Case No: 2206904/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr. J. Uddin**
Respondent: **London Borough of Ealing**

Heard at: **London Central** **On:** **26-30 November 2018**
Before: **Employment Judge Goodman**
Mrs J. Cameron
Mr. D. Eggmore

Representation
Claimant: **Mr K. Harris, counsel**
Respondent: **Mr P.Quill, solicitor**

RESERVED JUDGMENT

1. By a majority (Mr Eggmore dissenting) the unfair dismissal claim fails
2. By a majority (Mr Eggmore dissenting) the wrongful dismissal claim fails
3. Unanimously, the sex discrimination claim fails
4. Unanimously, the age discrimination claim fails

REASONS

1. The claimant was dismissed by the respondent for gross misconduct following an incident at evening drinks at a pub. He was accused of “inappropriate sexual behavior” with a social work student on placement.

Claims and Issues

2. He has brought claims of unfair dismissal, and of sex and age discrimination. The discrimination claim concerns the dismissal process an decision: that stereotypical assumptions about the behavior of older men informed and infected the fairness of the process. When the list of issues was prepared for a preliminary hearing the comparator for the sex claim was the claimant’s alleged victim, SR, and hypothetical comparators, and for the age claim, hypothetical comparators. During the hearing and at closing it was clarified that it was not alleged that SR had assaulted the claimant and that the

respondent should have investigated that. The less favourable treatment for the discrimination claims was the dismissal, and comments by the investigator that the claimant was a married man, and by the investigator and by the decision maker that he was a "senior manager" and "a senior member of staff".

Evidence

3. The tribunal heard live evidence from: **Ian Jenkins**, Head of Youth Offending Service, who investigated the claimant's conduct; **Carolyn Fair,** Director of Children and Families**,** who dismissed the claimant, and **Penny Jones**, one of 2 councillors who heard the claimant's appeal against dismissal. The claimant, **Jasim Uddin**, gave evidence, as did his union representative, **Shirley Mills**, Regional Organiser for UNISON. A written statement was submitted by SR (see paragraph 5 below), who did not attend, on her own account, because she was upset and receiving counselling, though there was no medical evidence to this effect.

4. The tribunal had bundles of documents approaching 1200 pages, containing policies, texts and emails, witness statements, letters and records of the hearings, a supplementary bundle from the claimant containing a police report he had obtained under a subject access request, CCTV footage which was viewed in tribunal and also supplied on a memory stick, and finally, an unredacted photo of bruising was emailed by S to the tribunal under order, said to be the photo shown to the police and to the investigators and decision makers (and by the union representative and the parties' representatives at this hearing), and viewed by the panel in deliberation.

5. The woman involved in the alleged misconduct for which he was dismissed was the subject of a restricted reporting order and was referred to in the public hearing and in this decision as SR. The parties, witnesses and the representatives know her identity.

Conduct of the Hearing

6. A few days before the hearing the claimant obtained leave to adduce a copy of the police report of the incident which he had obtained in July 2018, well after dismissal and appeal. Its relevance was that SR had withdrawn her complaint to the police before the disciplinary hearing following which he was dismissed. On the first hearing day, the respondent sought leave to adduce a witness statement from SR. Permission was refused by the employment judge on grounds that the respondent's reasons for dismissing must be judged by what was known at the time. Next day the application was renewed to the full panel, who had now read all the written material and the witness statements. Permission was given to adduce the statement, subject to the caution that as she was not proposing to attend we would give it little weight, on grounds that the lay members' view was that as the police report account contained hearsay, there should be an opportunity for the respondent to put SR's view of why she withdrew from the police matter. In turn the claimant applied for an order to summon the police officer who had made the report. That was refused as disproportionate to the importance of the issue, the issue being what the report added to alleged inconsistencies in SR's evidence already identified, and what weight the respondent had attached to the fact that she went to the police at all, and that whether the police officer had

accurately reported SR's words was of less importance, especially when SR did not propose to give live evidence on the point either. On the fourth day of the hearing an order was made that SR send the employment judge by email the photograph of bruising to the breasts she had shown to the respondent and her union representative; it had been produced earlier that day for Mrs Mills, the claimant's trade union representative, who had seen it in the disciplinary proceedings, to view and refresh her memory, but had been deleted before the tribunal could see it; there were conflicting descriptions of the photo and we wished to see what the investigators and representatives had seen. It was provided under order.

7. Last but not least, at the outset, the parties were informed that panel member Mr Eggmore had until 2009 been assigned to full-time union duties for UNISON at a London Borough (not the respondent) where he worked, as a UNISON official had represented the claimant, though he had no recollection of meeting Mrs Mills. After taking instructions neither party objected or saw apparent bias.

Findings of Fact

8. The respondent is a local authority and the claim concerns members of its Family and Children Locality Teams in two areas, Ealing and Acton, there being four such teams in all.

9. The claimant, aged 43 and 10 months at the date of the incident leading to dismissal, and 44 at dismissal, had been employed by the respondent from 3 December as deputy team leader in the family intervention programme. When his team was assigned to a project requiring only qualified social workers (which he is not) he was seconded to Acton Locality Team as a family support worker, where he had no staff to manage. There was no history of disciplinary action.

10. The woman involved in the alleged misconduct for which he was dismissed (and we will call her the victim, while recognising that this is an alleged victim), was (according to the police report) 26 at the time, a university student on a 3 month work placement. She knew the claimant, having as part of her placement shadowed him on two cases some weeks before, but he was not her mentor or supervisor, and at the time of the incident she had moved to Ealing team. The claimant estimated her age as 25. She has since found local authority employment in social work.

11. On 28 October an Acton team member emailed the team (there are 13 addressees, and the three team managers are copied in), saying that the Ealing team had suggested they meet up for drinks "seeing as we're soon to become one big team", while having separate Christmas celebrations. It was to be at the Aeronaut pub on Friday 11 November.

12. The drinks went ahead. SR attended with others. The claimant was on the original invitation list, and was urged by Anna Willis and SR to come. He arrived late, when some had already left. By midnight, many had gone home, but the claimant, SR, Shane Conteh and Anna Willis were still there. All had been drinking, and the claimant and SR had been drinking shots. The CCTV footage from midnight for the next 25 minutes or so shows the claimant and SR sitting side by side on bar stools, he with his hand on her waist, she

leaning towards him from time to time for affectionate kissing, “pecks”, at one point rubbing his head. Just after midnight they are seen moving toward the disabled toilet and entering it together. Anna Willis and Shane Conteh follow and bang on the door. After a minute the claimant and SR emerge. SR and Anna Willis then went to the ladies’ toilets for 9 minutes. After they come out, the claimant and SR can be seen speaking to each other for just under a minute. Soon after that there is a group hug and all leave.

13. This case is about what happened in the disabled toilet. We narrate how the allegation emerged. SR’s account is in statements made by her colleagues Anna Willis and Shane Conteh as they listened to her while taking her home in a car, some texts she sent on the early hours of Saturday, later that day, on Sunday and on Monday, and an email to her supervisor on the Wednesday. Conversation in the car was the claimant reporting remarks said to have been made to her by the claimant before they left the bar area and walked to the disabled toilet, to the effect that he proposed anal sex, because “that would not count”, when she objected that he was a married man. He had also put his tongue into her mouth. A text from early Saturday morning said: “such a traumatic evening”, and: “Jasim got very pervy and horrific but Anna and Shane rescued me”. Asked if she was OK, she said: “good, I promise these sorts of things don’t normally happen to me”. On Sunday evening, discussing a case for the following day with her mentor, Hannah Parker-Beldeau, she commented: “mission avoid Jasim in full flow haha”, and, responding to an offer of intervention, “always wanting to avoid conflict and yet knowing that stuff was wrong”. On Saturday afternoon, the claimant emailed SR to see how she was and she replied: “yeah just a bit hung over. Have a good weekend”. She said to investigators this was a neutral reply, drafted with the help of Anna Willis, because she wanted to draw a line under the event. The Tribunal notes that there is no mention of anything in the disabled toilet, but that SR was worried about the claimant, and felt something unpleasant had occurred.

14. On Monday the claimant spoke to SR on arrival at work, asking her to come into a side room, and then moving to another private room when someone interrupted the conversation saying they had a booking. Later on Monday her supervisor invited her to a debrief (about Friday) on Wednesday, and added it was not right that she felt this uncomfortable. SR responded: “I think it has the potential to become pretty messy though. He said today that everyone in the office loves and respects him and therefore I can’t say anything and it may be too embarrassing and would be pretty unpopular. I was more annoyed when he said he was angry with me.. and it was pretty scary and aggressive”. SR’s detailed account of Monday was made two weeks later, on 28 November, when she said the claimant took her on one side into a private room, saying he had not slept or eaten all weekend; he had gone to a club after the pub, and got home at 5 a.m. He knew he had done something wrong when SR did not answer his phone calls. He talked about his wife and young daughter. He asked who knew what had happened, at which the claimant referred him to Anna Willis, and mentioned that she and Shane Conteh knew. He said he was loved and respected by all the teams and if it came out he would not be able to go to work. “He then asked if we had had sex to which I said no and he said ok thank god because he wouldn’t have been able to live that down”. He referred the effect of drink making him aggressive. He asked for a hug.

15. The claimant's account of this encounter is that he made a casual remark over coffee asking if she got home alright, and took her aside because it was a corridor to which public had access. He then spoke to Anna Willis. Asked what happened, she said she and Shane made him open the disabled toilet door, he said: "did we have sex", meaning him and SR, to which she said no, and agreed not tell anyone. Later SR explained to Anna Willis that she had referred the claimant to her for an account of what happened. The claimant says he only discussed with Anna Willis how drunk they were, and she told him when she came into the toilet SR was being sick and the claimant was standing over her.

16. Following the Wednesday discussion with her mentor, SR emailed her a detailed account to her (16 November) saying that on the Friday evening the four of them were the only ones left. After dancing, the claimant took her to the bar:

> "(he) was saying things like "you don't deserve me" and "I would only have anal sex with you because it doesn't count" I kept saying he was married, and didn't like him like that, and he kept coming really close and saying that he could have anal sex with me if he wanted. Then he stuck his tongue in my mouth but that made me throw up so I was sick in the girls toilets then came back to the bar and he gave me a shot. Then dragged me to the disabled toilets which Anna saw happen and was banging the door but he wouldn't open it. I honestly don't remember happened in there but I did have a boob bruises. Anna said I was being sick when he finally opened the door".

On Friday 18 November SR sent the texts to her too.

17. SR's email and texts were passed up the line of management and a decision was made to suspend the claimant pending investigation, though it was not carried into effect on the Friday because Carolyn Fair was off site. The claimant and his trade union representative were formally told on Monday morning (21 November). The allegations of misconduct leading to him being placed on suspension was stated to be: (1) an incident of inappropriate sexual behaviour during social gathering on Friday, 11 November 2016 (2) a further incident of intimidating and threatening behaviour to a work colleague on Monday, 14 November 2016 and (3) bringing the council into disrepute.

18. Another manager prepared a timeline based on the texts and email. Ian Jenkins was asked to investigate. He is former police officer, and had been Ealing Borough Commander for some years. He began by meeting SR, who was too upset to tell him much, and cried a lot. They could not find another date until he was due to go on holiday, and he said he would speak in detail on return. He treated her sympathetically. He used the time to get the CCTV from the pub.

19. On 28 November SR prepared a long email with an account of events on 11 and 14 November. Of the events in the pub, she recited the same bar conversation, then going to be sick, then:

> "I have a really hazy memory really from this point until being in the toilet with him, I think there may have been more kissing. The next thing I remember clearly is standing in front of me and pushing me into

the sink and then hearing knocking at the door and him not answering it and but me telling him to let them in."

There was much circumstantial detail of what she remembered after that, and some other early morning texts to friends. There was a similarly detailed account of Monday 14th November.

20. On return, Ian Jenkins interviewed Hannah Parker-Beldeau on 7 December, SR on 9 December, Anna Willis on 13 December and Shane Conteh on 14 December. These are detailed interviews, with structured accounts.

21. In her account SR explained they were very drunk. Asked how she ended up in the toilet with the claimant, she said: "apparently Anna saw him dragging me to the disabled toilet. I can't remember going from the bar to the toilet or him accompanying me." Once in, "he pushed me back, forcibly against the mirror and sink. I can't remember exactly what happened but he had his hands on my breasts pushing them hard to push me back"; asked about the bruises, she said "my chest is extensively bruised". Asked about the conversation on Monday 14 November, she said he concluded with: "we are both to blame for this as we got so drunk. I thought there is no way I am to blame I have huge bruises me: he followed me into the toilet, locked me in and assaulted me. I can't believe he said that". She had not wanted to send the email on 16 November (describing events) but Hannah had insisted on reporting it as a safeguarding issue as well as an attack on her.

22. SR also showed Ian Jenkins a photograph of bruising to her breasts. He was shocked.

23. Both Shane Conteh and Anna Willis told Ian Jenkins that they had gone to bang on the disabled toilet door because they saw the claimant lead SR away from the group to the toilet and thought this unusual, because he had just bought drinks and was now walking away, also because if she was going to be sick he could have got a woman to take her. Anna Willis added: "SR was drunk and I thought they would do something inappropriate I thought let's stop this from happening. I just had this feeling that this was all wrong which is why I went to knock on the door".

24. Ian Jenkins had been told by another manager, Claire Davis, that she had heard the claimant had gone for a meal with another student, SS, before going to the pub; SS confirmed this to her in an email.

25. Ian Jenkins interviewed the claimant on 19 December. He had drafted a set of 194 questions for the claimant which were very searching, seeking an account of his movements for the day, and including a set of assertive questions about taking SS for dinner before going to the pub, others about being a role model as deputy manager, why he did not water SR's drinks knowing she was drunk, and, after a sequence of questions about the remarks SR said he had made at the bar: "did you still fancy your chances of having sex with her". To almost all questions about what happened after arriving at the pub the claimant said he could not remember. He denied taking SS out beforehand. Of the planned questions, 29 were not asked. He denied buying any drinks, saying his card was blocked. He said he would never suggest anal sex, nor would he have wanted to suggest sex in the toilet, it

was not his nature, nor had he fancied SR, or made any previous approach.

26. The claimant was asked to produce his bank records to show he had not made card withdrawals that evening. Mr Jenkins said he asked as it was an "integrity issue", as the others said he had been buying drinks, and he can be seen on CCTV paying with a banknote.

27. Mr Jenkins interviewed SS on 21 December, when she said she had not in fact been out with the claimant that evening, she had confused the dates. She had had a tea with him, not dinner, on another date.

28. The photograph seen by the Tribunal shows the torso of a young woman with long mid-brown hair. There is dark bruising extending across the mid and upper part of both breasts. The bruising is mottled and might be thought to show finger marks (as at one point described). The claimant has objected that this photo does not show SR but another woman, that it is not dated, and that Ian Jenkins said it showed bruising across the chest from the collarbone but Carolyn Fair said it was across the mid part of the breasts. The police (as recorded in their report) thought the hair colour was different from SR's. There are differences of description of the colour, from red and purple to brown. SR had also supplied a picture of herself in a sleeveless top to show a prominent mole on the upper arm in both pictures. Our conclusion is that this is a photograph of SR, because the full-bodied shape, hairstyle and mole are so similar, and that it was taken on 27 November (a date noted by the police, but not otherwise recorded by anyone), just over two weeks after the event. SR referred to bruising within days of the incident (according to Anna Willis she told her about it on the Saturday). We take account of the fact that different individuals may bruise more or less, responding to similar blows or pressure, and that bruising may spread over days before draining away. We thought the discrepancies in description were because no one was allowed to do more than view it on SR's phone, as she was reluctant for anyone to retain a permanent copy. We, like Carolyn Fair, thought it unlikely that bruising in this area would be caused by a fall.

29. Taking all that into account the majority of the Tribunal concluded it was probable that it is what SR says it is. Mr Eggmore, dissenting, holds the view there can be no certainty either way on the cause of the bruising, because (1) at least initially the claimant had no recollection of how the bruises were caused, and (2) there was no medical evidence to assist on the point (3) there is no CCTV evidence in the toilet and it does not show the claimant distressed immediately after (4) she reported no assault to Shane Conteh or Anna Willis that night. The panel is unanimous that it is very unlikely that she would have faked the bruising in the photo, or photographed another woman to implicate him.

30. The claimant and his union representative viewed the CCTV footage on 4 January. He was sent a typed record of the interview and returned the notes with additions on 10 January. The additions consist of "I had an alcohol related blackout" after each mention of not remembering, and some tentative explanations, "maybe.." and "perhaps..", and reports of what Anna Willis had told him.

31. On 12 January Ian Jenkins completed his report and sent it to Carolyn Fair with the texts, emails, interview records, a detailed list with timings of what

was shown on CCTV, and the claimant's amendments. He concluded there was a case to answer, referring to the respondent's code of conduct, for gross misconduct, being a "serious criminal offence which may be connected or connected with their employment", the offence being that he touched her breasts intentionally and without consent, by reference to section 3 of the Sexual Offences Act 2003; council employees were expected to act with integrity, and his conduct that night did not meet the threshold of integrity; he also said there was a case to answer for gross misconduct in that following on from the sexual assault "he harassed, intimidated and threatened SR and AW in work and outside work relating to the allegation". By referring to his wife and child and not being able to eat, and asking both not tell anyone, he showed he was seeking to intimidate, and this was harassment. His conduct and behaviour on both matters broke the trust his employers should be able to have in him, and had brought the respondent into disrepute.

32. On 18 January 2017 Carolyn Fair wrote to the claimant enclosing the report and supporting material, and invited him to a disciplinary hearing on 26 January. This was put off at the claimant's request on two occasions and eventually took place on 31 March 2017, where he was represented by the union's full-time officer, rather than the local representative, and as she had to leave early, it did not conclude until a further hearing on 5 April 2017.

33. Ian Jenkins had urged SR to go to the police, and she went to make a statement on 19 January 2017. On 31 January 2017 the police officer wrote a summary of her thinking on the claimant's account, after viewing the CCTV. She challenged inconsistencies, notably the discrepancy between being "dragged" to the disabled toilet, and the CCTV showing them walking (or being led) hand in hand, at the bar or walking away, that the claimant did not remember being taken to the toilet, or what had happened inside, or her conversation with her colleague afterwards. She could have only remember the conversation about anal sex. She had found the bruising on waking up next day, but had not then alleged that she was sexually assaulted. All these points were put to SR. In the words of the police: "it was explained to her with the information given to us, it kinda seems like what is being said she said is not making any allegations against him. She was asked how she got the bruising to her breast and she says she doesn't know". However, she couldn't explain how the bruising happened anywhere other than in the toilet. It was noted that she "wanted to speak to a solicitor before making a (further) statement, and it was arranged that she would return in a few days. Then she said she wanted to withdraw the allegations; questioned why, she said: "she didn't realise it would be so griefy and that she felt pressured by the council/Ian Jenkins"." In the words of the police note:

> "she couldn't remember what had happened but when Anna told her that he grabbed her by the arm and pulled to the toilet area and hearing the CCTV it has now become a memory for her and implanted memory, all semantics".

She signed a short withdrawal statement saying she did not remember being sexually assaulted. She showed the police the photograph on her phone– they identified a date on the image as 27 November 2016. Police officers recorded that they could not confirm if it was the same person in the photo as the victim, as it only showed her from neck down. She also seemed to be slimmer in the picture. Although SR had withdrawn her statement, the claimant attended the police station under caution on 23

February and his solicitor read out a prepared statement, saying he had gone to the bathroom with SR to help her. He did not lock the toilet door, he thought SR did. He denied touching her breasts. He refused to answer questions. A police case review on 24 February concluded that "the victim's account does not reflect what has been on the CCTV. The suspect's account was at least consistent with the CCTV", and: "Formal action against the offender is not in the public interest".

34. This episode is described in detail because the claimant says it should have shown the respondent that SR's evidence was unreliable, and the police did not consider there had been a sexual assault. Ian Jenkins knew the complaint had been withdrawn when he presented the evidence at the disciplinary hearings, but did not tell Carolyn Fair this. The claimant told Ms Fair the police were not proceeding further, but he did not then have the detail in the police report, that SR had withdrawn her statement after discussion with the police.

35. Also before the disciplinary hearing, and before the police had told him he would not be charged, on 7 February the claimant, by his solicitors, lodged a five page grievance about his suspension, and specifically included that that it was the claimant who "was actually harassed and the victim of inappropriate sexualised behaviour in that SR took advantage of his intoxicated condition". It had brought the council into disrepute by intoxication in public, and by kissing and hugging the claimant when he was intoxicated – she had taken advantage of him. She was blaming him to cover embarrassment for her actions. Further, the mismatch between treatment of him and of SR showed less favourable treatment "on the basis of his age and marital status", as Ian Jenkins had said that as an older married person he was expected to maintain a higher standard. Carolyn Fair responded that the grievance would be considered at the disciplinary hearing because it covered the same material.

36. The claimant lodged a supplementary grievance on 29 March, saying that SR had been pressurised by the council to complain to the police against her will. The council had not investigated her inappropriate sexualised behaviour. The police had told him SR's evidence was inconsistent and showed no offence been committed, but the council had not told him that. He had been less favourably treated than his female colleague. It should be dealt with prior to the disciplinary hearing. The respondent replied that they would not intervene with the disciplinary process, and if it was being alleged that SR was pressured by the council to make a *false* allegation to the police, he could use the whistleblowing procedure, or the letter could be sent to the head of internal audit.

37. One other development before the hearing is that on the 30 March Shane Conteh gave a further statement about the claimant approaching him off site on the afternoon of the suspension in some distress about the effect on his family. The claimant should not have contacted a witness once suspended, though there is no evidence this was weighed against him when Ms Fair made her decision. This statement was provided to the claimant's representative, who for reasons not explained had only been brought in that day to represent the claimant, and had only just seen the disciplinary report. This meant that in practice she was no more disadvantaged than if it had been sent earlier.

38. At the hearing, Ian Jenkins presented the evidence, an HR adviser was present, Carolyn Fair was in the chair, there was a minute taker, and the claimant attended with his representative, Mrs Mills. Anna Willis, SR and Shane Conte were called in turn as witnesses and questioned by Ian Jenkins and Shirley Mills. At the resumed hearing on 5 April Hannah Parker-Beldeau was also questioned. Ian Jenkins was asked about the hostile style of questioning of the claimant, and why he had told the pub landlord the CCTV was needed for a serious sexual assault – had he not made up his mind in advance? Finally the claimant gave evidence. The photograph was shown to Mrs Mills, but, with her agreement, not to the claimant. The CCTV was also viewed. Mrs Mills read out a prepared submission contrasting the claimant's consistency and SR's inconsistency, that she had only come forward at all under pressure. Ian Jenkins had not been impartial or objective. Bruising was consistent with getting out of a cab when drunk. She was a grown woman who had gone voluntarily to the toilet with the claimant. The witnesses had colluded. All were drunk. The claimant added that his marriage had broken down, he had been very ill with Crohns disease, and felt the victim of discrimination.

39. On 12 April 20 the claimant was dismissed for gross misconduct. The letter explaining why is eight pages long. All allegations were upheld. On the sexual misconduct, Ms Fair analysed the evidence to show why she did not accept an innocent explanation. On the alleged bullying, she noted that both SR and Anna Willis felt pressured not to report anything, compounded by both viewing him as "a more senior and longer serving member of staff in a position of authority", especially SR, "a student who you mentor", as "she had spent time with you shadowing and learning from you at work. This trust has now been broken". In her letter she credited SR with having complained to a manager and gone to the police; in evidence to the tribunal she said if she had known SR had withdrawn her statement she would have wanted to find out from her why.

40. The claimant appealed, on grounds that the investigation was prejudiced by leading questions, and multiple questions. Carolyn Fair had prevented questions. He had been discriminated against on grounds of sex, race and age. There had been no response to his grievances.

41. The appeal was due to be heard on 13 June 2017 but Mrs Mills was not available. It would have been heard on 3 July but a panel member was called away. A hearing on 28 July was postponed at the claimant's request. On 8 September the claimant did not attend. On 21 September it went ahead with two councillors rather than three as one had become unavailable and further delay was undesirable. They had pre-read the file and viewed the CCTV. Ms. Fair presented her reasons. Mrs. Mills said the decision was based on the claimant's age and ethnicity, and that SR was a mature student. The claimant said Ian Jenkins had viewed him as "Rochdale man" (alluding to a well publicised trial of a group of Muslim men in Yorkshire for grooming and sexual abuse of underage girls). According to the claimant, Councillor Proud was critical of the photographs as evidence.

42. The appeal panel concluded the investigation had been thorough and fair, the decision was fair, and the conversation on Monday was not a normal social conversation after a night out. (Councillor Jones told the tribunal that while the claimant had not explicitly threatened either woman on this occasion, he had

subjected them to “emotional blackmail”). Even taking his five years of good service into account, “trust and confidence in your working relationship with colleagues appears to have broken down”.

Relevant law

43. Unfair dismissal requires an employer to establish that the reason for dismissal was one of the potentially fair reasons set out in section 98 (1) of the Employment Rights Act 1996. Conduct is a potentially fair reason.

44. A reason is a set of facts, or as the case may be, beliefs, held by the employer which cause him to dismiss - **Abernethy v Mott Hay and Anderson (1974) ICR 323.**

45. If a potentially fair reason is established, it is then for the employment tribunal to determine whether the dismissal is fair or unfair having regard to the reason shown by the employer, and that depends whether in the circumstances, including the size and administrative resources of the undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.

46. Where the employer establishes that conduct was the reason for dismissal, tribunals must consider whether the employer had a genuine belief in the misconduct, and whether that belief was founded on reasonable grounds, including whether there had been a reasonable investigation – **British Home Stores v Burchell (1978) ICR 303**. The standard of proof is the civil standard of balance of probability, rather than the criminal standard beyond reasonable doubt, but **A v B, EAT/1167/01** establishes that the standard of investigation must be high if the outcome is career-ending for the employee, and the investigator must look for exculpatory evidence too. **Jhuti v Royal Mail 2017 EWCA Civ 1362**, reviewed how to treat a case where relevant information was withheld from the decision maker. The discussion shows that the acts and omissions of an investigator appointed by the employer in relation to the dismissal decision is part of the dismissal process (as was not the case in on the facts of **Jhuti**). We were referred to **Roldan v Salford (2010) EWCA Civ 822**, in that an employer is not forced to choose between two conflicting accounts but can decide that neither was at fault and make a decision based on all the facts available.

47. In a claim for wrongful dismissal, that is, that the claimant was entitled to notice under the contract, the tribunal must consider whether the claimant’s actions breached a fundamental term of the contract such that the respondent could treat it as at an end.

48. Discrimination claims fall under the Equality Act 2010. Section 13 provides there is discrimination where A treats B less favourably because of a protected characteristic. Age and sex are protected characteristics. But as discrimination can be hard to prove as the discriminator may not admit or even recognise that he is discriminating, the Act provides in section 136 that if there are facts from which the court could decide, in the absence of any other explanation that (A) contravened the provision concerned, the court must hold that the contravention occurred (unless) A shows that A did not contravene the provision. This consolidates earlier decisions in **Igen v Wong** and **Barton**

v Investec: it is for the claimant to prove facts from which the tribunal could conclude that discrimination occurred; if so it is then for the respondent to establish a non-discriminatory explanation. In **Pnaiser v NHS England and anor UKEAT/0137/15**, discrimination need not be the only inference from the facts before requiring an explanation. A tribunal need not take the stages in that order but may focus on explanation. It must address the "reason why" the employer acted as did, rather than "but for" causation. There must be no discrimination whatsoever in the reason.

Submissions

49. The claimant argues that this was not a reasonable investigation because of inconsistencies in SR's evidence: she said she was "dragged" to the toilet; sometimes she could remember this, and what happened inside, and sometimes she could not; she did not report to security at the time; she was alone with the claimant after the incident; she did not mention her bruised breasts to others for some time afterwards, nor in either written account before the investigation interview; she had not been closely questioned about her recollections, unlike the claimant who was disbelieved about SS and about his bank card. More particularly, Ian Jenkins did not tell Carolyn Fair SR had withdrawn her statement to the police. He had also shown prejudice by calling her the victim, by being supportive of her and hostile to the claimant, and had persuaded her to go to the police. His questions showed he had reached a conclusion of guilt before he began. There were not reasonable grounds to sustain belief, due to the inconsistencies, and the unreliability of the photograph, and the concerns of SR's colleagues on the night were not that there might be foul play, but that the pair might do something drunk they would regret when sober; locking the door could be automatic, not a sign of sinister intent. As for the 14 November conversation, it was consistent with the claimant being concerned that office gossip would reach his family, not a cover up. Neither Ms Fair nor Ian Jenkins had considered whether SR consented to whatever had occurred. Finally, they had chosen between one account and the other, rather than make their own decision.

50. On discrimination, the Tribunal was invited to compare the claimant, if he was the same age as SR, and the claimant as a woman behaving in this way with SR, or the claimant as a woman and SR as a man. The tribunal was also invited to consider Ian Jenkins as holding stereotypical views about the claimant being a predator because he was an older man.

51. The respondent submitted the decisions made were fair. Consent was irrelevant when the claimant did not admit any behaviour requiring consent; Ian Jenkins' interview could leave it to the claimant at a disciplinary hearing to challenge discrepancies of other witnesses, rather than go back to witnesses himself; the claimant had asserted to the police that he remembered, but in fact he could only remember what he saw on CCTV or interpret what he read in the others' statements. Not telling the police SR had withdrawn left him able to say he had been exonerated. The decision did not base itself on one or other witness but on fitting it together as a whole.

52. On discrimination the respondent argued that anyone else, given these facts, would have been treated the same. They did not investigate any complaint about SR because the claimant did not make one until 7 February, and then they were considered. There was no reason to investigate earlier.

Discussion and Conclusion

53. Neither side argued that if the conclusion on the facts was correct there should not have been a dismissal. The respondent submitted that even if the Monday conversations did not amount to bullying, the respondent was entitled to take account of the claimant's behavior then when deciding what to believe about the Friday. To us, this case was all about whether a reasonable employer could conclude the claimant was guilty of what is said to have happened then.

Unfair and Wrongful Dismissal - Majority Conclusion.

54. We considered that the decision maker had all the evidence before her, and all the relevant witnesses were questioned at the hearing. We also considered that generally there were few inconsistencies in SR's account: she was mostly very careful to state what she knew from memory and what she had been told by others, and particularly so at the police station. The exaggeration of the term "dragged" was spotted by Carolyn Fair for herself from the CCTV – SR was being led, on one view, or had walked alongside the claimant. She also identified that the photograph showed bruising not from the collarbone, as Ian Jenkins had described it, but across the mid part of both breasts. Carolyn Fair was an experienced social worker in children and families, used to how people react to violence, and used to judging when and how people reveal information, which she used when considering how SR had added information over time. Her letter shows she had several reasons for preferring SR's account.

55. The only exception may be where she included the fact that SR had been to the police, as a reason to accept her evidence, not knowing she had retracted her complaint. We considered the effect on the reasoning in her letter if the words "and to the police" was removed from the sentence where it appears. We concluded she had sufficient reasons even so for concluding that the claimant had grabbed or pushed R's breasts, and this complaint had little weight. She already knew the police were taking it no further; and knew there were different standards of proof. More, she had already identified and considered the discrepancies ("dragged", and the inconsistency of what she could remember in the toilet). As for her stopping questions, we can read in the transcript that she did try to do so, to protect SR, but also that Mrs Mills went ahead and asked it anyway, and SR answered, without further intervention from Ms Fair.

56. The only two witnesses to what happened in the toilet had no, or no reliable, recollection of events. The two friends could have misunderstood the claimant's intentions when he suddenly took SR to the toilet – it is possible that he took her to be sick, but it is also possible, since SR never wavered in her account of conversation at the bar, that he was aroused and did intend sexual contact when she was extremely drunk, and, if he had thought about it, too drunk to consent. What is difficult to explain away – and this perhaps explains why the claimant was so persistent in stating the photograph was faked, of another person, or taken after a different incident – is the photograph. Although the date was not known at the hearing (though since summer 2018 when the claimant obtained the police report we know it was taken on 26 November 2016), the claimant had mentioned to Anna over the

weekend that she had “boob bruises”, and in the following days she put it in writing. The timing makes it unlikely to be something she made up. There was no certainty as to what happened in the toilet, but the surrounding circumstances and the photograph made it reasonable to draw the inference to a balance of probability standard. We add that although neither person involved had much recollection, the claimant was obviously extremely worried that something bad had occurred that night, hence his anxiety and questions on the Monday; so was SR, as immediately after the episode she was upset, indicating it had been “traumatic” and the claimant had been “pervy”. The “group hug” before they parted was chaste and brief. By itself “pervy” might allude only to his language, but the photograph and bruises still require explanation. The affectionate kissing on the CCTV shows that was consensual, but we cannot see that this indicates consent to a tongue in the mouth, a proposal of sexual intercourse, anal or otherwise, or pressure on the breasts such as to cause bruising, when a woman is obviously drunk. There was enough there to conclude that the episode in the toilet had led to substastantial bruising, and was not consented to. It was also clear enough that the claimant could remember nothing, and anything he said was based on other evidence.

57. It seemed to us that Ian Jenkins did adopt a hostile approach to the claimant. He had reason to ask about SS, given she had already stated she went out with him earlier in the evening, and he dropped it when SS then changed the date. He had reason, given what the claimant said about not being able to pay for drinks, to ask to see his bank records to check if it was true. (We do not know of the claimant did supply them or what they showed). He had been shocked by the sight of the bruising and by her tears. It was possible that someone reading the questions could adopt his view that the claimant had to prove his innocence, though we do not think it sinister or showing prejudice that he referred to her as “victim”, as he was a former police officer and we can see the police used the same term in their report, but his questioning was tough. There was however evidence for the conclusion he drew; further, the investigation was very thorough, and the report included all the material on which it was based. We were satisfied that Ms Fair was alive to discrepancies, and that over a two day hearing the claimant had ample opportunity to challenge the evidence and any inferences that might be drawn from it. She demonstrated sufficient independence for us to be confident her decision was based on the evidence and did not replicate Ian Jenkins’s suspicious hostility. Nor do we think any hostility impaired the claimant’s ability to give an account of himself– it seemed to us that he genuinely could not remember, perhaps because he is likely to have gone on drinking through the night. Just as a thorough appeal can “cure” defects in an unfair dismissal decision, so we concluded a thorough and fair hearing “cured” any deficiency in his interview and report.

58. It was suggested at various stages by the claimant and his union representative that the after work drinks was not an official function, and not something the respondent should have concerned itself with. We did not agree that it was an official team building event – though it had that effect - as it was arranged by the team members, not the managers. Nevertheless, it took place because they were colleagues in the two named teams, and was not a private matter divorced from work. No one outside work had been involved in the evening. The claimant was not a manager, and no longer a deputy team leader, but SR had shadowed him as part of her training

placement, and was entitled to feel safe, not vulnerable, in his presence.

59. As for the second charge, of bullying, it is true there was no open threat, and it is possible that the claimant was simply concerned about gossip and was appealing to her better feelings, and did not intend to warn her off a complaint. Nevertheless, his words can also be read as indicating she might not be believed if she did, and she sensed he was angry and said she was at fault for being drunk. She had not intended to say anything until then – it was being blamed or warned off that led her to complain about it to her mentor, who recognised there might be more to this and encouraged her to complain. The respondent took his conduct into account – that he was trying to warn both off a complaint. By itself it is unlikely to have justified dismissal. Taken with the other matter, if he was concerned something inappropriate (including intercourse) had occurred, he should not have tried to dissuade more junior colleagues not to mention it. We agreed with Ms Jones that his conversation added up to moral pressure rather than specific threat. His explanation of the conversations- especially wanting them in private, away from other colleagues as much as the general public - was implausible when he had already enquired by text on Saturday as to the claimant's wellbeing and been reassured. It was something a reasonable employer could take into account.

60. The appeal was thorough. The claimant noted Mr. Proud was critical of the photograph, but even so, he too concluded the decision was safe. We were satisfied they had engaged critically with the evidence.

61. As to whether this was wrongful dismissal, the majority's own assessment of the evidence on a balance of probability was that the claimant had touched the claimant with enough force to cause bruising. Unwanted and forceful sexual contact with a colleague (and she may have consented to affectionate kissing and a hand on her waist in a public area, but not to forceful touching of her breast in a private place) is a breach of contract entitling an employer to dismiss without notice.

62. The panel had a long and anxious debate about the incident and the evidence, given that both parties were very drunk, SR is not seen on CCTV to resist, she had withdrawn her statement,(though we concluded this did not show she was any less reliable than already shown), and the claimant lost his job and is unlikely to find other work in social services departments because of that, such that we eventually split in our conclusions. The majority agree that it can be said that the claimant was very unlucky, and that when in drink people often act foolishly. Nevertheless, for the reasons given, the majority concluded the respondent had reason to find gross misconduct, and we did not find the dismissal unfair. We also concluded on a balance of probability that an assault had taken place, justifying summary dismissal.

Minority Conclusion – Unfair and Wrongful Dismissal

63. The respondent's investigation into the incident was faced with fundamental difficulties. The claimant consistently argued that he had no recollection of the incident, attributing this to the amount of alcohol he had drunk, but that he would not, in any case, has sexually assaulted SR or anyone else. SR's initial evidence was that she remembered nothing after being up above the claimant, but later that she recalled the claimant pushing her in the disabled person's toilet. In cross-examination in tribunal, Carolyn fair said that the

disciplinary hearing SR Saying that she couldn't remember what had happened in the toilet, and also told the tribunal that no one knew what had happened toilet. Both SR and the claimant exhibited inconsistency in their account of events. CCTV evidence was analysed by Ian Jones in his disciplinary investigation, and seen by the tribunal. It showed that subsequent suggestion after 12th November that the claimant had "dragged" SR to the disabled toilet was unfounded. The suggestion may have arisen from from the inebriated state of bold CCTV record shows that the claimant and SR entered the toilets together, voluntarily on both sides, at. 00.05. 07 on 12th November and after a period when analysts and Shane Conte arrived and were trying to get access, having followed SR and the claimant, the toilet door was opened at 00 .06.02. SR and the claimant will therefore together in the toilets together with no one else present for 55 seconds. In addition, Anna Willis's evidence was that when she entered the toilet as I was by the toilet bowl possible and that was because she felt she was going to be sick or had actually vomited. Also, Shane Conte's evidence was that he did not suspect foul play when he accompanied Anna Willis to enable toilet, and he subsequently made no suggestion that foul play (that is, sexual assault) had taken place.

64. With regard to Ian Jones's investigation of the incident, it was not just hostile, it was biased in favour of SR and that was reflected in his conclusions. Although Miss Fair, in chairing the disciplinary hearing, did not accept Mr Jones's conclusions as the unvarnished truth, on the basis of the evidence presented, she was strongly influenced by Ian Jones approach, and became predisposed to accept the case against the claimant, without sufficient consideration of other possible explanations, or that there was no convincing evidence at all what did or did not happen during this 55 seconds on 12 November 2016.

65. The fact that SR had withdrawn her complaints to the police should have reported to disciplinary hearing. Failure to do so was prejudicial to the claimant, and if you had been reported, there is at least the possibility that the respondents process would have been interrupted to allow further investigations.

66. Not a case where it is one person's word against another. In this case, like the person involved could recall what actually happened. Although Farr later said she recalled more details there were considerable inconsistencies in her evidence the respondent, and on the highest level of level evidence it is not in any sexual assault, or other nonconsensual sexual activity, actually took place.

67. With regard to Monday, 14 November, Mr Eggmore does not conclude that the claimant's actions towards SR and Anna Willis that say, or his meeting with Shane Conteh on the day of suspension, amount to any form of harassment or serious misconduct. The claimant went to work on 14 November with the feeling that he and SR had behaved very foolishly at the pub, without knowing exactly what had happened. His concern was to find out what SR and Anna Willis thought to have taken place and then try to smooth things over. No one told him anything serious (sexual intercourse or sexual assault) had taken place. He did talk about his concerns regarding his reputation, and he was terrified of the consequences for his marriage. While accepting that there was an element of moral pressure on SR and Anna Willis, as suggested by Ms. Jones, this in no way amounted to harassment or

threat, and the respondent should not have taken this into account when determining the outcome of the disciplinary process.

68. To conclude, the respondent did not have reasonable grounds for concluding that the claimant was guilty of gross misconduct justifying dismissal.

69. Mr Eggmore also dissents from the conclusion that on the evidence the claimant had touched SR with enough force to cause bruising. He did not breach the contract with respect to the treatment of colleagues, and is entitled to be paid notice.

Discrimination Claims

70. As for the discrimination claims, in which our conclusion is unanimous, we discount any comparison with the treatment of SR. They were not comparable, because he did not complain about her until the investigation was concluded. It was not then necessary to go back to SR when her evidence was to be tested in a hearing.

71. We focused on the hypothetical comparisons. If both claimant and SR had been 26 (or 43) we did not think the outcome would have differed. The claimant may not have been a manager, but there was a hierarchy - he was an established member of staff and had mentored SR on two cases. That made it important that he did not take advantage of his status either in the incident itself (it was not clear he did, but a responsible person would have held back given her student status) or in the conversation about not mentioning it to people. He would have been expected to have higher standards. It was not that she was young, but that she was a student. When the dismissal letter mentioned he was “a more senior and long-serving member of staff” it was about relative status, not relative age.

72. It may be right that Ian Jenkins was aggressively assuming guilt and that the age difference was a factor he had added to the evidence he already had. We did not think it significant that he collected reports from others before seeing the claimant; an investigation into any serious matter (as more commonly with fraud) may have taken this course. We did not believe Ms Fair was influenced by this. The claimant may have been questioned more fiercely, but the evidence of the photographs was a large part of that. Her also had the opportunity to test all the witnesses at the hearing.

73. As for Ian Jenkins saying he was older, we noted that the police report had some standard box factors to tick, including age difference, and the officers had identified an age difference of “10-14 years”. In assessing the seriousness of an alleged assault, it was not irrelevant to take account of age, and the risk of abuse of seniority meant it was to be considered; control of such abuse is a legitimate aim, and it was proportionate to mention it.

74. As for the difference in sex and marital status, we considered that a social work department, alive to diversity issues, would have treated the episode as seriously if both had been a woman, or if the sexes of claimant and SR had been reversed (though it was hard to envisage this in reality, perhaps because a male SR may have hit back and a female claimant been unlikely to use sufficient force), or if both had been men. They would still have been averse to blaming the victim, which would have been enough to account for a

difference in interrogation style. The lay members observe that a local authority (of which both have substantial experience) would be very sensitive to suggestions that inconvenient events were being covered up, and thought it necessary to investigate fully whoever was said to have assaulted whom. Social work managers would also be especially aware of diversity issues, and the need to avoid blaming victims. They also have much experience of assaults, actual and alleged, in their casework, and of forensic situations.

75. The remark about being a married man was relevant, when on SR's account she had declined further engagement before the episode because he was married, and the claimant had mentioned it to the two women in the Monday conversation; in any case marital status has some relevance in considering an allegation of sexual misconduct, whichever sex is involved, and did not indicate discrimination on grounds of marital status. We did not conclude the claimant was less favourably treated by mention of his marital status.

76. None of us was able to conclude that the respondent discriminated because of age, sex or marital status,

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Employment Judge

Date 15 January 2019

JUDGMENT SENT TO THE PARTIES ON

15 January 2019

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FOR THE TRIBUNAL OFFICE