



# EMPLOYMENT TRIBUNALS

**Claimant:** A

**Respondent:** B

**HELD AT:** Manchester **ON:** 20 & 21 June 2017; In Chambers  
11 July 2017 & 16 August 2017

**BEFORE:** Employment Judge Holmes

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr B Brown, Solicitor

# RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant was not unfairly dismissed and his complaint is accordingly dismissed.

# REASONS

1. By a claim form presented to the Tribunal on 29 November 2016 the claimant complains of unfair dismissal arising out of the termination of his employment with the respondent on 28 July 2016. The respondent admits the dismissal, and contends that it was a fair dismissal for the potentially fair reason of the claimant's conduct.

2. The claimant has appeared in person, supported by his father and other members of his family, and the respondent has been represented by Mr Brown, solicitor. The respondent called David Meredith, who carried out the investigation; David Harris, who carried out the dismissal; and Mark Qualter, who heard the appeal. The claimant gave evidence himself, but called no witnesses. There was an agreed bundle of documents. The parties made their submissions at the conclusion of the evidence with Mr Brown making his first, and the claimant, after time for preparation, then making his oral submissions. The tribunal reserved its judgment, which is now given.

3. In the meantime, whilst deliberating, the Employment Judge noted that no application had been made by either party for a rule 50 order. As the claims involve allegations of sexual conduct on the part of persons who have not appeared before the tribunal, which impinge upon their right to privacy under article 8 of the ECHR, the Employment Judge considered that the tribunal should consider whether an

order should be made under rule 50 so as to anonymise the parties and certain persons who may be identified from the judgment. As judgments are now widely available on the central register on the internet, this has become a more acute issue than hitherto. The tribunal accordingly wrote to the parties on 11 July 2017, informing them that the Employment Judge was considering making such an order. They were asked to comment upon this proposal. No comments were received, and an order has accordingly been made. The Employment Judge then resumed his deliberations and the finalisation of this judgment. It is regretted that the promulgation has been a little delayed from the target date, due to the inability of the tribunal to finalise the judgment until the issue of anonymity had been addressed, and pressure of judicial business.

### **Findings of Fact**

4. Having heard the evidence of the witnesses, read the documents in the bundle, and considered the submissions of the parties, the Tribunal finds the following facts:

4.1 The claimant was employed as an Assistant Relationship Manager at the respondent's branch in central Manchester from 20 July 2015. He had been employed by the respondent since 24 September 2007, and had previously been at another outlying suburban branch. Following his transfer to Manchester in 2015, in late 2015 he struck up a relationship with Miss A, who worked in the same branch, and who was a female Senior Relationship Manager.

4.2 The relationship between the claimant and Miss A initially was conducted on social media, but in due course they each exchanged mobile telephone numbers, and their relationship intensified. The claimant contends, though this is denied by Miss A, that their relationship became a sexual one, and that this was certainly the case in late 2015.

4.3 By January 2016, however, the claimant was transferred into Miss A's team so that she became his Senior Relationship Manager. By this time the sexual relationship had ceased, and the claimant and Miss A discussed their future working relationship together. They decided that this could continue and it did so.

4.4 Working alongside the claimant at this time was a female 18 year old apprentice, Miss B. Another colleague was Mr C, an Assistant Relationship Manager, whom the claimant knew well, and had worked with previously. The claimant travelled to and from his work in Manchester from his home in Wigan by train, and frequently travelled on the same train as Miss B. Miss B had been employed for some six months or so at the time of these events, and was receiving training from the claimant.

4.5 As a result of conversations between Miss B and Miss A, on 3 May 2016 Miss A approached David Meredith who was her, and the claimant's, line manager as the Director in the Commercial Banking Division in the branch. She reported to David Meredith that Miss B had told her that the claimant had been making comments about her, and in particular had alleged that she was having a relationship with Mr C. Miss A was concerned and upset at learning this, and raised the matter with David Meredith.

- 4.6 David Meredith in turn spoke to the claimant on his return from holiday on 9 May 2016. This was an informal discussion. In this discussion the claimant apologised if his comments and actions had upset Miss A , and said that he was happy to apologise to her face to face.
- 4.7 David Meredith sought advice from HR as to how the matter should be progressed. He was referred to the Resolving Issues at Work Support Pack, and advised to attempt to resolve the issue informally if possible. David Meredith met with Miss A and explained how the claimant had offered to apologise and to apologise to her face to face, but she declined this saying that she was uncomfortable in his company and did not think that she could work with him.
- 4.8 David Meredith discussed the matter further with Miss A and she disagreed with any approach that would mean that she would be moved if she felt she was the victim of the situation and should not be penalised.
- 4.9 On 10 May Miss A spoke to Stephen Sankson, the Regional Director. As a result of this involvement, the matter was referred again to the HR department. David Meredith was told the matter should then be investigated and he consequently set about an investigation and the taking of statements.
- 4.10 Around this time, an entry was made on the Peoplesoft HR system , dated 10 May 2016 by Faye Mitchell, in relation to the claimant, under the heading “sexual harassment allegation”. In terms of the details, a document produced at pages 360-361 of the bundle also records what was put on the system apparently by Amanda Treadwell, where it is recorded that a male MOS (member of staff) had approached a female MOS and followed her to her car and expressed his feelings for her. Female MOS has rejected this. Over the page, on page 361 of the bundle, there is reference to the male MOS then starting to “stalk her” on social media and post things on Facebook about her. The entry continues:

*“LM [line manager] David Meredith put a call into People Services 09.05.16 and said he had spoken to MOS and MOS was sorry and wanted to apologise to the female MOS involved and that the female MOS did not want to take this any further and it had been arranged to have female MOS moved to another team and she was happy with this. The case was shut down by People Services.”*

The entry continues:

*“This morning Amanda Treadwell has made a call to priority line to say that she is phoning on behalf of Steve Sankson who is the LM for both David and Amanda. They are looking to suspend the member of staff, and Amanda says that the female member of staff is not happy about the situation and does not want to drop it. She feels uncomfortable working with MOS and feels unsafe.”*

- 4.11 This entry was put to all three of the respondent’s witnesses, and they knew nothing of it. It has somewhat bedevilled the hearing of this case, and the respondent’s case is that this is an inaccurate entry made by somebody not immediately involved in gathering the evidence . It has somewhat exercised the claimant in that it was the first recorded mention of sexual harassment allegations, but the allegations as detailed in this record do not tally with those that were actually made subsequently in the investigation, and the subsequent

disciplinary. The Tribunal's conclusion is that this is indeed an erroneous entry which has been disclosed, quite properly, by the respondent, but which, it is accepted, none of the respondent's witnesses called before the tribunal had seen, and therefore it had no influence upon any decisions that they made.

- 4.12 On 10 May 2016 David Meredith informed the claimant that he would carry out an investigatory meeting with him the following day. He provided him with a disciplinary pack, and this enabled the claimant to prepare a document for use in the meeting the following day (see pages 196-198 of the bundle).
- 4.13 On 11 May 2016 David Meredith first interviewed Miss A. The notes of that interview are at pages 158-159 of the bundle. In her interview she explained the relationship that she had had with the claimant since July 2015, and accepted that things had got "a bit flirty". She claimed that she was concerned that she might be encouraging the claimant, and that she had then cut off contact. She went on to say how in January the claimant was moved into her team and became her Assistant Relationship Manager. She made reference to travelling in a car with the claimant to see a customer, and alleged the claimant told her of his feelings for her and how he had asked if she thought anything could happen between them. She claimed that she had declined this advance. She then went on to refer to other incidents where she had received text messages from the claimant, and claimed at one point that he had sent her some 15 messages, but she did not respond to these. She went on to refer to comments the claimant had made about her working relationships with other people in the office such as Hannah Regan, and the claimant's mood at this time. She went on to say how the claimant had been moody and had alleged that Miss A wanted someone else to be her Assistant Relationship Manager, and how she felt she had to tread very carefully around him. She went on to say how she had been told by Mr C of a conversation he had had with Miss B enquiring if it was correct that Miss A and he were having an affair. It was at this point that Miss B had also made other allegations about comments that the claimant had made about Miss A and Mr C and these had been passed on to Miss A. This had led her to ask for the meeting on 3 May with David Meredith, and she had gone on to block the claimant on social media on Wednesday 4 May 2016.
- 4.14 Additionally Miss A provided to David Meredith an email dated 10 May 2016 in which she set out details from the messages that Miss B had told her about, or had shown to her. This email is at pages 134-135 of the bundle. The comments include (and these can be seen in their original form in the screenshots provided from Miss B's telephone or Facebook account at pages 137-155 of the bundle) the following:

*"Wears short skirts for my benefit"*

*"I'm going to make her life hell"*

*"She flirts with others to make me jealous"*

*"She is a bitch"*

*"She flirts with [Mr X] t"*

*“There is something going on with her and [Mr C], see he took the dog to Formby beach, that’s where [Miss A] takes her dog”*

*“The reason [Miss A] and [Mr C] are not friends on Facebook is so Miss D (Mr C’s girlfriend) doesn’t work out they are seeing each other”*

*Also the following messages were received:*

*“She is a nob and a tease”*

*“Course I do like her, always have and she knows how I feel, told her loads of times, I think she really likes me too but is scared of anything happening with the work thing. She flirts and doesn’t include me in stuff to try and get my attention”*

*“She is being a tease with me and she wants me to react and I’m not”*

*“They are chatting on here now” (meaning Miss A and Mr C on Facebook)*

*“They speak on WhatsApp all the time and probably about me, all they know about me so not sure will be able to tell on the next work’s do”*

4.15 In this email Miss A refers to herself and the claimant having been friends, but that she had made it clear that she did not want anything more than friendship. She referred to the messages that had been received, including one in which the claimant refers to a “bombshell” that he had dropped on her. She went on to say how Miss B had told her that the claimant had spoken a lot about her over the last few months and that it had got to a point where Miss B felt that she had to tell someone what he was saying, as it was turning into an obsession for him. She went on to say that she was shocked and angry and she did not see what she could have done differently. She had had to offer to go to meet Mr C’s girlfriend to try to put her mind at rest that they were not seeing each other. She ended by saying that she did not feel it was appropriate for her and the claimant to work in the same team anymore.

4.16 David Meredith interviewed Miss B the same day, 11 May 2016. David Meredith was not specifically asked the order in which he conducted these interviews, and his witness statement suggests that the claimant was interviewed before Miss B. The record of interview in the bundle, however, is in a slightly different order in that the interview with Miss B follows on from that with Miss A at pages 161-162 of the bundle. This would seem logical, but was not addressed specifically in the hearing. Whatever the position, in the interview Miss B gave David Meredith an account of what the claimant had been saying to her about Miss A. This is recorded in a number of bullet points in the notes of this investigation meeting. In addition to items that had been included in text messages or other social media communications, Miss B alleged that the claimant had, on a number of occasions, made comments to her about Miss A. She made reference to what he told her about Miss A and Mr C’s relationship, and also said that the claimant had made such comments about Miss A and Mr C in front of other people, including Miss Y, an apprentice at the Wigan commercial office. The claimant accepted in evidence that he may have made comments to Miss B of this nature, but that he did not realise that Miss Y would be able to hear them. Miss B’s account included telling David Meredith that the claimant said that

Miss A was “a bitch” all the time, and how he would be constantly checking social media to see if Miss A was active on it and would tell Miss B when she and Mr C are on it at the same time. He had also made a comment about a picture posted by Miss A on social media while she was on holiday where he said, “she’s got her tits out in that dress”. David Meredith asked Miss B why the claimant was sending her these messages, and she said that he got off the train they shared before she did and even though he had been talking to her on the train he continued to message her even though she did not always answer. In conclusion Miss B said that she felt that the claimant was coming across “stalkerish”, always checking social media.

- 4.17 The claimant was also interviewed on 11 May 2016 by David Meredith. The notes of this interview are at pages 165-167 of the bundle. The claimant presented his statement that he had prepared the previous day referred to above. David Meredith in this meeting set out the allegations from his meetings with Miss A and Miss B previously and repeated the comments that had been allegedly made by the claimant, either on social media or verbally to Miss B. He explained to the claimant that Miss A was very upset about the comments as was Mr C: that the claimant was saying that he thought that he and Miss A were having an affair. The claimant replied that Miss B had broken his confidence, which may well have been the case. He went on to say, that said, he probably did make these comments. He went on to give a brief background of his relationship with Miss A which had started in 2015. He went on to say that they had become more than friends and met up outside work. When they had realised they were going to be working together from early 2016 they had had a chat to see if everything would be ok and they agreed that it would. He explained how he had returned to work on 9 May 2016 when everyone appeared to know what had gone on and he felt upset and vulnerable in the team. He explained why he had made the statement which was produced in the meeting, and which he read out. He accepted that he did speak and send texts to Miss B about Miss A, but that this was done outside work. He did feel that Mr C, Miss Z and Miss A had been undermining him, making him feel like he was being watched. In relation to the comment about making Miss A’s life hell, the claimant said that if he had said it, it was said in haste. When asked if he had called her a bitch, he said he could not remember.
- 4.18 In terms of his own statement, under questions that he posed, these were largely in relation to confidentiality issues and whether the Bank’s Code of Conduct had been broken. He was particularly concerned about the conduct of others, and whether any action would be taken against them. He made the point that he had offered to apologise, and that this matter could be dealt with informally, he considered. David Meredith, however, explained that Miss A was not happy simply to accept an apology and her stance required that the situation would be investigated further. The claimant reiterated that he was happy to apologise, and had tried to call Mr C to apologise to him as well. David Meredith said that he would need to continue the interviews , and the claimant confirmed that the conversations with her did happen on the train.
- 4.19 Having conducted these interviews, David Meredith referred to the matter back to Steve Sankson, and on 20 May 2016 the claimant was suspended. David Meredith conducted the suspension, and a letter dated 20 May 2016 (pages 175 and 176 of the bundle) was sent to him along with a copy of the disciplinary policy and disciplinary support pack. In terms of the reason for the suspension, all that

was said in the second paragraph of this letter is that this was a precautionary measure, “while we carry out an investigation into alleged misconduct and inappropriate behaviour towards a colleague”.

4.20 By a letter actually dated 23 May 2016 (but wrongly dated on the copy in the bundle as 29 December 2016, at pages 179-181 of the bundle), the claimant was requested to attend a disciplinary meeting to be held on 31 May 2016. This letter was from Stephen Sankson, the Regional Director, and the meeting was to be held with him along with Steven Allcock of HR and Amanda Treadwell to take minutes. In this letter Steve Sankson set out the allegation as follows:

*“It is alleged that you have behaved inappropriately towards a colleague and that your actions could be seen as sexual harassment. It is alleged that you have made inappropriate and derogatory comments about this same colleague to a third colleague, some of which were of a sexual nature.”*

4.21 Thereafter the letter sets out some background and in terms of alleged comments made by the claimant there are four bullet points which are then referred to, as had been previously referred to in the interviews with David Meredith. The letter continued to set out the various other allegations of inappropriate comments, and then went on to refer to the definition of harassment in the Bank’s policy documents. Two thirds of the way down the second page the following appears:

*“It is alleged that you have made unwanted, unwelcome and unreciprocated propositions to Miss A and that when these were rejected you have followed this up with a campaign against [Miss A] and that you have made derogatory remarks about her to colleagues, some of which are of a sexual nature, and that you have made false allegations that [Miss A] has engaged in a relationship with another colleague, to the extent that [Miss A] has had to personally assure his partner that this isn’t true.”*

4.22 The minutes of the investigatory meeting with the claimant were enclosed with that letter, as was a copy of the disciplinary policy. The claimant was also provided with notes of the investigation meetings with Miss A and Miss B, and a timeline of events document that had been provided by Miss A along with screen prints of the conversations which had come from Miss B. The timeline of events document would appear to be at pages 156-157 of the bundle. The claimant was advised of his right to be accompanied at this meeting and warned of the possible outcome that he could be dismissed from his employment without pay in lieu of notice or notice.

4.23 The claimant was ill at this time, and went to his doctor on 24 May 2016. He was given a fit note for the period from 24 May 2016 to 7 June 2016 for stress at work. Consequently he would not be able to attend the meeting of 31 May 2016. Subsequently, by a letter dated 8 June 2016 (page 201 of the bundle), the claimant wrote to Steve Sankson advising him of his continuing illness, and further making the point that the invitation letter was the first knowledge that he had that an accusation of sexual harassment had been made against him, and further that he objected to Steve Sankson hearing the disciplinary, as he had been advised that he should have an independent adjudicator and minute taker

because both Steve Sankson and Amanda Treadwell knew the complainant, Miss A. He advised that he would have a further doctor's appointment to review his condition to see if he was fit to attend the meeting. He sent with this document a timeline (pages 202-203 of the bundle), together with 101 pages of photographs and text exchanges on social media and mobile phones (pages 204-305 of the bundle).

- 4.24 The respondent referred the claimant to Occupational Health by a letter of 15 June 2016 to assess his fitness to attend a disciplinary hearing, and following a telephone consultation, a report dated 21 June 2016 (pages 307-308 of the bundle) was obtained. That report concluded that the claimant was not fit to attend a meeting. The advice that was given was to the effect that the claimant may struggle, because of poor concentration, to understand or follow the proceedings which may have an effect on his mental health. The advice, however, was that he would be able to respond to the allegations in writing and to provide mitigation points for such a meeting, and accordingly this report was provided to the claimant and the respondent. The claimant submitted a further fit note dated 22 June 2016 covering his absence for a further period of four weeks.
- 4.25 By a letter of 1 July 2016 David Harris, who had been asked by Steve Sankson to take over the disciplinary hearing in the light of the claimant's objections raised in his letter of 8 June 2016, having telephoned the claimant initially to inform him of his appointment, sent him a letter dated 1 July 2016 (pages 310-313 of the bundle) re-arranging the disciplinary meeting for Tuesday 12 July 2016. His letter was in similar terms to that of Steve Sankson of 23 May 2016, but had some additional features in that David Harris had prepared some additional questions for the claimant to respond to in writing to assist him in reaching his decision. Those are set out on the third page of the letter (pages 312-313 of the bundle), and contain some five points that the claimant was invited to address.
- 4.26 On 5 and 6 July 2016 Miss A spoke with David Harris about his involvement in the hearing, and he advised her that he may need to speak to her but could not be certain of this until the meeting started. It was uncertain at that time as to whether the claimant would attend the meeting (he was entitled to do so notwithstanding his sickness absence), and Miss A advised that it would be appropriate to alert Miss B to the claimant's potential attendance as she may see him on the train as they often travelled together. Miss A raised questions about the possible outcome and how she did not want to work in the same office, but David Harris declined to be drawn on these issues, which would have to be considered further. She raised concerns about safety should a negative outcome for the claimant be forthcoming, which David Harris again declined to comment upon.
- 4.27 On 12 July 2016 the meeting was convened with David Harris, Stephen Allcock and Lucy Watt as a note taker at 9.30am. The claimant did not, as he had indicated, attend, and the meeting was adjourned at 9.40am to allow time for David Harris to consider the information contained in the claimant's submissions, and make any further enquiries.



4.28 Later than day at 11:35 David Harris interviewed Miss A. The notes of that conversation are at pages 316-319 of the bundle. In this interview David Harris put to Miss A many of the matters alleged by the claimant in his submissions for the disciplinary hearing. In particular he put to her the contention that the claimant made that there had been more than a friendship between the two of them. Miss A accepted that they had been flirtatious, and how she had given him a lift home following a work seminar at the end of November. She claimed that their relationship did not progress to a sexual relationship. She went on to claim that at the beginning of December she had told him that she did not want anything further to happen between them, and that it looked to her like he was moving on. The messages that the claimant had provided in his submissions were discussed, and the pictures that the claimant alleged, and Miss A accepted, had been sent to him (pages 204 to 208 of the Bundle). They included a photograph that she had sent the claimant of a bruise on her bottom, and pictures of the claimant at her house. Miss A said she had deleted some of the conversations that the claimant had referred to, and David Harris did ask her to seek to retrieve them from her network provider, but in due course she was unable to do so. Miss A accepted that they had shared a consensual kiss but denied sexual intimacy. She went on to say how in January things had quietened down between the two of them, and she pointed out that she had not been his manager at the time of the kiss.

4.29 Having carried out this interview, David Harris took his decision, which was communicated to the claimant by a letter of 28 July 2016 (pages 321-326 of the bundle). David Harris decided that the claimant was to be dismissed. He set out his reasoning extensively in this letter, in which he addressed the points made by the claimant in his response to the allegations. In summary, he did not accept that the claimant had been in sexual relationship with Miss A, given her denials, but, in any event, even if that had been the case, he considered that there was no excuse for the claimant's later behaviour in expressing his feelings after she had told him that she did not want the relationship to go any further, but he did not let it go. He believed that the claimant had made unwanted propositions, and had alleged that Miss A was in relationships with other parties, and had made derogatory remarks about her, some of which were of a sexual nature. He rejected the claimant's contentions that, as he had not directly harassed Miss A, but had spoken in, what he thought was, confidence to a friend, this was not worthy of disciplinary action. He also rejected the suggestion that he could not act on hearsay, i.e the claimant's word against that of Miss B. He took into account, as the claimant asked him to, his length of service and clear disciplinary record, and his offer of an apology.

4.30 David Harris concluded his letter as follows (pages 325 to 326 of the Bundle):

***“My findings on the allegation***

*It's my belief that you've behaved inappropriately towards a colleague and I see your actions as sexual harassment. I believe that you have made unwanted propositions towards and inappropriate and derogatory comments about this same colleague to [sc. "a"] third colleague, some of which were of a sexual nature.*

***Summary***

*I considered the allegations, the evidence and the points raised above and have concluded that you've failed to meet the required standards of the bank.*

*I believe that you've behaved inappropriately towards Miss A, both directly in terms of unwanted propositions when she'd made it clear to you that the relationship wouldn't go any further and that following this ,you've made derogatory remarks about her, some of which were of a sexual nature. You've confirmed in your own words that this was out of 'jealousy and temper'. I find this unacceptable.*

*I believe that some of your actions have been unwanted, unwelcome and unreciprocated created a hostile, degrading and offensive environment at work for [Miss A].*

*I consider your actions were gross misconduct, specifically bullying or harassment.*

*I did consider whether a lesser warning was appropriate and I did consider that [Miss A] told me that she'd be willing to accept an apology (albeit she didn't think you'd be able to work together again). However, given how seriously I view these allegations and given my belief that your actions do amount to sexual harassment, which I cannot condone, I didn't think this was the correct course of action.*

*For this reason I have decided that it is appropriate to dismiss you from our employment."*

- 4.31 The claimant was advised of the procedure for his P45, benefits and pension options, and of his right of appeal. In that letter David Harris states that he was enclosing a copy of his interview with Miss A, and of the minutes of the meeting . He did not , in fact do so.
- 4.32 The claimant raised with David Harris by e-mail on 1 August 2016 (page 329 of the Bundle) the issues of return of his own paperwork and asked him also to "send out the paperwork that was not included in the letter." He did not in that e-mail specifically refer to either the minutes of the statement from Miss A.
- 4.33 David Harris subsequently sent the minutes document by e-mail on 18 August 2016 (page 330 of the Bundle). That document is at page 331. It is brief, in that the claimant did not attend the meeting, and hence it was adjourned shortly after it started. David Harris said he was sending other documentation back to the claimant by post. He did not, however, send the claimant the notes of his interview with Miss A.
- 4.34 The claimant exercised his right of appeal by letter of 3 August 2016 (pages 332 to 333 of the Bundle). In his letter of appeal he stated that his grounds were "procedural discrepancies". He then set out three paragraphs. The first referred to how the original allegations had been of inappropriate comments and messages, but Mr Sankson's letter had introduced sexual harassment for the first time, and his dismissal was for bullying and harassment. He considered this incorrect procedure.

- 4.35 The second paragraph of the appeal letter refers to his discussions with Steve Sankson, and the proposed role of Amanda Treadwell as a notetaker. The claimant had requested that she was not the notetaker, as she was not impartial. He suggested that reference by David Harris to this in his dismissal letter indicated that he was questioning the claimant's request for an impartial adjudicator.
- 4.36 In the third paragraph he questioned why, if he had been sexually harassing Miss A on a day to day basis, why had she not speak directly to her line manager sooner? Why had it taken two weeks to suspend him? He referred again to the allegations being based upon a third party, a conversation on a train. He suggested that Mr Sankson and Mr Harris probably contacted each other in their day to day routine, and he questioned the ability of HR to appoint anyone impartial. He complained of not receiving the minutes or a copy of Miss A's statement.
- 4.37 The claimant's appeal was heard by Mark Qualter on 25 August 2016. The claimant attended this hearing, and was unaccompanied. The minutes of this hearing are at pages 343 to 348 of the Bundle. The claimant has signed them, and no issue is taken as to their accuracy.
- 4.38 Mark Qualter, after introductions, clarified that the claimant was not accompanied, and was content to proceed on that basis. The first part of the appeal was concerned with the missing documents from David Harris' dismissal letter. The claimant, having received that document then questioned it, saying that he felt these were not proper minutes. In particular, the claimant said this (page 344 of the Bundle):

*"I have taken the time to go through the outcome letter from David Harris (DH) dated 28<sup>th</sup> July in which it stated the minutes would be enclosed along with [Miss A's] statement. They were not enclosed. I emailed DH 1<sup>st</sup> August asking for these along with my paperwork to be returned. On the 18<sup>th</sup> August I received an e mail from DH as he had been out of the office apologising for not sending them originally but attaching with his e mail."*

- 4.39 The discussion then moved on to the minutes of the disciplinary meeting held on 12 July 2016. The claimant then went on to develop the other points of his appeal. There was no further mention by him of the missing "statement" from Miss A.
- 4.40 In the course of the appeal the claimant said:

*"... Obviously I've said some stupid things about the way I was treated by JS, but I didn't expect my trust to be broken..."* (page 347 of the Bundle)

In answer to the question *"What punishment did you think you would receive, what do you see as what you have done?"* (page 347 of the Bundle) he replied:

*"A verbal warning for the text messages to [Miss B], yes I was hasty and jealous in what I said. I hold my hands up. I have also found it difficult to interact with some people on the team. For me, I have done the texts to [Miss B] that no one would have known about. I offered to apologise for these, [Miss A] wanted to take it further but didn't originally. I thought I'd receive a warning but never*

*imagined this would happen I intend to go to a Tribunal and stand to defend myself as I have not done any of what has been said to [Miss A].”*

He went on to say that he did not deny that he had done “*something wrong*” but not something that warranted his dismissal.

4.41 Mark Qualter did not make a decision at that point, but made further enquiries of his own. They were to hold telephone interviews on 7 September 2016 with Miss A (notes at page 349 of the Bundle) , Steve Sankson (notes at page 351 of the Bundle) , and David Harris (notes at page 351 of the Bundle) . Nina Butler interviewed Steve Allcock of HR, who had been present in the short disciplinary hearing on 12 July 2016 about what happened , and why the notes were so brief. The note of that interview is at page 352 of the Bundle, and was provided to Mark Qualter.

4.42 The decision on the appeal was given in a letter dated 4 October 2016 from Mark Qualter (pages 353 to 359 of the Bundle) He rejected the appeal, setting out his reasons in detail. He went through the points raised in the claimant’s letter of appeal, some seven in total, and then dealt with a further three that the claimant also asked to be considered.

4.43 In summary , in relation to the main points raised by the claimant, his findings were, adopting the enumeration in his letter:

1.“Sexual harassment” was not originally mentioned, only inappropriate comments and behaviour. This term was added at the disciplinary stage.

Mark Qualter considered that whether that term was used or not, and when , had no bearing on the overall fairness of the decision to dismiss. The claimant was aware of the specific allegations, and was allowed time to respond to them, which he did. He considered that it was appropriate to allege that the claimant’s comments or behaviour may constitute sexual harassment.

[2.Points relating to Steve Sankson’s involvement were considered, but as he was not in fact appointed to hear the disciplinary, they were considered of no real relevance]

3.There was a two week delay between the allegations being made and the claimant’s suspension.

Mark Qualter accepted this was so, and that suspension would normally be at the earliest opportunity, but this was because careful consideration was being given to the issue. In any event, he did not consider any delay in suspension had any bearing on the decision to dismiss,

4.Inaccurate investigation notes

Mark Qualter received the claimant’s annotated notes of the meeting, and took them into account.

[5.This point related to the requirement to call in on a daily basis when off sick.It had no bearing on the decision to dismiss.]

6.The claimant had not received the minutes of the disciplinary meeting on 12 July 2016, which he did not attend, and which, when he did receive them, he considered could not be correct.

Mark Qualter had looked into this, and explained how this short meeting was held, and what David Harris then did.

[7.This was a point about post – dismissal confidentiality, and has no bearing on the fairness of the decision to dismiss]

8.The claimant questioned the impartiality of David Harris, and the effect of the claimant’s absence from the disciplinary meeting.

Mark Qualter had looked into this with David Harris, and was satisfied that he had given full consideration to the case advanced by the claimant in his documents and submissions.

9.Miss A would have accepted an apology.

Mark Qualter acknowledged this, but considered that irrespective of whether that was so, due to the severity of the comments, and the detrimental impact upon her, it was right for the respondent to formally investigate, and that dismissal was an appropriate sanction.

10.The claimant denied sending 15 unanswered text messages to Miss A, as she had told David Harris he had.

Mark Qualter had spoken to Miss A and asked for evidence of these, which she could not provide. He therefore discounted this evidence from his consideration.

11.The claimant had not directly harassed Miss A, and nothing had occurred in the work environment.

Mark Qualter acknowledged that the majority of the claimant’s conduct had not been directly towards Miss A, although his comments about still having feelings for her were , for they were made to her in a car. He acknowledged too that the claimant had made his comments to Miss B, and did not intend them to be repeated back to Miss A. Given, however, that they were such that Miss B felt compelled to raise them with someone. The claimant had made comments to a work colleague, about another work colleague, and they were reported back. These were unwelcome and unwanted and created a hostile working environment for Miss A. It was not relevant that the comments were made outside the office, the result was the same.

4.44 Mark Qualter therefore rejected the claimant’s appeal points for these reasons. He went on to set out (pages 357 to 359 of the Bundle) his rationale for his decision to uphold the dismissal,. He considered that the allegations fell into three broad categories, and dealt with each one. The first was that the claimant had made unwelcome, unwanted and unreciprocated propositions to Miss A. He did not uphold this allegation. He noted that the extent of the relationship between the two of them appeared unclear, and that there had clearly been a consensual relationship of some sort at some time. He did not consider that the claimant had made “unwanted propositions” , as there was only evidence of this

on one occasion. Even then, there was no evidence that this made Miss A feel threatened or uncomfortable. Whilst he did not consider it appropriate for the claimant to have made his feelings known in this way and at this time, Mark Qualter did not find that this was , in itself, gross misconduct.

4.45 The second allegation was that the claimant had made derogatory comments about Miss A to her colleagues, some of which were of a sexual nature. Mark Qualter noted that the claimant did not dispute this allegation, which derived from the comments he made to Miss B by text message and what he said to her. He noted in particular the threat contained in the message “I am going to make her life hell”, which he considered needed to be treated extremely seriously. He considered that , irrespective of how the behaviour was labelled, it fell far short of the professional behaviour expected of an employee, and was part of a pattern of behaviour consistent with bullying and harassment, which constituted gross misconduct.

4.46 The third allegation was that the claimant had made a false allegation that Miss A was engaged in a relationship with another colleague. The claimant did not dispute the allegation. Mark Qualter considered it inappropriate that the claimant should discuss colleagues in this context, and that the claimant had become fixated on this issue. He considered that this was wholly unacceptable, and constituted malicious gossip , which was a form of bullying, and therefore gross misconduct.

4.47 In conclusion Mark Qualter , having considered a lesser sanction, and acknowledging that Miss A may have been prepared to accept an apology, decided that the respondent had a duty of care to all staff and that to allow the claimant to remain employed would not be appropriate. He upheld the dismissal.

4.48 The respondent has a Disciplinary Policy which is at pages 128 to 133 of the Bundle . It provides (at page 129 of the Bundle) non – exhaustive examples of gross misconduct. Bullying or harassment is the third example. Section 5 (pages 131 and 132 of the Bundle) sets out the procedure in relation to the formal stage, and the requirement to carry out an investigation before progressing with a formal disciplinary procedure, and for appeals. .

5. Those are the tribunal’s findings of fact. There was not much dispute of fact, and the tribunal was not required to determine what the claimant had actually done, but whether the respondent was entitled to dismiss on the information provided to it.

### **The submissions.**

6. The parties made submissions. The claimant followed the respondent , by agreement. The respondent’s submissions were set out in a document - Written Submissions (Liability Only) – to which Mr Brown spoke. It is not intended to repeat the contents of that document in this judgment. In that document he set out the relevant law in respect of various aspects of the case, such as , the test to be applied to conduct dismissals, the effect of any appeal, and the way in which the tribunal should assess the reasonableness of both the substantive and procedural aspects of the dismissal. His written submissions did address whether the dismissal was wrongful as well, but there was no claim by the claimant for notice pay, so the tribunal is not required to, and will not , determine whether the claimant in fact

committed an act of misconduct entitling the respondent to dismiss him without notice. As ever in unfair dismissal claims, the issue for the tribunal is whether the decision to dismiss was reasonable in all the circumstances, not was the claimant actually guilty of the conduct alleged against him.

7. Mr Brown then moved on to the facts, referring the tribunal to features of the evidence and the documents in the Bundle. He reserved his position on any reduction for ***Polkey*** and/or contributory fault, in the event of a finding of unfair dismissal. In summary, he invited the tribunal to find that both procedurally, and substantively, the dismissal fell within the range of reasonable responses, and invited the tribunal to dismiss the claim.

8. The claimant in reply, not being legally qualified or represented was not expected to make any submissions on matters of law. He was afforded a break, as he requested after the respondent's submissions, having been supplied with the written submissions, for him to prepare what he wanted to say. He refuted the respondent's case set out in pages 3 to 7 of Mr Brown's submissions. When Miss A was interviewed on 3 May 2016 he considered that was a formal grievance interview. He was then interviewed on 9 May 2016 by David Meredith. This was about what he called "comments and hearsay". He thought that had cleared the matter off. There was no mention then of sexual harassment. He referred to the Peoplesoft Services log at page 360 of the Bundle, and how the details of an alleged sexual harassment complaint came to be entered there. He considered the respondent had broken its own procedures in this regard. It was relevant that he and Miss A had had a consensual sexual relationship. This had a massive bearing on the case. The respondent had taken Miss A's case, which was very unfair when that involved allegations of sexual harassment made against him. No action was taken about Miss A's comments and messages to him.

9. He felt that the procedure had been broken on many occasions, and he was not given a fair shot at defending himself. What started as a grievance became a conduct issue, and it was clear that the respondent did not want him back, and was intent upon dismissal. There was a neglect of his well being, but Miss A's was given priority, and the judgment was in her favour. Some of the procedure was really flawed. The respondent had changed the goal posts, there was a lot of confusion over policies and procedures. He comprehensively rejected that he had been given fair treatment throughout this process.

### **The Law.**

10. The relevant statutory provisions are contained in s.98 of the Employment Rights Act 1996, which are set out in the Annex to this judgment.

11. The relevant caselaw in relation to conduct dismissals is contained in Mr Brown's written submissions, and, in particular, he correctly cites ***British Home Stores v Burchell [1978] IRLR 379*** in relation to the test to be applied in conduct dismissals, ***Taylor v OCS Group Ltd [2006] IRLR 613*** in relation to the test to be applied as to the potential for an appeal to cure any defects in the original dismissal decision, ***HSBC v Madden [2000] ICR 1283*** as to the test to be applied by a tribunal in assessing reasonableness, and ***Sainsbury Supermarket Ltd v Hitt [2003] IRLR 23*** as to the application of that test to both substantive and procedural aspects of the dismissal.

**Discussion and Findings.**

12. The first issue to be determined is the reason for dismissal, the burden of establishing a potentially fair reason being upon the respondent. The reason advanced is “conduct”, and the tribunal has no hesitation in accepting that this was indeed the reason. No alternative reason has seriously been advanced by the claimant, and the tribunal has therefore to consider under the **Burchell** test whether the respondent genuinely believed, on reasonable grounds, having carried out a reasonable investigation, that the claimant was guilty of the conduct alleged against him. It is also necessary to consider whether the respondent carried out a fair procedure.

13. As to this last requirement, whilst points have been taken by the claimant as to the procedure, they are, the tribunal considers, largely without substance. It is unfortunate, but, of course, entirely proper, that the respondent disclosed the document at page 360 of the Bundle in which an erroneous reference is made to the claimant sexually harassing a fellow employee in a car park. This has led the claimant to question witnesses, particularly David Meredith about “new” allegations of sexual harassment. He has also sought to draw a distinction between allegations of what he terms “comments and hearsay” and of sexual harassment. David Meredith never saw this document, and was not the author of it. David Harris and Mark Qualter never saw it either. The claimant has, understandably, sought to make much of it, suggesting that HR “closed the case”, but it was then re-opened. That may be so, but as far as David Meredith was concerned he was advised that an investigation would be required, and one was carried out by David Meredith, in the course of which the claimant was interviewed.

14. He was then called to a disciplinary meeting, and provided, in advance, with the relevant material in the management case against him. He was not fit enough to attend that meeting, and agreed to deal with it by making written submissions, and answering specific questions. Whilst in this hearing the suggestion was half – made that the claimant should have been given a chance to attend in person, that was never put at the time, and no complaint was made at the appeal that the disciplinary hearing should not have been conducted that way.

15. There is one aspect of the procedure, however, which has given the tribunal reason to pause, and reflect as to whether a fair procedure was followed. This is in relation to the notes of David Harris’s interview with Miss A on 12 July 2016. These are at pages 316 to 319 of the Bundle. Clearly, David Harris interviewed her to check her account against the points made by the claimant in his written submissions for the disciplinary hearing. The outcome letter of 28 July 2016 (pages 321 to 326 of the Bundle) expressly states, at page 322 that David Harris had interviewed Miss A, and that he was enclosing “copies of Miss A’s statement”. That must be a reference to the notes of the interview that he held with her on 12 July 2016, as the statement she had made in the course of the investigation on 11 May 2016, and her “timeline of events” are expressly referred to in the preceding bullet points on that page. No such document, however, was enclosed, and the minutes of the meeting on 12 July 2016, which were similarly intended to have been enclosed were not either. The claimant raised with David Harris by e-mail on 1 August 2016 the issues of return of his own paperwork (i.e that which he had submitted) and asked him also to “send out the paperwork that was not included in the letter.” It is unfortunate that in his e-mail of 1 August 2016 the claimant did not identify the documents that were missing from



David Harris's letter, and he seems to have assumed that it was only the minutes of the hearing on 12 July 2016 that were missing, for that is what he sent. He did not send, and the claimant complained about this in his grounds of appeal (page 333 of the Bundle) Miss A's "statement".

16. This may not render the dismissal unfair in itself, but it is an understandable and legitimate concern on the part of the claimant. That said, the tribunal does not consider that it is unreasonable not to provide to an employee notes of a further investigatory interview with a witness, when their original statement in the investigation process has been provided, and the employee has been given the opportunity to comment upon it, as occurred here. The danger is of documentary "ping-pong", where there is no end of comment upon comment. Provided nothing new was being advanced by the witness in the course of any further interview by the disciplining officer, which was the case here, the tribunal sees no unfairness in not disclosing the notes or statement obtained on that occasion. As it is, the claimant was informed of the fact that she had been interviewed by David Harris, and his letter makes clear what she told him.

17. In any event, there was an appeal, and the claimant did attend that in person, with the opportunity for accompaniment, which he did not take up. Whether an appeal will "cure" any procedural deficiencies in the previous disciplinary procedure is a matter for the tribunal to consider in the round, and tribunals should not fixate solely on the issue of whether the appeal is a review or a re-hearing (see *Taylor v OCS Group Ltd [2006] IRLR 613*). In this case, the tribunal is satisfied that if there was any unfairness in proceeding in the absence of the claimant in the original hearing, it was certainly remedied by his participation in the appeal, and the extent to which, in the appeal, Mark Qualter himself looked into the allegations and made enquiries of his own.

18. In relation to the missing "statement" from Miss A, the claimant did raise this in his appeal letter, and it was discussed in the early stages of the appeal. Unfortunately, from the way in which the claimant put the matter (page 344 of the Bundle) he did not make it clear that whilst David Harris sent him the missing minutes, he did not send him the missing statement or notes relating to Miss A. As the claimant did not thereafter refer to this issue again in the appeal, Mark Qualter can be forgiven for thinking that when David Harris sent the minutes, he also sent the "statement" of Miss A. Thus, whilst this issue remained unresolved, it was clearly not a major one, and the tribunal does not find that this continuing issue over failure to disclose the "statement" until the hearing Bundle, which is when the claimant says he first saw it, is sufficiently serious to render the dismissal unfair. In any event, it is clear that Mark Qualter decided to uphold the dismissal on two out of three allegations only, both of which were factually admitted by the claimant. In terms of the evidence of Miss A, in her interview with David Harris, this was not germane to the decision to dismiss. To the extent that the claimant disputed that he had sent 15 text messages, Mark Qualter discounted this, as Miss A could not produce evidence of this, and nothing else that Miss A had said was critical to the decision to dismiss. The claimant's own admissions of what he had said or sent to Miss B were what led to his dismissal, not any contested evidence from Miss A. The omission of her interview notes or statement from David Harris's letter, and the failure of the respondent effectively to provide the claimant with a copy of that evidence until these proceedings, the tribunal finds, does not render the dismissal unfair. If, however, the tribunal was wrong on that, that omission made no difference to the outcome, which

would have been the same had that material been supplied, and there would be grounds for making a 100% **Polkey** reduction in any award.

19. In terms of the genuine belief, the tribunal has no hesitation in accepting that David Harris genuinely believed that the claimant had been guilty of such conduct. He was, the tribunal finds independent, and from the evidence presented to him, genuinely formed the belief that that the claimant had made comments to Miss B about Miss A having an affair with Mr C, and had made comments to Miss B as she alleged to the effect that Miss A was a tease, a flirt and a bitch.

20. As to the reasonable grounds upon which David Harris so concluded, these are firstly , and importantly, the claimant's own admissions in the course of the investigation and the disciplinary hearing. Secondly, where the claimant did not expressly admit the allegations, he did not contest them. In addition , of course, David Harris had the account of Miss B.

21. The claimant did not dispute that he had said to Miss B the things she reported in the investigation. Rather his point was, and still is, that he had told these things to Miss B in confidence, and she had broken that confidence by reporting them to third parties.

22. The next question is whether the grounds upon which the respondent formed this belief were the result of a reasonable investigation. The tribunal cannot see how the investigation can be said to be unreasonable. Firstly, David Meredith interviewed the claimant, Miss B and Miss A. Of these, Miss B was clearly the most important, as it was to her that the claimant had made the comments about Miss A and Mr C. In addition to that, David Harris himself, before determining the disciplinary process also spoke to Miss A and explored with her the points raised by the claimant in his written submissions and responses to the questions he had been asked. The claimant has not been able to identify any further investigations that he says should have been carried out.

23. Having concluded that the respondent genuinely believed on reasonable grounds in the misconduct of the claimant, having carried out a reasonable investigation, the remaining question is whether the decision to dismiss fell within the band of reasonable responses. In considering this issue, along with the others issues of reasonableness, the tribunal reminds itself that it is not to substitute its own views for those of the employer, but must approach the matter from the standpoint of the range of reasonable responses (see **HSBC v Madden [2000] ICR 1283**).

24. There is no doubt that dismissal came as a shock to the claimant, and has ended his career with the respondent after 8 years. Equally, his dismissal came for a first "offence", as he had a clean record with the respondent. He did, it is true , offer to apologise to Miss A, who does appear to have vacillated as to whether or not she would accept this. That was not, however, a matter for her, but was a factor to take into account. The tribunal accepts that the respondent did so, but considered the conduct so serious that dismissal had to be an option.

25. The claimant's main mitigation was that Miss B broke his confidence in telling Miss A what he had said to her, that this had not happened "at work" because it was on the train home, or in other non – workplace locations, and that this was tantamount to being dismissed for "hearsay". He seemed to lack insight into his

actions, and did not, and perhaps still does not, see how they could amount to harassment of Miss A, or, indeed, cause embarrassment and difficulty for Miss B to whom he made the comments. That she was an 18 year old apprentice, for whom he was responsible, did not alarm him, and he was considered to have put her in a difficult position. It is not to be overlooked that it was she who initiated the whole process by bringing to the attention of Miss A and Mr C what the claimant had been saying about each of them.

26. The tribunal has concluded that, whilst undoubtedly a hard decision, it was, on the respondent's disciplinary policy, and its need for the highest standards in relationships between its staff. Whilst the tribunal sympathises with the claimant, the fact remains that having had a relationship (of whatever sort does not really matter) with a work colleague which then changed in its nature, he then wanted something more from it which was not reciprocated by Miss A, which then resulted in him, on several occasions, venting his feelings about this situation, and towards Miss A, to a junior employee who felt put in a difficult position, and compelled to raise these issues with Miss A and the other party involved. This was a fairly sustained course of conduct, the seriousness of which the claimant appeared not to appreciate.

27. Whilst the claimant has raised issues with the procedure, the tribunal considers that in both the original disciplinary hearing, and the very thorough appeal, the respondent acted reasonably. Mark Qualter demonstrated fairness in his approach to the first of the three allegations he considered in relation to the claimant's direct interaction with Miss A, he discounted unsubstantiated evidence of 15 text messages, and did not find that the claimant's expression of continued feelings for her, made directly to her in a car, to amount to bullying or harassment. He did, however, find, and it was open to him to find, that in the claimant's admitted, and admittedly wrong, behaviour in his comments to Miss B about Miss A, and her alleged relationship with Mr C, the claimant did commit the gross misconduct of bullying and harassment, and dismissal, after due consideration of the alternatives, and the circumstances, was a sanction reasonably open to the respondent.

28. There was, during the Second World War, a slogan "Careless Talk Costs Lives". It can, today, cost jobs, as the claimant has unfortunately found to his cost. Whilst sympathising with him, the tribunal has to find that the decision to dismiss in these circumstances, was one that did fall with the band of reasonable responses, and was fair. The claim is accordingly dismissed.

Employment Judge Holmes

Dated: 16 August 2017

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON  
24 August 2017

FOR THE TRIBUNAL OFFICE

## ANNEXE

**s.98 Employment Rights Act 1996**

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

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

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

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

*(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) (N/a)*

*(4) [In any other case 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.*