjee that he was upset for Colleague 1 because Tommy M "wasn't making a move". The claimant denied using the phrase "I have tried but she keeps knocking me back". He stated the vocabulary was not his.
55. In relation to the accessible toilet incident, the claimant denied he followed Colleague 1 to the toilet. He asked the respondent whether they had requested the CCTV footage. The claimant stated they went together and he stated it was common for a gentlemen to wait for a lady and come back together. The claimant stated that when Colleague 1 came out of the toilet, she said, "please keep what I told you a secret". The claimant stated he invited Colleague 1 into

the accessible toilet to continue talking in there. He denied grabbing and pulling her. He added she was a large lady who is a semi-professional weight lifter. The claimant denied pinning Colleague 1 to the wall and holding her against it. The claimant denied kissing her or putting his hand up her skirt. He also denied forcing Colleague 1 to do anything. The claimant stated that the account that was advanced was “complete fiction”.

56. The claimant referred to rivalry between the English speaking and non-English speaking group at the firm. The claimant also stated he thought there had been some bias in the investigation and that the investigating officer had only spoken to a close group of friends/colleagues who were English speaking and that no evidence had been gathered from the Russian speaking colleagues.

57. In relation to Colleague 2’s evidence, the claimant highlighted that Colleague 2 had stated the claimant did not cross the line. The claimant stated he does not recall touching Colleague 2’s waist. He accepted that if he did, it would be inappropriate.

Post Disciplinary Hearing Submissions

58. Following the hearing, the claimant’s solicitor wrote to the respondent in a letter dated 16 August 2023 contending that the hearing was unfair because the claimant had been refused legal representation at the hearing. The claimant’s solicitor also provided the WhatsApp message sent by the claimant to Colleague 1 which stated, “Hi Colleague 1, did you get home okay?”

59. On 17 August 2023, the claimant provided Ms Banga with a written statement of his position (page 222 to 230) in relation to the allegations against him, as summarised in the Investigation Report. That written statement was consistent with the claimant’s evidence during the disciplinary hearing. The claimant also responded to a number of specific points in the Investigation Report.

“It is unclear whether Jas witnessed me being “creepy and predatory throughout the evening” or she witnessed me saying the above words. Her account is unclear to me, but would seem to be her character assassination of me rather than any contemporaneous evidence.” (page 226)

...

As far as the incident near the toilets is concerned, I hope Fieldfisher has requested the bar to provide CCTV footage: because:

...

I did not force Colleague 1 to go into toilet; I did not “grab” her or “pull” her into the toilet. (page 227)

...

I have noted the sentence: “Throughout the investigation, there have been repeated references to [the claimant] acting inappropriately towards another colleague, Colleague 2 (Senior Paralegal).” - as mentioned above, Fieldfisher

did not speak to many other colleagues who were at the same event: Kuanysh Sarsenbayev, Sergey Okoev, Olena Usenko, Elena Pop, Alesia Tsiabus, Galyna Carey. Notably, all of these colleagues are from the Russian-speaking team of the CIS Group. Colleague 2's own conclusion is mentioned above and only serves to support my case, that these are false allegations. (page 228 to 229)

...

Why did the managing partner, Andrew Sanderson not act when he saw, [the claimant] acting "over to top with physical touching" and "grabbing/ putting his arms around Colleague 2"? Something that is not supported by Colleague 2." (page 229)

Inadequacies of the Investigation Report

60. Mr Egan is correct to observe that the sole evidence provided to the claimant at the hearing on 16 August 2023 was the respondent's Investigation Report. As accepted by the respondent, the claimant was not provided with the interviews gathered by the respondent and therefore could only respond to the allegations as set out in the Investigation Report. Mr Sammour submits this made no difference because the substance of the allegations were made known to the claimant. I agree with Mr Egan that whilst the claimant did know of the charges against him, he could not have known of the nature of all the evidence relied upon by the respondent.
61. Furthermore, having carefully considered the interviews carried out by Mr Akin and the Investigation Report, it would appear that some of the evidence of those who had been interviewed were transposed inaccurately into the Investigation Report. Firstly, I find there is no basis for the assertion in the Investigation Report that Ms Sembi witnessed the claimant inviting Colleague 1 and Colleague 2 to go into the toilet to have sex. Having carefully considered the transcript of Ms Sembi's interview, I find that at no point during the interview did Ms Sembi say this. In fact, Ms Sembi's account would suggest the opposite, namely that it was "normal chat". I find this to be a significant inaccuracy because it had the potential to provide corroboration for the alleged underlying sexual motive for the January 2023 incident and the accessible toilet incident.
62. I also find there is no basis for the assertion in the Investigation Report that Mr Sanderson witnessed "over the top physical touching" or "grabbing" by the claimant. I find from the transcript of the interview with Mr Sanderson that this remark can only be attributed to Ms Sembi who reported to Mr Sanderson that the claimant was being "over the top physical touching" or "grabbing". I find Mr Sanderson's evidence to Mr Akin was inaccurately transposed into the Investigation Report. Although Mr Sanderson did witness other behaviours, it is unfortunate that the investigation report did not accurately reflect what was said to Mr Akin during the interview.
63. Furthermore, Mr Akin did not summarise within the Investigation Report which individuals had stated the claimant had acted inappropriately with Colleague 2. The report simply states that "there have been repeated references" of the

claimant acting inappropriately towards Colleague 2. Those individuals were not identified. Mr Akin did not highlight aspects of the evidence which had the potential to be contradictory to the accessible toilet incident, namely Colleague 1's contemporaneous conversation with Mr Aslanyan where she denied anything had happened in the accessible toilet, apart from being locked in.

64. Therefore, whilst the claimant did know of the charges against him, I find he could not have known of the nature of the evidence relied upon by the respondent. Neither could the claimant have been aware of the inaccuracies in the Investigation Report.

Further Investigations

65. Following her meeting with the claimant, Ms Banga considered it necessary to conduct further meetings with witnesses. This included a number of Russian-speaking employees of the respondent whom the claimant requested Ms Banga speak to. She held interviews with Mr Haria (page 259 to 261); Natalya Pokotylyuk (Senior Associate) (page 262 to 264); Galyna Carey (Associate) (page 265 to 266); Ms Mukherjee (page 276 to 278); Kuanysh Sarensbayev (Solicitor) (page 279 to 281); Colleague 1 (page 282 to 285); Olena Pop (Paralegal) (page 289 to 291); Paul Grelon (Senior Associate) (page 310 to 313); Ms Sembi (page 314 to 318); Colleague 2 (page 336 to 338); Sergey Okoev (page 342 to 343) and Mr Aslanyan (page 344).

Bhavul Haria

66. Mr Haria could not recall the occasion for the January 2023 event. He was however able to recall that Colleague 1 and him had ordered Ubers and that the claimant "kept asking Colleague 1 to cancel hers". Mr Haria stated it was not possible that the claimant was asking Colleague 1 to go back to the venue because it was late. Mr Haria stated that the claimant was suggesting Colleague 1 should come with him and he offered to drive her home. As for the event on 20 July 2023, Mr Haria could not recall the claimant speaking specifically to Colleague 1 and he did not notice anything out of the ordinary on that night. He stated he did not notice the claimant acting "touchy feely" or overtly flirty or being flirtatious with someone in particular.

67. In relation to the "sex game" referred to by the claimant at the disciplinary hearing, Mr Haria stated that these types of conversations do take place but he does not recall a specific game.

Natalya Pokotylyuk

68. Natalya Pokotylyuk stated that the only event she attended in January 2023 was her 40th birthday event which she organised and paid for herself. She stated this was not a 'work event'. She stated that some then went onto a post party drinks at All Bar One (Be At One). She stated when the bar was closing, there were about six or seven people waiting to leave outside the venue. She recalled the claimant was there, along with Colleague 1, maybe Colleague 2 and Olen Pop. She did not recall Mr Haria being at All Bar One.

69. Ms Pokotylyuk stated that the “sex game” usually played was called “Snog, Marry, Avoid” and that there may be another name too. She stated that it was a harmless game and mostly only played by the girls. She did not recall if the men took part in it but they may have been present when the game was played. She thought it was probable that Colleague 1 had been in a group which played this game.

70. She was asked whether she had witnessed the claimant acting inappropriately. Ms Pokotylyuk stated she had not seen anything which surprised her. She stated that they are a close knit group and everyone hugs and dance together and that

“nothing [the claimant] has done has ever made me feel uncomfortable. I have never seen any inappropriate touching – he has hugged me before but I have hugged him too so I would not say he has never laid his hands on anyone. We are all very friendly, especially the Russian-speakers – we are close outside of work too.”

71. Ms Pokotylyuk was asked whether it was unusual for her to text or message one another after a night out. She stated “No, we often message each other to make sure everyone got home OK, especially the girls.” As for whether it would be unusual for the claimant to text Colleague 1 after a night out, she stated,

“I do not really know. It would not be unusual for him to text me, making sure I got home OK. He would usually send me a message and made sure I got a cab. The team is genuinely very good friends and very close.”

Galyna Carey

72. Galyna Carey stated she was present at the July 2023 event and stated that the claimant’s behaviour was normal that evening. She stated

“He was in a good mood, making jokes. He is known for being a “funny man”, but there was nothing specific.

73. Ms Carey had never heard of the “sex game”. When Ms Banga asked whether the claimant was being flirtatious or ‘overly physical’ when talking to people, Ms Carey stated “No, nothing physical. He was making lots of jokes but all light – there was no intention.” She went on to describe the type of jokes and stories that the claimant would often tell, familiar to Russian-speakers. She also gave other examples such as the following:

“Other times he would say to a woman “would you go out with me?”. But all said in light way. There is no hidden agenda. An example; if a drink was split and a lady got some tissues and was cleaning it up, he would say if you could cook, I would marry you. He is very playful and likes to present as a “ladies man”. If there is a (sic) photo booth, [the claimant] would want to be in a picture with him in the middle and ladies on either side.”

74. When asked whether she has ever witnessed an occasion when someone does not see the joke, Ms Carey stated “Not amongst the Russian-speakers. He is foolish, we wouldn’t think he was being serious.”

Elora Mukherjee

75. Ms Banga interviewed Elora Mukherjee. Although Ms Mukherjee states she is not good friends with the claimant, she confirmed she did invite the claimant to her birthday party. In relation about the phone incident , she stated she did not think the claimant had snatched Colleague 1’s phone to speak to her.

76. In contrast to the interview with Mr Akin where Ms Mukherjee expressed the opinion that the claimant’s behaviour was inappropriate towards Colleague 1, Ms Mukherjee recounted the phone conversation very differently in this interview:

“He alluded to the fact that at one point, Colleague 1 had knocked him back. It was said in jest though.”

77. Ms Banga then stated that the claimant does not deny saying, "why isn't Tommy interested, if it were me I'd be interested. He must be mad". Ms Banga asked “To what extent was that conversation "I would do this" in the context of Tommy? Did he go beyond this and suggest that he had previously made a move on Colleague 1 and been rejected” to which Ms Mukherjee replied as follows:

“As far as I can remember, I understood it was that he could not believe Tommy was not interested and I believe he said he had expressed an interest but had been "Knocked back". I do think it was designed to make her feel better but he certainly alluded to Colleague 1 knocking him back.”

78. In relation to whether Ms Mukherjee had ever noticed the claimant being overtly flirtatious or putting his hands on people, Ms Mukherjee stated:

“I do not think that he makes people uncomfortable. There is an understanding that he is flirtatious but everyone is flirtatious. I have never personally seen him as a threat. My perception is that if you wanted to something with him, you could.”

79. In relation to whether the claimant had overstep the mark or taken any physical steps, Ms Mukherjee stated:

“Up until this incident, he may have put his arms around people but to be honest that is something I think I may have done too. I have seen him be tactile but never thought it inappropriate, as they were his friends. So no, in the context of it’s a friendly team.”

80. In relation to the “sex game”, Ms Mukherjee confirmed Ms Pokotylyuk’s evidence that the game was called “Snog, Marry, Avoid” and according to Ms Mukherjee, one has to pick the “top three people who you would shag”. She stated Colleague 1 plays this game and she has never seen the claimant play this game.

81. When questioned regarding her interview with Mr Akin and her use of the word “pervert” to describe the claimant, Ms Mukherjee stated:

“Pervert may be too strong. My view of him is coloured because I know he is married and has no problem pursuing other women outside of his marriage. My interactions with him generally have been limited because it is clear we do not share the same values. I would like to strike 'pervert' from the record and change to flirtatious. I have seen him be very flirtatious.”

82. It is clear that Ms Mukherjee’s evidence to Ms Banga was materially different to the evidence she gave Mr Akin. In the interview with Mr Akin, there was no suggestion or indication that the phrase “knocking him back” was said in jest. In fact, in the previous interview, Ms Mukherjee indicated that the claimant’s behaviour was highly inappropriate. There was also no suggestion in the previous interview that what the claimant said in the phone conversation was said in solidarity or to console Colleague 1. Furthermore, Ms Mukherjee was clear in the previous interview that she had witnessed the claimant behaving inappropriately and in that context had described the claimant as a “pervert”.

83. In the interview with Ms Banga, Ms Mukherjee rowed back on her previous comment and instead asked for the word “pervert” to be substituted with “flirtatious” – two plainly very different adjectives, with very different connotations and meaning. It would also appear that Ms Mukherjee’s opinion of the claimant was significantly influenced by her own marital experience and her views on morality.

Kuanysh Sarsenbayev

84. Ms Banga asked whether Kuanysh Sarsenbayev recalled speaking to either Colleague 1 or the claimant at the July 2023 event. Mr Sarsenbayev confirmed as follows:

“Yes, she was there with her colleagues. We chatted to her and [the claimant] did too. We discussed a lot of topics. I did see that [the claimant] had a discussion with Colleague 1. He is a very communicative person. She likes to be friendly. I saw that he was talking to the group she was standing with. I stayed with the Russian-speaking colleagues.”

85. Ms Banga asked Mr Sarsenbayev to describe what he witnessed that night. Mr Sarsenbayev gave the following narrative:

“I remember [the claimant] was very friendly that night to everyone who was there, he was being nice and speaking with his colleagues.

I remember him and Colleague 1 had conversations, one occasion was with a group of people, the other occasion it was just the two of them speaking. I tried to join them but they were being very friendly. Colleague 1 was also friendly to me; we have worked on projects together. Colleague 1 had attended a few CIS events too so we see each other a lot.

From my side, I saw [the claimant] being friendly with everyone. He tried to communicate with everyone. I do not remember anything unusual. It was a usual conversation. I was standing close and tried to speak to [the claimant] about an issue but noticed they were talking to each other on private matters, they were asking each other questions that were personal in my view.”

86. When asked to describe what he heard, Mr Sarsenbayev gave the following narrative:

“When I tried to talk to them they were talking about Colleague 1's boyfriend. They were joking and being friendly. [The claimant] was giving attention to her, she was giving attention to him. I heard words like "boyfriend". It sounded like Colleague 1 was sharing personal information with [the claimant]. They were both smiling and laughing. I heard [the claimant] say something like "are you OK with that?" They were definitely flirting with each other. I did not hear anything unusual from [the claimant].”

87. When asked whether the claimant was sharing personal information with Colleague 1, Mr Sarsenbayev replied:

“No, it was just her sharing personal information and [the claimant] was responding and smiling. They were joking about something.”

88. When asked whether he had noticed the claimant generally “being physical or paying particular attention to a women” (sic), Mr Sarsenbayev replied:

“That is an interesting question. I have known him for a while. He is a professional guy. To be honest, I have never noticed such kind of behaviour. He is a professional and respectful guy. He is very nice. He likes to be centre of the party.”

89. When asked to describe what he heard of the conversation between the claimant and Colleague 1, Mr Sarsenbayev said:

“I cannot remember exactly what was said. It was my perception that she was trying to be attractive to [the claimant]. I cannot remember the exact words but it was my perception she was demanding attention from him.”

90. Mr Sarsenbayev had not heard of the “Snog, Marry, Avoid” game.

Colleague 1

91. Ms Banga interviewed Colleague 1. Colleague 1 could not recall the purpose of the event in January 2023. However, she could recall ending up at Be At One. She stated that only Mr Haria, the claimant and herself were waiting for taxis at the end of the night. She stated she could not recall the time they left Be At One but upon checking her phone was able to confirm that she got home at 1.20 a.m. as that was when she sent Mr Haria a message to ask why the claimant was “being creepy”. Colleague 1 also stated that the claimant told someone at a CIS outing in 2021 that he was interested in Colleague 1. Colleague 1 stated that a few months before this interview, the claimant told

Colleague 1 that she “give off good energy”. She said she was dismissive of his advances.

92. In relation to the phone incident, Colleague 1 stated she rang Ms Mukherjee to discuss her interest in Tommy M. She stated that the claimant took the phone out of her hands. She said she did not protest when the claimant took the phone from her. She stated she heard the claimant speak of her to Ms Mukherjee along the lines of “I am so offended that she has knocked me back”.

93. Colleague 1 stated the claimant also showed an interest in Colleague 2 and stated that she heard the claimant tell Colleague 2 that same night by words to the effect of “if I could sleep with anyone in our department...”. Colleague 1 also said of the claimant and Colleague 2, “I think he did have his hands around her at the event on 20 July as well.”

94. In relation to the accessible toilet incident, Colleague 1 stated that when she came out of the ladies’ toilet, she saw the claimant. She stated she recalled the conversation from earlier in the evening when the claimant said to her “why don’t you just come in the toilet and shag me” and that made her panic that he had come to the toilet. Ms Banga invited Colleague 1’s comment on the claimant’s version of incident, namely that they both willingly went into the toilet to talk. Colleague 1 refuted the claimant’s version of the incident.

95. Colleague 1 stated that when Ms Sembi pulled her into toilet, Ms Sembi said “I already think I know the answer but was any of that consensual?”. When Ms Banga asked whether Colleague 1 had told Ms Sembi what had happened, Colleague 1 said, “Not right then, but when we left the venue with Colleague 2 I told them.” She stated that she shared a cab with Mr Grelon and spoke to Mr Sanderson and Mr Aslanyan but did not tell them the specifics.

96. In relation to the “Snog, Marry, Avoid” game, Colleague 1 stated the game is played not infrequently and that it is not gender specific i.e. played by whoever was present. Colleague 1 stated that both herself and the claimant have played this game together. Colleague 1 stated that the claimant has said when playing this game that

“I would be at the top of his list many time. Another time, he told me that Colleague 2 had “bumped me off the top”. I think he was trying to get a reaction from me, but I honestly didn’t care.”

97. Colleague 1 stated that it is not uncommon for people to give joke answers. Given Colleague 1 concedes that it is not uncommon for people to give joke answers at such games, it is unclear why she thought the claimant’s answers demonstrated a romantic interest in her. She was not challenged about this in her interview with Ms Banga.

Olena Pop

98. Olena Pop was questioned by Ms Banga regarding the January 2023 event. She confirmed that there were a handful of colleagues who went to the after

party at Be At One. She states that there was herself, Ms Pokotylyuk, Colleague 1, Colleague 2, Mr Haria, Olena Usenko and the claimant. Ms Pop stated that they were all leaving at roughly the same time and she could not recall specifically whether she was outside with the claimant. She believed the claimant had returned to the office as he had left his car there.

99. In relation to the July 2023 event, Ms Pop did not recall anything to suggest the claimant's behaviour was overtly friendly. She stated at one point in the evening, the claimant was stood between Colleague 2 and Colleague 1 who were both sitting down. Ms Pop stated the claimant may have had his arm around Colleague 2 whilst they were talking. Ms Pop stated

"There was loud music and I think he had to lean towards them to speak. I am not 100% sure he had his arms around Colleague 2, maybe he just had his arm on her shoulder. I didn't see as a problem at the time, it all seemed normal and was done in a friendly manner."

100. Ms Pop stated she sat in Colleague 2's seat and saw the claimant return with Colleague 2 from the toilet and that "Everything was fine though, I didn't see or hear anyone having problems." She also recalled Ms Sembi speaking to the claimant but does not recall what was said. She recalls asking the claimant what was going on and the claimant told her that Ms Sembi had "misunderstood something". Although she noticed the claimant and Ms Sembi talking, she said she did not see anyone being upset.

101. When questioned as to whether Ms Pop had heard the claimant express an interest in someone within the Team, Ms Pop had this to say:

"He always says he likes me and Colleague 2. It is not like he is saying it seriously. When in a drinking atmosphere people say who is best looking woman and best looking man in DR. We played the game in January, someone suggested it – if you had to pick top three from the team and he picked me, and someone else, I cannot remember who. He was only joking."

102. I find Ms Pop's evidence of the game being played is consistent with Ms Pokotylyuk, Ms Mukherjee and Colleague 1's evidence. I find Ms Pop's evidence is consistent with Colleague 1's evidence that players often say names in jest when playing the game.

Paul Grelon

103. Paul Grelon was interviewed by Ms Banga and he gave the following narrative:

"Before the incident, there had already been comments about the individual's behaviour. Colleague 2 had mentioned being uncomfortable. There was nothing aggressively gropey from what I remember, it was more him coming close and putting his hands around people's backs. I do recall Colleague 2 awkwardly came over to the group I was stood with and asked "do you mind if I join your conversation? He (meaning [the claimant]) was making her uncomfortable."

104. Mr Grelon stated that prior to being informed by Colleague 2, he had not noticed anything untoward regarding the claimant's behaviour. Mr Grelon said that he did not see the claimant trying to get close to Colleague 2 or lingering. He said that Colleague 2 "gave him the eyes that suggested she was trying to get away from him." Mr Grelon said Colleague 2 said "[the claimant] is being too touchy/ feely and was putting his arms around me".

105. Mr Grelon stated that when Colleague 1 came back from the toilet after the incident and she seemed frazzled. He stated that Colleague 1 had told him that the claimant had pulled her and taken her into the disabled toilet and physically held her. He had been "touchy and kissy." In the cab ride home, he suggested to Colleague 1 that if Colleague 1 felt uncomfortable, that she should raise what had happened. Mr Grelon also confirmed that he did not notice the claimant being overtly flirtatious or acting in a physical way with Colleague 1 until he became aware something had happened. When questioned by Ms Banga as to how he found out what happened, M Grelon could not recall whether he was told in the cab he shared with Colleague 1 or whether he had "overheard whispers from the girls". Regarding the incident, Mr Grelon stated this was what he was told:

"My understanding was that when coming back from the toilets, [the claimant] was near the disabled toilets and he forcibly grabbed her and was trying to get him to kiss her, being gropey. She had decided to play a long a little as to not aggravate him."

106. Mr Grelon also stated that everyone did not leave after the alleged accessible toilet incident. He stated that people stayed a little longer, about 15 to 30 minutes and he did not recall "a sense, this has happened, party over".

107. I find it is clear from Mr Grelon's interview that he did not personally witness anything and that his account is purely based on what had been narrated to him by Colleague 1 and Colleague 2 after the event. I find Mr Grelon's evidence vague for the following reasons. He could not recall how he knew of the incidents; who had reported it to him and when he knew of the incidents.

Jas Sembi

108. Ms Sembi was questioned about her use of the word "creep" to describe the claimant. Ms Sembi rowed back on the word "creep" which she used in her interview with Mr Akin. She referred to the claimant's marital status and stated he was a "sleazy character" who does not have the "usual moral standard". Ms Sembi said the claimant:

"is a very flirty character, for example when we are out, he has said things like "I'll attend to your every need – I'll pour your prosecco". I just brush him off and get on with my evening and say, "try it on with the next one – go away"

I also believe he has had relationships with other people in the team but I assumed they were consensual."

109. However, when asked by Ms Banga whether she thought the claimant was flirting with her in respect of the prosecco example, she stated she did not get that impression. I find Ms Sembi's remarks to be contradictory given the prosecco example was the example she used to illustrate why she thought the claimant was a "flirty character".
110. As to whether she had ever heard the claimant say "you're on my list of people in the department" or words to that effect?", Ms Sembi denied that. She agreed flirting was not an issue but expressed the view that the claimant was "obviously sexist". Ms Banga questioned Ms Sembi regarding the remark she made in her previous interview that the claimant had "made passes". Ms Sembi said she had heard the claimant say to both Colleague 1 and Colleague 2 that he had been "trying to make passes" at them. She said she did not think much of it at the time. She stated she recalls Colleague 1 talking about another male and showing the claimant text messages on her phone. She said "I did think it odd she was opening up to him but she was a drunk."
111. When recounting the accessible toilet incident, Ms Sembi said it was shocking that Colleague 1 was in there with the claimant as Colleague 1 was not interested in the claimant. Ms Sembi said, "It all just felt weird. She then pulled me back into the disabled toilets. She told me that he had tried kissing her but she was vague. She was obviously in shock." Ms Banga asked whether either the claimant or Colleague 1 had said anything to make Ms Sembi think something sexual had happened which made Ms Sembi tell the claimant to leave. Ms Sembi said, "It was her (Colleague 1's) face. She looked shocked. I think my priority was just making sure Colleague 1 was OK." Ms Sembi added Colleague 1 pulled her into the accessible toilet and Ms Sembi asked Colleague 1 if it was consensual and Colleague 1:
- "She just shook her head. She looked very broken, shocked almost statuesque. I asked what had happened and she said he had kissed her, she could not get out and he was standing in front of the door. She said she did not know what had happened but she could not get out. She saved I had saved her and gave me a hug."
112. Ms Sembi stated that when she came back from the accessible toilet with Colleague 1, the claimant was sat with Ms Pop. Ms Sembi said Mr Grelon was not there and she thought Mr Grelon was outside vaping. She stated she cannot recall if they discussed any of the details in front of Mr Grelon. Ms Sembi reiterated that she thought the claimant was "sleazy" and at a CIS away day, the claimant was "overly close with Olena Pop" and that "they were being very flirtatious". Ms Sembi stated she went into "mother hen" mode and said they were leaving. She states she left with Colleague 1 and Colleague 2 and when leaving, they met Mr Grelon outside.
113. I find there are a number of material inconsistencies between the evidence of Ms Sembi, Colleague 1 and Paul Grelon. Colleague 1 was clear in her interview with Ms Banga that she did not tell Ms Sembi what had happened when they went into the accessible toilet together. She stated that she told Ms

Sembi and Colleague 2 what happened when they left the venue. Colleague 1 was also clear that even though she shared a cab with Mr Grelon, she did not tell him “the specifics”. Mr Grelon himself cannot remember how he found out and I have already found his evidence to be vague. Mr Grelon was clear in his interview with Ms Banga that he saw Colleague 1 return from the toilets looking “frazzled” but Ms Sembi was clear that Mr Grelon was not at the table when she returned from the toilet with Colleague 1. She believed he was outside. Ms Sembi’s account is that she was told by Colleague 1 in the accessible toilet that the claimant had “kissed her, she could not get out and he was standing in front of the door”, an account which is contradicted by Colleague 1 herself who said she did not provide the details of what happened until they left the venue. Furthermore, there is inconsistent evidence in relation to the timing of when they left i.e. was it immediately after the accessible toilet incident or within 15 to 30 minutes of the incident.

Colleague 2

114. Ms Banga interviewed Colleague 2. In relation to the January 2023 event, Colleague 2 could not recall whether she left before or after Colleague 1. She stated she stayed until 1.30 a.m. and got an Uber home. When asked about the “Snog, Marry, Avoid” game, Colleague 2 confirmed that the game was played during the January 2023 event and that it was played in jest; done in a jovial sense; that it was not serious and that it was more of a joke. When asked whether she recalled the claimant naming either Colleague 1 or Colleague 2, Colleague 2 stated that it was usual to exclude people who are present when the game was played.

115. Colleague 2 stated that the claimant offered to drive her home as his car was at the office. Colleague 2 stated she politely declined the offer as it was late. When asked to comment on whether she had noted anything that was inappropriate, Colleague 2 stated there was nothing that she recalled. When asked whether she has ever felt on other occasions that the claimant had touched or said anything inappropriate to her or others, Colleague 2 states:

“[The claimant] is very flirty. I have never felt threatened by him. He likes to talk; he is a good talker and can be cheeky. Its flirtatious banter. The reason I think that Jas was on 'high alert' that night (20 July) was because she had seen him go to the bathroom when Colleague 1 and I went, and because he had been flirty.”

116. Colleague 2 stated that she had not seen the claimant touch anyone before that night. She stated that the claimant did put his hands on her waist twice that night. Ms Banga questioned Colleague 2 as to whether she had tried to get away from the claimant and Colleague 2 stated that she was “bored” so she got up and joined Colleague 1 and Mr Grelon.

117. Ms Banga asked Colleague 2 the following question:

“That night, would you describe yourself as feeling uncomfortable (i.e. when [the claimant] was waiting outside or when he put his hands on your waist)?”

118. Colleague 2's response was:

"I did. I definitely felt uncomfortable when he first put his hands on me and I thought it was strange he had waited outside the toilet for me when I had told him not to. I do not know why he tried to put his hands on me a second time. I had told him to stop."

119. Mr Egan cross examined Ms Banga as to why the question was not put in a neutral way. Ms Banga accepted that with the benefit of hindsight, she could have used language which was not leading. I agree with Mr Egan and find the question was plainly leading. I find that prior to the leading question, Colleague 2 did not give this as a reason for why she joined Mr Grelon's table. She told Ms Banga she was "bored" by conversation with the claimant. I also find there was no challenge to Colleague 2 as to why her account changed from the first interview she gave to Mr Akin, where she stated she was "not uncomfortable". I find the change in her evidence is plainly as a consequence of a leading question. I find this significantly reduces the weight which can be attached to the response.

120. In relation to the phone incident, at first Colleague 2 told Ms Banga that she did see the claimant take Colleague 1's phone earlier in the evening in a friendly manner. However, when questioned further, she then said she did not witness it and was only told about it later by Colleague 1. As for her recollection of whether Mr Sanderson came over at any point, she said she does not recall this.

Sergey Okoev

121. Ms Banga interviewed Sergey Okoev who confirmed he left the venue at 9 p.m. on 20 July 2023 and therefore could not add anything. He stated that prior to leaving, he did not notice anything unusual, inappropriate or outrageous.

Arik Aslanyan

122. Ms Banga also interviewed Mr Aslanyan. Mr Aslanyan confirmed his previous account that Colleague 1 did not mention any sexual assault when he spoke to Colleague 1 on 21 July 2023. Colleague 1 had only asked Mr Aslanyan to have a word with the claimant.

CCTV Footage and Associated Investigation

123. On 31 August 2023, the respondent was informed by an employee of Savage Garden bar at the Hilton that they were prepared to provide a written description of the CCTV footage of the incident, so far as it had been recorded, provided that all affected individuals consented. The claimant, Colleague 1 and Ms Sembi provided their consent (page 345 to 361). A series of questions were prepared and put to the Hilton to answer. A representative of the Hilton provided the respondent with a written description of the CCTV footage on 10 September 2023 (page 362).

124. In response to the question, “When Female A and Male A entered the accessible toilet, is there any evidence of force? If so, please describe this”, the Hilton said:

“No. According to CCTV it seems consensual from both sides. Female A initiates a hug, Male A honours this. They are hugging for quite a while then start kissing and Male A gently directs towards the disabled toilet while hugging. Female A does not resist, no force was used at all.”

125. In response to the question, “If there is no evidence of force, does either party lead the other party into the accessible toilet? If so, who?”, the Hilton said:

“Male A directs, very gently. No resistance from Female A. They are hugging, kissing, Male A makes the move and Female A agrees.”

126. In response to the question, “When Female A and Male A emerged from the accessible toilet, was there any conversation between either or them and Female B?”, the Hilton said:

“Yes. A very short chat amongst all 3 and then Male A leaves. Female B holds Female A back and they go back to the disabled toilet together.”

127. In response to the question, “If so, how do the parties interact upon leaving the accessible toilet?”, the Hilton said:

“Female A smiling, Female B looks surprised, Male A smiling. They all talk in a normal manner, no argument took place. None of them are frustrated or distressed.”

128. In response to the question, “Does the CCTV show Female A and Female B re-entering the accessible toilet? If so: a. When Female A and Female B re-entered the accessible toilet, does the CCTV confirm how long they stayed in there? b. When Female A and Female B exited the accessible toilet, is it possible to describe how Female A appears?”, the Hilton said:

“Yes. Female A and Female B re-enter the disabled toilet and they are in there for 1 minute and 2 seconds. There is no facial expression from Female A when exiting the toilet. I can not say she is smiling and I can not say she is frustrated or distressed. Following her on the lounge camera she acts absolutely normal chatting to Female B.”

Investigatory Meetings

129. Ms Banga considered that the description was inconsistent in material respects with the accounts given by both the claimant and Colleague 1. She provided the description to Colleague 1 in a meeting on 12 September 2023 (page 372) but did not obtain any response from Colleague 1 regarding the discrepancies in Colleague 1’s account against the footage description provided by the Hilton. Ms Banga held a meeting with the claimant on 14 September 2023 (page 376 to 377).

130. Ms Banga in her oral evidence stated she did not feel there was a need to address the serious discrepancies between Colleague 1's account and the CCTV footage description of what happened immediately before going into the accessible toilet. Ms Banga stated that her focus was on the discrepancies in the claimant's account and the CCTV footage description. When asked why she chose to concentrate on that, Ms Banga stated that she felt there was a discrepancy. When Mr Egan suggested to Ms Banga that the claimant was never questioned about what contact took place prior to going into the accessible toilet apart from responding to the allegation that he grabbed Colleague 1 and pulled her into the accessible toilet, Ms Banga maintained that the CCTV footage description did contradict the claimant's account. Ms Banga accepted in oral evidence that nothing further, apart from the CCTV footage description, was discussed at the meeting with the claimant.
131. I find it entirely odd that Ms Banga did not think it was important to question Colleague 1 regarding the discrepancies in her evidence against the CCTV footage. That, after all was what gave rise to the allegations of sexual assault against the claimant in the first place. I find the failure to question Colleague 1 meant that the respondent missed an opportunity to test Colleague 1's evidence and motive in making these allegations.

Claimant's Grievance

132. On 18 September 2023 the claimant raise a grievance. The claimant stated the allegations presented against him were very serious and may have grave consequences for him not limited to the loss of a job, licence to practice law, reputation, but also detrimental effects on his family and health. The claimant stated he was shocked and disgusted by the allegations and the false evidence presented by "the group". The claimant stated that "[s]uch conduct is unacceptable for a solicitor and should be investigated by the firm" (page 385).
133. On 25 September 2023, Mr Akin informed the claimant that his Grievance would be considered by Ms Banga because the allegations made in the Grievance overlapped to a large extent with those made by the claimant in his defence of the disciplinary charges (page 400).

Consent Withheld

134. On 19 September 2023, Mr Akin asked the Hilton whether they would release the footage. The Hilton replied the same day stating that having taken legal advice, they would be prepared to release the footage provided all individuals provided consent (page 387). The claimant consented on 21 September 2023 (page 390). On 22 September 2023, Colleague 1 informed the respondent that she wished to take independent advice before making a decision on whether to consent (page 397). On 27 September 2023, Colleague 1 replied to Mr Akin stating that having taken legal advice, she would not be providing her consent to the CCTV being provided (page 413).
135. Colleague 1 stated that she had concerns about her data privacy. She questioned the value of reviewing the CCTV given that a description had

already been provided by the venue. She stated the footage would not show what happened inside the accessible toilet. She stated she found the prospect of someone watching the CCTV surrounding the events of her being sexually assaulted very upsetting and did not want to have additional trauma or to be re-traumatised by that. She stated that she found the language used by the venue to describe the events extremely subjective, unfair and troubling. She did not think that having someone else “review the CCTV in a more subjective manner would offer enough benefit to the investigation to outweigh my concerns”.

136. On 28 September 2023, Ms Banga replied to Colleague 1 to explain why she wanted to view the footage and to allay Colleague 1’s concerns (page 421-422). Colleague 1 was provided with the names of the individuals at the respondent firm who would view the footage. Ms Banga explained the reasons for those individuals’ involvement given the seriousness of the allegations and the potential involvement of the Solicitors Regulation Authority.

137. On 28 September 2023, Colleague 1 replied, still withholding her consent for the release of the CCTV footage to the respondent (page 425 to 426). She voiced her disagreement with the venue’s account of her facial expressions; being “very gently” directed into the toilet; and the absence of an argument between Ms Sembi and the claimant. She stated these were views which the venue were unqualified to give.

138. Colleague 1 also stated:

“As at today, I no longer have a very clear recollection of what happened immediately before, with the time that has passed since 20 July and also working hard on suppressing intrusive images from the night. It was a surprise to me to see an account where there was physical interaction outside of the toilet and I do not remember this as having happened (though to be clear, my absence of memory of it happening is not a strict denial that it could have).”

139. On 31 October 2023, the claimant’s solicitor wrote to the respondent stating that in the absence of the CCTV footage, the only safe finding for the respondent to make in the disciplinary proceedings is that the allegations have not been made out. The claimant’s solicitor stated that at its highest, the witnesses’ recollection of the events of that evening are either unreliable or at worse, consciously misleading. The claimant’s solicitor stated that in the absence of any explanation as to why the footage could not be released, the claimant was forced to take the view that the other parties will not consent to the release of the CCTV footage because they know their account is misleading and if the respondent were to view the footage, they would be placed in a position of having to take action against those individuals (page 434 to 435).

Colleague 1’s False Evidence

140. In oral evidence, Ms Banga accepted that Colleague 1’s evidence about what happened immediately before entering the accessible toilet was false. Ms Banga also agreed in cross examination that the only part of the CCTV footage description that could be open to interpretation were the facial expressions of the relevant persons in the footage. She agreed in oral evidence that the

allegation about being “grabbed” and “pulled into the accessible toilet” was not open to interpretation by anyone watching the CCTV footage.

141. Ms Banga stated she gave weight to Colleague 1’s email (page 425) that she no longer had a very clear recollection of what happened immediately before the accessible toilet incident. Ms Banga accepted in her oral evidence that Colleague 1’s email was not a strict denial of what was shown on the CCTV footage description. She accepted this affected Colleague 1’s credibility as a witness of fact. Nonetheless, Ms Banga concluded even though Colleague 1 had given false evidence, that she did not do it deliberately. Ms Banga stated that she did not think Colleague 1 recalled the actual truth. Mr Egan submits it was not credible that Colleague 1 no longer had a clear recollection of what happened outside, immediately before the accessible toilet incident, but would seem to recall perfectly clearly what happened inside the accessible toilet. Ms Banga agreed that Colleague 1’s evidence was not supported by the CCTV footage.

142. I find there is no other way to put this. Colleague 1’s version of events immediately before the accessible toilet incident is wholly unsupported by the CCTV footage description and wholly incredible. However, the issue is whether she deliberately gave false evidence. Having given careful consideration to all of the documentary and oral evidence, I can find no basis to underpin Ms Banga’s reasoning that Colleague 1 did not deliberately give false evidence. I find Colleague 1’s email dated 13 September 2023 (page 382-383) continues to present an account which contradicted the CCTV footage description. Although she stated in her email dated 28 September 2023 that she no longer had a clear recollection of what happened, she nonetheless continued to allow those allegations to remain live. I find she also continued to withhold consent for the release of the CCTV footage, despite being fully aware that the CCTV footage would have clarified to Ms Banga precisely what happened immediately before the accessible toilet incident.

143. If it was the case Colleague 1 did not have a clear recollection of what happened or did not deliberately give false evidence, it is unclear why Colleague 1 did not choose to withdraw the complaint regarding the accessible toilet incident once presented with the CCTV footage description. The fact Colleague 1 continued to allow the respondent to persist in the disciplinary investigation arising from her complaint regarding being grabbed and pulled into the accessible toilet would indicate that deliberate false evidence continued to be provided to Ms Banga, even at this late stage in the process.

144. I find the CCTV footage would have provided clear evidence of what took place immediately prior to the accessible toilet incident. It would have dispelled any concerns Colleague 1 had that the footage description provided by the Hilton was “biased”. I find the sequence of events indicate Colleague 1 knew her complaint about being grabbed and pulled into the accessible toilet was patently false. I agree with Mr Egan’s submission that this severely damages her credibility as a witness of fact.

Disciplinary and Grievance Outcome

145. Ms Banga's decision, and the reasons supporting it, were communicated to the claimant in a letter dated 6 November 2023 (page 437 to 451). In relation to the drinks event in January 2023 (page 443), in summary, Ms Banga placed reliance on the WhatsApp messages (page 111 to 112). Although Ms Banga acknowledged that the WhatsApp messages do not state exactly what happened outside 'Be At One', Ms Banga was of the view that the WhatsApp messages provide "clear contemporaneous evidence" of the following:

- a) the claimant persistently attempted to persuade Colleague 1 to cancel her Uber and to return to the respondent's offices with him;
- b) he did so in such a way as to cause Colleague 1 to reasonably believe that his conduct was inappropriate and done with an underlying sexual motive, and to reasonably be concerned for her safety; and
- c) that, as a consequence, the claimant's conduct toward Colleague 1 fell below the standards of behaviour expected by the respondent, and in particular that it amounted to harassment.

146. In respect of the work event on 20 July 2023, Ms Banga found (page 444):

- a) the claimant put his hand around the waist of Colleague 2 as he accompanied her to the bathroom, waited for her outside the bathroom, and then attempted to do put his hand around her waist a second time when accompanying her back to their table, despite Colleague 2 having told him not to and to "get off" when he first did so;
- b) Colleague 2 felt that she was receiving unwanted attention from the Claimant, such that she had to move to a different group at the event to stay away from him, and;
- c) that the claimant's behaviour fell below the standards expected by the respondent.

147. Ms Banga explained that she had been unable to reach a conclusion regarding the accessible toilet incident owing to the conflicting nature of the evidence from both the claimant and Colleague 1. However, Ms Banga explained that the claimant's evidence in relation to that incident remained material to her decision to dismiss him. She explained in her letter (page 450):

"...I am not confident that you have been fully transparent in your account about what happened in July. By way of illustration, you denied emphatically that anything at all physical had happened with Colleague 1, but changed your account on being provided with a description of the CCTV footage. As I have mentioned, I do not consider it credible that you went into the accessible toilet to continue a conversation that could easily have taken place outside of it. Given the serious nature of the concerns we were discussing with you, I am concerned by this potential lack of transparency..."

148. Ms Banga explained her decision to dismiss, rather than impose some lesser sanction, as follows:

“...I did consider issuing you a final written warning, but I do not feel that such a sanction would be appropriate given the nature of your behaviour on two separate occasions (as explained in the findings in this letter), the need to protect our employees from harassment, and my concern at the veracity of your initial account...”

149. By a letter sent on the same date, Ms Banga rejected the claimant's Grievance.

Claimant's Appeal

150. The claimant appealed his dismissal. His grounds of appeal were set out in a five page letter sent by his solicitors (page 460 to 465). The claimant relied upon four grounds, as follows:

- a) the dismissal was based on allegations not put to the claimant during the disciplinary process;
- b) the dismissal was based on evidence not put the claimant during the disciplinary process;
- c) the dismissal was based on a flawed investigation;
- d) the finding of misconduct was one that no reasonable employer could have made;

151. By a letter of 15 November 2023, the claimant was informed that his appeal would be considered by Mr Cassels, a partner in the respondent firm and co-head of its Regulatory team. The claimant was invited to an appeal meeting on 21 November 2023 (page 469).

152. The claimant was accompanied by his solicitor, Paul Britton, during that meeting (page 476 to 488). Following that meeting, Mr Cassels:

- a) held meetings, at the claimant's request, with Alesia Tsiabus (page 493 to 494), Olena Usenko (page 495 to 497) and of his own volition, with Ms Banga (page 505 to 510);
- b) considered notes of a meeting between Tom Freestone (who assisted Mr Cassels in the appeal from a HR perspective) and Mr Akin (page 517);
- c) provided the claimant (through Mr Freestone) with the notes of all interviews conducted by Ms Banga as part of the disciplinary process, save for the notes of Ms Sembi and Colleague 1, both of whom refused to provide their consent for the sharing of those notes with the Claimant; and
- d) considered the claimant's commentary in relation to those notes (page 573-576).

153. Mr Cassels issued his appeal outcome on 8 February 2024. He dismissed the appeal and set out his reasoning for reaching that conclusion in a 17-page letter (page 582 to 598). He agreed with the conclusions drawn by Ms Banga that:

- a) the claimant had acted inappropriately toward and sexually harassed Colleague 1 at the event in January 2023;
- b) the claimant's conduct toward Colleague 2 at the event on 20 July 2023 fell below the standards required by the respondent;
- c) dismissal was an appropriate sanction in all the circumstances.

Discussion and Analysis

January 2023 Incident

154. Mr Egan submits that with the exception of the CCTV footage description from the venue regarding the accessible toilet incident, none of the evidence obtained by the respondent after the 16 August 2023 meeting was put to the claimant for his response prior to the decision to dismiss. Mr Egan submits that it is clear that at least some of the additional evidence obtained post 16 August 2023 was materially relied upon by Ms Banga in her findings on liability.

WhatsApp Messages

155. The claimant stated he had no knowledge of the existence of the WhatsApp messages prior to receiving the Disciplinary Outcome letter and has had no opportunity to respond to this. The claimant states that the first time he could properly respond to this was in his oral evidence. The claimant refutes that the WhatsApp messages demonstrated a) he asked Colleague 1 to return to the respondent's offices with him and b) there was any underlying sexual motive. Mr Egan submits that an employer acting reasonably in a disciplinary process, would put the additional evidence obtained post disciplinary hearing to the employee for comment before a final decision.

156. I agree with Mr Egan's submission that an employer acting reasonably in a disciplinary process, would have put the additional evidence obtained to the employee for comment before a final decision. I find this was particularly important when contextualised to the facts of this case, namely Ms Banga's own concession in her oral evidence that Colleague 1 had given false evidence regarding the accessible toilet incident.

157. I find, as also acknowledged by Ms Banga in her disciplinary outcome letter, the WhatsApp messages do not state what happened on the night of the January 2023 incident. I find there is nothing within the WhatsApp messages to indicate that the claimant invited Colleague 1 to go back to the office and that there was an underlying sexual motive to that invitation.

158. I find that Mr Haria's evidence to Mr Akin also does not suggest there was an invitation to return to the office because of a sexual motive. I find in Mr Haria's interview with Mr Akin, Mr Haria states that the claimant offered Colleague 1 a lift home. I find Mr Haria's account of what happened was consistent with the content of the WhatsApp messages where the thread centred around the claimant asking Colleague 1 to cancel her cab. I find it is clear from the WhatsApp messages that the claimant was driving home and therefore it is likely that the claimant had offered Colleague 1 a lift home.

159. I have considered whether Mr Haria's actions on the day could provide an indication that the claimant invited Colleague 1 to the respondent's office and that there was an underlying sexual motive to that invitation. I find it unlikely given Mr Haria's own evidence is that he did not intervene or say anything to the claimant on the night.
160. Ms Banga determined that the claimant's conduct (in asking Colleague 1 to cancel her cab) was due to Colleague 1's gender. I agree with Mr Egan that the respondent relied on a finding that the claimant did not ask any male employees to cancel their cabs. However, I find from the transcript of the meeting of 16 August 2023 and the subsequent investigation that this point was never put to the claimant. In the claimant's witness statement, he makes clear that he has, on other occasions, offered and carried out such lifts to both male and female colleagues. I agree with Mr Egan that an employer acting reasonably in a disciplinary process, would have put a material issue such as this to the employee for comment before a final decision.

Negative Pull of the Lie

161. Mr Egan asked Ms Banga to explain, in light of the defective nature Colleague 1's evidence regarding the accessible toilet incident, whether that had been taken into account when considering the veracity of Colleague 1's evidence regarding the January 2023 incident. Ms Banga's evidence is that those were two separate incidents. Ms Banga stated that reliance was placed on the WhatsApp messages which Ms Banga stated indicated some truth in Colleague 1's account.
162. In *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49 at [31] - [33], the Supreme Court considered how a fact finding Tribunal should deal with the impact of lies on the evidence considered:

"The lie may have a heavy bearing on the issue in question, or the tribunal may consider that it is of little moment. Everything depends on the facts. [...] The lie might understandably carry far less weight where, [...], the judge is satisfied that the appellant has lied where the lie is against her interests."

Where the appellant has given a totally incredible account of the relevant facts, the tribunal must decide what weight to give to the lie, as well as to all the other evidence in the case, including the general evidence. [...] The AIT in the present case was rightly alive to the danger of falling into the trap of dismissing an appeal merely because the appellant had told lies. The dangers of that trap are well understood by judges who preside over criminal trials before juries. People lie for many reasons. In *R v Lucas* [1981] QB 720, the Court of Appeal had to consider whether a statement containing a lie was capable of amounting to corroboration. At p 724F, Lord Lane CJ said:

"To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly, it must relate to a material issue. Thirdly, the motive for the lie must be a realisation of guilt and fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just

cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family...."

163. Although the analogy is not exact, it is close enough for these words to be of relevance in the present context. I have already found above that the CCTV footage description demonstrated that Colleague 1's evidence regarding the accessible toilet incident was wholly incredible. I have already found it was deliberate false evidence. I find that her false evidence regarding the accessible toilet incident was not a mistake and did not arise out of confusion. I find Colleague 1's false evidence relates to a significant issue, namely her allegation of sexual assault. That allegation is similar in nature to the January 2023 allegation of sexual harassment. Colleague 1 was not interviewed by Ms Banga regarding the discrepancies in her evidence against the CCTV footage description. I have already found this was a lost opportunity in establishing her motive for making allegations of sexual assault.

164. What could be the motive? I am satisfied she did not lie against her interests. Therefore, the lie could only be to protect her own interests and her reputation especially given Ms Sembi had witnessed her exiting the accessible toilet together with the claimant. I find that on the facts of this case, Colleague 1's lie does have a heavy bearing because it relates to a central issue in the case. The question I have to consider is whether the general evidence is sufficiently strong to counteract "the negative pull" of Colleague 1's lies (*MA (Somalia)* at [33]).

Evidence of Flirting

165. I have considered the general evidence available to the respondent. I find from Mr Sarsenbayev's interview with Ms Banga that there was flirting between the claimant and Colleague 1 at the July 2023 event. Furthermore, I find the CCTV footage description is incontrovertible that Colleague 1 initiated physical contact with the claimant (pages 368 to 369). These two pieces of evidence, when viewed in the context of the January 2023 incident, strongly undermine the allegation that the claimant sexually harassed Colleague 1 in January 2023.

166. I have also considered the other general evidence of flirting. I find from Ms Pokotylyuk's interview with Ms Banga that it is common for the Russian-speakers at the respondent's firm to hug and dance together and that she herself had never witnessed inappropriate touching. I find from Ms Carey's interview with Ms Banga that the claimant likes to present as a "ladies man"; that he was "foolish" and no one would think he was serious. I find this is further supported by Colleague 2's interview with Ms Banga where she said the claimant can be "cheeky" and engages in flirtatious banter.

167. I find from Ms Mukherjee's interview with Ms Banga that she thought the claimant was flirtatious but conceded that "everyone is flirtatious". Ms Mukherjee also conceded that the comment about Colleague 1 knocking the claimant back was said in jest and designed to make Colleague 1 feel better about herself. I find that Ms Sembi agreed the claimant was a "flirty character"

but she did not think he was seriously flirting with her in the processo example. I find there is evidence that no one takes flirtatious banter emanating from the claimant seriously or as a form of sexual harassment.

168. I find from the interview of Colleague 2 with Ms Banga that the “Snog, Marry, Avoid” game was played during the January 2023 event. I find from Colleague 2’s evidence that the game is played in jest. I find from the interview of Ms Pop that the game “Snog, Marry, Avoid” is always played in jest. I find that even Colleague 1 concedes people give joke answers when playing this game. I find the general evidence about the game “Snog, Marry, Avoid” is that it is played in jest. On that basis, I find there could be no reason for Colleague 1 to think the claimant displayed a romantic interest in her when the game was played.

169. I have considered whether the general evidence is sufficiently strong to counteract “the negative pull” of Colleague 1’s lies. Having considered all of the evidence, I find that the general evidence is wholly insufficient to counteract “the negative pull” of Colleague 1’s lies. This is because the general evidence indicates that the claimant’s behaviour was not considered inappropriate by many other colleagues. I conclude that the negative pull of Colleague 1’s lies is such that her allegation that the claimant harassed her in January 2023 is wholly undermined.

July 2023 Incident

170. I observe that the respondent has acknowledged that no formal complaint has been made by Colleague 2 and that during the initial investigations, Colleague 2 indicated that she did not feel the claimant had overstepped the mark or made her feel uncomfortable. I have already found that the failure to question Colleague 2 in a neutral way which led to a change in Colleague 2’s evidence significantly reduces the weight which can be attached to the subsequent evidence by Colleague 2 to Ms Banga that the claimant made Colleague 2 feel uncomfortable.

171. However, I find there was other evidence which indicates that the claimant did have his arm on Colleague 2’s shoulder. I find this was witnessed by Mr Sanderson who thought Colleague 2 looked uncomfortable. However, I find this was only after he was alerted to it by Ms Sembi. I also find that Ms Sembi witnessed the claimant putting his arm around Colleague 2 on the way to the toilet. Ms Pop also witnessed the claimant putting his arm on Colleague 2’s shoulder, although I observe that Ms Pop thought that seemed normal and done in a friendly manner. Although Mr Grelon did not witness the claimant placing his arm on Colleague 2, his evidence is that he recalls Colleague 2 telling him during the evening of July 2023 event that the claimant was “too touchy/ feely” and was putting his arms around her. On the basis of the range of corroborative evidence available, I find there is sufficient evidence to suggest the claimant did have his arm around Colleague 2.

Conclusions

January 2023 Incident

Did the Respondent Follow a Reasonably Fair Procedure?

172. I reach the finding that the respondent had failed to follow a reasonably fair procedure for a number of reasons. Firstly, I find that whilst the claimant was aware of the allegations against him, the only information he had for the disciplinary meeting on 16 August 2023 was the respondent's Investigation Report.
173. I find the principal and most serious allegation to which the claimant was responding to prior to the Disciplinary Outcome Letter was the accessible toilet incident. I have already found there were a number of inadequacies within the Investigation Report which had the potential to provide corroboration for the alleged underlying sexual motive for the January 2023 incident and the accessible toilet incident. Furthermore, matters which did not support Colleague 1's account such as Colleague 1's contemporaneous conversation with Mr Aslanyan where she denied anything had happened in the accessible toilet, apart from being locked in, were omitted from the Investigation Report.
174. Given the claimant was unaware of the nature of the evidence, it would have been impossible for the claimant to respond fully to the evidence which underpinned the Investigation Report. I find that an employer acting reasonably in a disciplinary process, would have provided the interviews which unpinned the Investigation Report to the employee for comment before a final decision.
175. Secondly, it is clear from the Disciplinary Outcome Letter that the respondent's finding regarding the January 2023 incident relied heavily on the WhatsApp messages and some of the evidence obtained post 16 August 2023. I find that apart from the CCTV footage description, none of the additional evidence were put to the claimant for comment. I find this is a clear breach of the respondent's Disciplinary Policy (page 101). Whilst the claimant accepts that not all of the evidence obtained post 16 August 2023 were relevant, I find that the WhatsApp messages and interview transcripts of the individuals mentioned in the Disciplinary Outcome Letter were relevant evidence. I find the claimant did not have a meaningful opportunity to respond to the relevant additional evidence. I find that an employer acting reasonably in a disciplinary process, would put the relevant additional evidence obtained post disciplinary hearing to the employee for comment before a final decision.
176. Thirdly, I find the appeal process did not cure the defects of the procedure. I find that although some interview transcripts were provided post appeal hearing on 21 December 2023, Colleague 1 and Ms Sembi's interview transcripts were not provided. I find these had a negative impact on the appellant's ability to respond to the January 2023 incident. I find that an employer acting reasonably in a disciplinary appeal process, would put all relevant evidence to the employee for comment before a final decision.

177. Fourthly, I find there were a number of matters which had not been discussed with the claimant at the disciplinary and appeal stages of the process which have also led to an unfair procedure. The respondent determined that the claimant's conduct in asking Colleague 1 to cancel her Uber in January 2023 was due to Colleague 1's gender. However, this point was not put to the claimant for comment. Furthermore, I find that the issue of sanction was not discussed with the claimant during the appeal process even though this formed part of the claimant's grounds of appeal. I find that the issue of the claimant's self-awareness was not raised during the appeal process notwithstanding the respondent's reliance on that factor when considering the issue of sanction. I find the claimant was deprived of an opportunity to respond to these matters and in fact responded to it for the first time in cross examination. I find that an employer acting reasonably in a disciplinary and appeal process, would have put these core issues on which reliance had been placed, to the employee for comment before a final decision.

178. Fifthly, although the claimant raised a grievance, the respondent chose not to address the serious discrepancies between Colleague 1's account and the CCTV footage description of what happened immediately before going into the accessible toilet. The claimant characterises this as bias by Ms Banga. I would not go so far but I am content that the failure to interview Colleague 1 was procedurally unfair to the claimant. I have been provided with no good reason why the respondent chose to take this wholly unusual step. I find this has material relevance for the finding and decision the respondent arrived at in respect of the January 2023 incident. I find that an employer acting reasonably in a joint grievance and disciplinary/appeal process, would have taken the step to interview the complainant, namely Colleague 1, before a final decision. I find these matters taken together has rendered the procedure unfair.

179. There were other matters raised by the claimant which the claimant states also led to an unfair procedure, for example, the respondent treating the appeal process as including an appeal against the grievance decision but the claimant was unaware of this. I do not consider that this led to an unfair process. I find there were substantial overlaps between both matters that it was reasonable for the respondent to deal with both matters together.

180. In reaching the above decision, I have taken into account the size and administrative resources of the respondent. I find the respondent is an international law firm with an adequately resourced HR department.

Did the Respondent Have Reasonable Grounds for the Belief of Misconduct?

181. I find that reasonableness must be considered in the light of the respondent's investigation and knowledge. If the investigation was as thorough as could reasonably be expected, it will support a reasonable belief in the findings, even though some information has not been uncovered. However, I have already found the respondent did not follow a reasonably fair procedure. As a consequence of the respondent's failure to follow a reasonably fair procedure in respect of its investigation, disciplinary and appeal process in respect of the January 2023 incident, I find the respondent did not have

reasonable grounds for the belief of misconduct regarding the January 2023 incident.

Was the Respondent's Response Within the Band of Reasonable Responses?

182. I find the respondent's failure to give adequate weight to a) the material discrepancies in Colleague 1's evidence against the CCTV footage description; b) evidence of flirting between Colleague 1 and the claimant, as significant and weighty factors affecting her credibility as a witness in relation to the January 2023 incident, is a response which no reasonable employer would make. I find that a reasonable employer acting reasonably would consider a lie on a material matter to be significant and that it should be accorded adequate weight.

183. The respondent's case that the claimant's behaviour were two serious acts of misconduct over six months was also not within the band of reasonable responses because it is clear the respondent did not speak to the claimant immediately or in the period post the January 2023 allegation to inform the claimant that his behaviour was unacceptable.

Colleague 2 July 2023 Incident

Did the Respondent Follow a Reasonably Fair Procedure?

184. I find that apart from Ms Banga's leading question to Colleague 2 whereby Colleague 2 changed her evidence, the respondent followed a reasonably fair procedure in its investigation regarding this incident.

Did the Respondent Have Reasonable Grounds for the Belief of Misconduct?

185. I find the respondent had ample statements from witnesses who were present on 20 July 2023 who were able to corroborate Colleague 2's account that the claimant had his arm around Colleague 2. I find the respondent did have reasonable grounds for the belief of misconduct regarding the July 2023 incident.

Was the Respondent's Response Within the Band of Reasonable Responses?

186. I find the respondent's response was within the band of reasonable responses because even though Colleague 2 had changed her evidence following Ms Banga's leading question, and even allowing for less weight to be placed on Colleague 2's evidence because of the change in evidence, there was nonetheless ample corroboration from other witnesses that the claimant had his arm around her. I find the respondent's treatment of the 20 July 2023 incident was within the band of reasonable responses.

Sanction

187. I have already found the issue of sanction was not discussed with the claimant during the appeal process even though this formed part of the claimant's grounds of appeal. I have already found the issue of the claimant's

self-awareness was not raised during the appeal process notwithstanding the respondent's reliance on that factor when considering the issue of sanction.

188. Having found the respondent's response of the January 2023 incident was not within the band of reasonable responses, I conclude that no reasonable employer would dismiss the claimant for a first offence of having his arm around a colleague instead of imposing some other disciplinary sanction. I find the respondent's action in the dismissal of the claimant is in contravention of its own Disciplinary Policy given the claimant did not commit a misconduct when there was an active final written warning on his record, and neither was he dismissed for gross misconduct. I find that no reasonable employer would have dismissed the claimant in the circumstances.

Was the Dismissal Fair?

189. I find the respondent failed to follow a fair procedure in respect of the January 2023 incident and that the dismissal fell outwith the band of reasonable responses. I find the July 2023 incident in respect of Colleague 2 was within the band of reasonable responses.

190. When considering all the circumstances and the substantial merits of the case, the respondent did not act reasonably in treating the reason for the claimant's dismissal as a sufficient one. I find there were alternatives to dismissal.

191. Having made all of the above findings of fact and associated conclusions, I find the claimant's claim for unfair dismissal is accordingly well founded and succeeds.

192. There will have to be a separate hearing on the issue of remedy. The Tribunal will issue further case management directions shortly.

**Employment Judge Anthony
18 October 2024**

Judgment sent to the parties
on:

23 October 2024

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For the Tribunal:

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