Case Number: 3305266/2018

EMPLOYMENT TRIBUNALS

Claimant
Mr. ZZ

Respondent
(1) National Probation Service ('HMPPS')

(2) Ms I. Davies

v

Heard at: Amersham **On**: 9 – 13 September 2019

Before: Employment Judge Heal
Mr. A. Kapur,
Ms S. Hamill

Appearances

For the Claimant: Mr Singh, counsel
For the Respondent: Ms Gray, counsel

RESERVED JUDGMENT

1. We order that the identities of the claimant, his line manager until October 2017, and the premises where the claimant worked should not be disclosed to the public, by use of the anonymisation set out in our reasons, in any documents entered on the register or otherwise forming part of the public record.
2. The complaints of unfair dismissal and race discrimination are not well founded and are dismissed.

REASONS

1. By a claim form presented on 28 March 2018 the claimant made a complaint (in box 8.1) of unfair dismissal, although the particulars of claim attached to the form also contained allegations under a heading of race and sex discrimination.
2. We have had the benefit of an agreed bundle running to 307 pages to which no new documents have been added during the course of the hearing.
3. We have heard oral evidence from the following witnesses in this order:

Mr Z, the claimant,

Mr Andrew Wisdom, Senior Probation officer and Approved Premises manager for Y premises and Tulse Hill;

Ms Diane Orlebar, Approved Premises manager for Beckenham, Canadian and Kew;

Mr Daniel Rizzo, Senior Employee Relations Manager and Reward Adviser;

Ms Ilid Davies, sometime Head of Public Protection in London.

4. Each of those witnesses gave evidence in chief by means of a prepared typed witness statement and then the witness was cross examined and re-examined in the usual way.

Issues

5. At a preliminary hearing held on 1 March 2019 Employment Judge Henry identified the issues as set out below. On day 2 of this hearing we confirmed with the representatives and they agreed that these were the issues in the case. We agreed with the parties that we would deal with liability, contributory fault and 'Polkey' but not remedy at this stage.

Unfair Dismissal

5.1 Did the claimant terminate the contract under which he was employed?

5.2 Did he do so in circumstances in which he was entitled so to do, by reason of the respondent's conduct, in that, there had been a breach of the implied term of trust and confidence, namely by:

5.2.1 the respondent's attempt to confirm that he had previously been charged with a sexual assault;

5.2.2 the level of support received by the claimant during his long-term sickness absence; and

5.2.3 the decision to suspend the claimant.

5.3 If there was a breach, was that breach of a fundamental nature going to the root of the employment relationship so as to entitle the claimant to treat the employment relationship at an end?

5.4 Did the claimant accept those breaches as bringing the contract to an end?

5.5 Did the claimant resign in response to those breaches?

5.6 Did the respondent act reasonably in accepting the claimant's resignation when it did, so as to be reasonable in all the circumstances of the case, sufficient the purposes of section 98(4) of the Employment Rights Act 1996?

Direct Discrimination because of race and/or sex

6. Has the respondent subjected the claimant to the following treatment?

6.1 deciding to investigate the claimant for bringing the respondent into disrepute as a result of being charged but not convicted with a sexual offence several months after the event and in circumstances where it knew or ought to have known that the criminal trial was less than 3 weeks away.

6.2 requested at the investigation meeting that the claimant disclose the evidence and the particulars of his defence case in criminal proceedings to the respondent.

6.3 Has the respondent treated the claimant as alleged less favourably than it treated or would have treated a comparator?

6.4 If so, are there primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because the protected characteristic of race and/or sex?

6.5 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

7. Employment Judge Henry originally ordered that the claimant's application to amend to add those issues of direct discrimination would be decided after the end of the evidence in the full hearing. In the event, the respondent conceded the application and so we proceeded - now as a three person tribunal - to hear the complaints of race and/or sex discrimination.

8. We granted the claimant's application that his name and the name of the premises where he worked should be anonymised. The respondent opposed the application. We gave reasons orally for granting the application at the time and do not repeat them here.

9. On our own initiative we have also anonymised the name of the claimant's line manager. He has been heavily criticised in this case. He resigned from his employment in October 2017 and has not been called to give evidence. Therefore, he has not had the chance to answer the considerable criticisms made of him. He has not chosen for these proceedings to be brought. In those circumstances we bear in mind his right to a fair trial of those criticisms and his right to a private life. We consider that these matters outweigh the interests of open justice in having him identified. We have anonymised his name in this judgment therefore and call him 'M'.

Concise statement of the law

Constructive unfair dismissal

10. So far as is relevant section 95 of the 1996 Act provides:

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

(a) …,

(b) …,

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

11. To succeed in establishing a claim under section 95(1)(c) the claimant must show that the employer is guilty of a fundamental or repudiatory breach of the contract of employment. Behaviour that is merely unreasonable is not enough. The test is not one of whether the employer was acting outside the range of reasonable responses, but the question is whether, considered objectively, there was a breach of a fundamental term of the employment by the employer.

12. Although unreasonableness on the part of the employer is not enough an employee may rely upon the "implied term of trust and confidence". Properly stated the term implied is *"the employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

13. The duty not to undermine trust and confidence is capable of applying to a series of acts which individually might not themselves be breaches of contract.

14. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship. The question is, does the cumulative series of acts, taken together, amount to a breach of the implied term?

15. The employee must leave in response to the breach of contract, which may mean the tribunal deciding whether it was *an* effective (but not necessarily the sole or *the* effective) cause of the resignation. There is no legal requirement

that the departing employee must tell the employer of the reason for leaving, however.

16. A repudiatory breach is not capable of being remedied so as to preclude acceptance. The wronged party has an unfettered choice of whether to treat the breach as terminal, regardless of his reason or motive for so doing. All the defaulting party can do is to invite affirmation by making amends.

17. The fact that a dismissal is constructive (within sub-section (2)(*c*)) does not of itself mean that it will be held to have been unfair (though in practice that will often be the case); we must still go on to consider fairness in the normal way.

Discrimination: the burden of proof

18. We have reminded ourselves of the principles set out in the annex to the Court of Appeal's judgment in *Igen Ltd v Wong* [2005] EWCA Civ 142, [2005] IRLR 258. We do not set out the entire annex in full here, but we have re-read it and understand it to work as follows.

19. It is the claimant who must establish his case to an initial level. Once he does so, the burden transfers to the respondent to prove, on the balance of probabilities, *no discrimination whatsoever*. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing a claimant which it would be very difficult to overcome if he had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race and/or sex. What then, is that initial level that the claimant must prove?

20. In answering that we remind ourselves that it is unusual to find direct evidence of unlawful discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases, the discrimination will not be ill-intentioned but merely based on an assumption that "he or she would not have fitted in".

21. We have to make findings of primary fact on the balance of probability on the basis of the evidence we have heard. From those findings, the focus of our analysis must at all times be the question whether we can *properly and fairly* infer discrimination.

22. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the *'same, or not materially different'* as those of the claimant.

23. Facts adduced by way of explanations do not come into whether the first stage is met. The claimant, however, must prove the facts on which he places reliance for the drawing of the inference of discrimination, actually happened. This means, for example, that if the complainant's case is based on particular words or conduct by the respondent employer, he must prove (on the balance of probabilities) that such words were uttered or that the conduct did actually take place, not just that this might have been so. Simply showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof.

24. If unreasonable conduct therefore occurs alongside other indications (such as under-representation of a particular group in the workplace, or failure on the part of the respondent to comply with internal rules or procedures designed to ensure non-discriminatory conduct) that there is or might be discrimination on a prohibited ground, then a tribunal should find that enough has been done to shift the burden onto the respondent to show that its treatment of the claimant had nothing to do with the prohibited ground. However, if there is no rational reason proffered for the unreasonable treatment of the claimant, that may be sufficient to give rise to an inference of discrimination.

25. It was pointed out by Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] ICR 337 (at paragraphs 7–12) that sometimes it will not be possible to decide whether there is less favourable treatment without deciding *'the reason why'*. Where we are considering a hypothetical comparator, it will only be possible to decide that a hypothetical comparator would have been treated differently once it is known what the reason for the treatment of the complainant was. If the complainant was treated as he was because of the relevant protected characteristic, then it is likely that a hypothetical comparator without that protected characteristic would have been treated differently. That conclusion can only be reached however once the basis for the treatment of the claimant has been established.

26. Some cases arise (See *Martin v Devonshire's Solicitors* [2011] ICR 352 EAT paragraphs 38 - 39) in which there is no room for doubt as to the employer's motivation: if we are in a position to make positive findings on the evidence one way or the other, the burden of proof does not come into play.

Facts

27. We have made the following findings of fact on the balance of probability.

28. The respondent had an attendance management procedure which included the following:

‘2.4 *Line managers must:*

- focus on early intervention and be proactive in addressing health issues which may affect attendance or performance;

- support employees in achieving a satisfactory level of attendance by helping them to continue to work when they experience ill-health or return to work as soon as possible following a period of sickness absence;
- hold a Formal ***Unsatisfactory Attendance*** Meeting with all employees who reached the Trigger Point and make a decision on whether to take formal action.

2.5. Employees are expected to:

- attend work unless they are not well enough to do so and return to work as soon as they are able;
- talk to their manager at the earliest opportunity about any health issues which might affect their attendance or performance;
- be aware of the standard of attendance expected of them i.e. their Trigger Point and the consequences if they reach are exceeded;
- work with their line manager to achieve or maintain a satisfactory level of attendance. This means exploring ways to enable them to work when they experience ill-health or return to work as soon as possible following a period of sickness absence.

2.11 Occupational Health give specialist advice on preventing or resolving health problems which can affect the employee's ability to attend work or do their job effectively.

2.12 A referral to Occupational Health can be made at any time if the line manager or employee is concerned about the impact of the employee's health on their performance or attendance. They do not have to wait until the employee has reached the Trigger Point or until they are absent from work before seeking advice.

2.13 Referral to Occupational Health can be made at any time it is deemed reasonable to do so by local line management. *Line managers must make a decision about what action to take based on the information available and ensure it is evidenced.'*

29. The claimant began employment with the respondent in 2008 as a receptionist. He advanced from that position and at all relevant times was a residential assistant at the respondent's Y Approved Premises in north London.

30. On 7 August 2016 the claimant was arrested for an alleged sexual offence unconnected with his work. We make it clear from the start that he was ultimately acquitted of this offence.

31. On 8 August 2016 the claimant told Mr Wisdom who was then his line manager that he had been arrested in relation to a sexual assault and was on police bail.

32. From 16 September 2016 to 18 November 2016, the claimant was off sick with stress.

33. From 21 April 2017 to 15 May 2017 and from 28 June 2017 to 14 September 2017, the claimant was signed off sick by his GP with stress.

34. During this period the claimant's line manager was Mr M, with Mr Wisdom as M's line manager.

35. On 28 July 2017, having been absent for 4 weeks the claimant reached a trigger point in relation to his sickness.

36. On the same day, M emailed Mr Rizzo: saying that he had taken Mr Rizzo's advice and attempted to maintain contact with the claimant. Mr Rizzo, who was based in Petty France had been allocated to provide remote support for the claimant's attendance management.

37. On 1 August 2017 after nearly a year, the claimant was charged in relation to the arrest - nearly one year before - on 7 August 2016. We stress that there was only one alleged offence, however the time delay between arrest and charge caused subsequent confusion within the respondent. That confusion has been in part the background to this claim.

38. On 4 August 2017 M emailed Mr Rizzo saying that he had not able to make contact with the claimant and had left several messages but not heard back. The claimant told us however that once he had presented a sick-note he did not have to constantly call his manager.

39. On 7 August 2017 Mr Rizzo told M that it was *his* duty to maintain contact.

40. On 8 August 2017 M wrote to Mr Rizzo: he had spoken briefly to the claimant who said he would return his call but did not.

41. On 9 August 2017 there was a further conversation between M and Mr Rizzo. During this conversation M told Mr Rizzo that the claimant had been arrested for sexual assault and was facing a court appearance. M later emailed Mr Rizzo to say that contact had been made with the claimant. He had asked the claimant about his general well-being, to which the claimant replied, 'I'm good.' The claimant would phone in on 11 August. M said that he had provided the claimant with the number of the employee assistance scheme. Before us however the claimant denied that M had given him this number. He was not challenged on this. In the absence of evidence from M, we accept the claimant's evidence about this.

42. On 11 August 2017 the claimant told M that he had visited his GP that day and had his sick note (for stress related issues) extended.

43. On 14 August 2017 M told Mr Rizzo by email that the claimant had not called as agreed but M had called the claimant. The claimant told M that his sick note for stress had been extended for 4 weeks. He said that he would be in touch in a week's time.

44. On 15 August 2017 at 10.30, Rob Hutt told M to refer the claimant to Occupational Health. He added that he thought they needed to get to the bottom of '*these alleged offences'*. (We note the use of the plural.)

45. On 15 August 2017 at 17.25 M sent an email to Mr Hutt saying,

'…*I have made contact with the Ilford Jigsaw team and spoken to Marian Madden. I explained that I wanted to know the details of ZZ's arrest in July 2017. She said Z's arrest was in relation to an alleged offence of Sexual Assault. for which he is due to appear at North East Magistrates Court today (15.08.17). Marian indicated Z was originally arrested 07.08.2016 and placed on bail then subsequently arrested and charged 01.08.17*.'

46. We note that this paragraph refers to two arrests, thereby giving the possible appearance of two offences, although in fact there had been only one arrest and one alleged offence.

47. A further court appearance was scheduled for 13 September 2017. The Snaresbrook police officer was a Nick Palmer and the police expected the case to go to trial.

48. Also, on 15 August 2017. Mr Rizzo wrote to M saying that an Occupational Health referral should be made because the claimant had been signed off for four weeks. He asked too whether any consideration had been given to the allegations of misconduct against the claimant in respect of his ongoing court case because of the risk of reputational damage.

49. Neither party suggests that the Occupational Health referral was completed.

50. Mr Rizzo had become concerned that the claimant had failed to report his 'most recent arrest'. This was why he contacted the claimant's managers to provide advice and guidance.

51. In fact, we find that the claimant had told Mr Wisdom that he had been *charged* (he had not been arrested for a second time) and had also told M. It appears that this information did not reach Mr Rizzo.

52. By email dated 17 August 2017 M wrote to Mr Hutt, with copies to Ms Davies, Mr Wisdom and Mr Rizzo. He said that he had tried unsuccessfully to make contact with Nick Palmer. Meanwhile he would send the claimant an invitation to a meeting on 24 August 2017 to discuss the claimant's ongoing sick absence management, Occupational Health referral and to seek an explanation from the claimant as to why police had made contact with senior management about his arrest.

53. By email dated 17 August 2017 to M, Mr Wisdom and Ms Davis, Mr Rizzo raised concerns about the approach that had been agreed. He said:

'…

I think it is important to understand what format the meeting next week would take i.e. an informal attendance review meeting or a disciplinary interview?

The two should not be combined as this would not be appropriate, for example in terms of representation for the employee, and should be dealt with separately. In addition, in the knowledge that Z is absent due to the stress caused by the court proceedings - for which the outcome may be known before the informal meeting

takes place - I am concerned that any informal meeting would not be appropriate at that stage and the role of the attendees would need to be clarified with Z. For example, a decision to suspend Z following the outcome of court hearing this week could only be taken by an ACO grade.

It is still unclear when the business first knew of Z's arrest in August 2016, and it would appear that the most recent arrest in August 2017 incident has been reported recently to senior management and after the beginning of his sick absence in June 2017. It may be the case that disciplinary proceedings therefore supersede the Long Term absence process, as the benefit of an OH referral at this stage may be limited, knowing that the cause of his absence are the ongoing legal proceedings.

I believe there are clear grounds below for breaches of the conduct policy due to that nature of the allegations Z is facing. The next step in dealing with Z's case may not be attendance management but suspension and consideration of the criminal convictions he may already have and the more recent charges he faces in the context of, and in contrast to, his role in HMPPS and working in an AP.

Rob/Ilid - I am happy to discuss, as I may not know all the details but it would appear to me that these are very serious charges and allegations which require attention and potential action. It would appear that the second arrest was not for a breach of bail terms, and therefore, a new and separate incident; for which the CPS found enough evidence to proceed to a charge.

Let me know if you have any questions or concerns with the above'

54. We note that Mr Rizzo was working at a distance from the key players in this matter: he was giving support from Petty France and trying to make sense of information coming into him by email which conveyed to him the impression that there were or might be two alleged offences. He had been given the wrong impression that there was a second arrest which was not for a breach of bail and so he concluded that there was a new and separate incident.

55. By email dated 18 August 2017, Ms Davies wrote to Mr Rizzo. She said that it looked to her as if the claimant should be suspended as he had now been charged. She added that the respondent service could not have the claimant present in approved premises.

56. We find that the matter had become more serious to the respondent once the claimant had been charged, because the fact of the charge meant that the CPS had concluded that there was enough evidence to charge the claimant. This would have been the same however many offences he had been charged with. The claimant was in an offender facing role and potentially at least there was a conduct issue and a reputational risk to be investigated. It would have been inappropriate, were the claimant to end his sick leave, to expose the respondent to a situation where he could be placed back in Y premises facing offenders (some of whom might well have been convicted of similar offences). Mr Rizzo also had in his mind - although he did not express it at the time - that it would be helpful to the claimant to be suspended

because he would be suspended on full pay and so would not be using up his sick pay.

57. Ms Davies told us, and we accept, that she did not take the decision to suspend alone but it was taken collectively. The managers had a situation where the claimant's sick certificate had run out. It was more appropriate to suspend because they could not ask the claimant to return to work with high risk offenders in approved premises. There was a duty to protect the public. It would be unfair to expect the claimant to provide the same service (which he usually did very well) when he was anxious about his own future. It would be insensitive to him to expect him to work with offenders who had been convicted of the same or similar offences and it might be insensitive to the offenders themselves.

58. There were no other roles which the claimant could do which did not involve contact with offenders. Any alternative would place him in an office where offenders would be coming in and out. There was no system of back room paperwork: almost everything was now done on computers in an office.

59. As a result, on 18 August 2017 a draft suspension letter was produced by which the claimant would be suspended on full pay.

60. The letter said:

'*You are being suspended from work as I have been notified by the police that you were arrested on the 01 August 2017, and were subsequently charged by the Crown Prosecution Service (CPS) on the same day, for alleged sexual assault. I have decided that you should be suspended, rather than place you on alternative duties or detached duty because such a charge is in clear breach of the civil service code and in conflict with HMPPS professional standards, and also has the potential to cause severe reputational damage to the department*.'

61. M and Mr Wisdom were not involved in that decision-making process, although they knew that it was taking place.

62. The suspension letter demonstrates the degree of confusion within management about what was the correct situation in relation to the state of the criminal process. The claimant had not been arrested on 1 August 2017: he had been arrested in 2016. He had been *charged* in August 2017.

63. At this stage Mr Rizzo was still under the impression however that there had been two separate acts of alleged sexual assault, one in August 2016 and one in August 2017.

64. On 21 August therefore Mr Rizzo telephoned Mr Wisdom and asked him why he had not taken action about a previous sexual offence. The source of the confusion appears to have been M, although we notice that Mr Hutt also held a wrong idea of two offences on 15 August. Mr Wisdom was surprised and confused because he knew that there was only one alleged sexual offence and there had been no previous offence. Mr Wisdom told Mr Rizzo this but also said that he would clarify the situation with the claimant and M and get back to Mr Rizzo.

65. Accordingly, Mr Wisdom telephoned the claimant and told him that M had told Mr Rizzo that he was accused by the respondent of a second sexual offence. Mr Wisdom told the claimant that steps were being taken for him to be dismissed. The claimant told Mr Wisdom clearly that there was no second sexual offence. The claimant was very upset by this telephone call. Mr Wisdom tried to placate the claimant by saying that he thought the length of time it had taken the police to charge him had caused the misapprehension that there were two alleged offences.

66. In his subsequent grievance the claimant said that it was this telephone call that led him to resign. He said this again in answer to Miss Gray in cross examination. Later however he said that it was the subsequent investigation in January that made him resign.

67. On 22 August 2017 Mr Wisdom spoke to M to clarify where he had got the information about the previous conviction. M denied having said anything of such a nature to Mr Rizzo.

68. The suspension letter was sent to the claimant on 22 August 2017. Ms Davies kept Mr Rizzo informed of this and added, '*I guess I need to wait now before I proceed as he's [p]leading not guilty?'*

69. By email dated 23 August 2017 Mr Rizzo wrote to Ms Davies saying, amongst other things:

'… *Ultimately, we are now aware of two separate acts of Sexual assault for which he has been arrested and charged (in August 2016 and July/August 2017).*'

70. After that Mr Wisdom contacted Mr Rizzo to tell him that there had been only one alleged offence. Mr Rizzo was not happy that M had misled him, and Mr Wisdom shared with him the theory that the 12-month delay had caused the confusion. Mr Rizzo undertook to convey this information to Ms Davies.

71. Mr Wisdom then went back to the claimant and told him that he had established that in his view M had been misled by regarding the 2016 arrest as relating to a previous offence and Mr Wisdom had clarified the situation with Mr Rizzo. The claimant was still unhappy with M's error, but he accepted thankfully that the situation had been concluded amicably.

72. Although M has not been present in the tribunal to give evidence or to answer accusations against himself, we accept Mr Wisdom's evidence that the claimant was not the only person who had difficulties with M: other employees of different races and both men and women also experienced difficulties with him. There was evidence before us that M was being performance managed and ultimately resigned (we have not been told why) in October 2017.

73. Ms Davies decided to investigate the matters raised in the suspension letter because she thought it necessary to discover the facts of the situation in the light of Z being charged. She understood that because there was a criminal case pending, the investigation had to be limited. She intended there to be a purely fact finding exercise. Initially Ms Davies expected M to investigate because according to policy the line manager was expected to investigate. However, there was some

complication caused by M's departure and the need to find an alternative investigator.

74. On 30 October 2017 Diane Orlebar was tasked to investigate after M resigned. Her terms of reference (which we have not seen) were to investigate the claimant (1) bringing discredit on the respondent and (2) being charged with a criminal offence.

75. At this point the respondent did not know the date of the claimant's trial. There were delays in the investigation because Ms Orlebar wanted to interview Mr Wisdom first and there were some delays in finding an available room.

76. Ms Orlebar interviewed Mr Wisdom on 14 December 2017. This was a fact-finding investigation in relation to the claimant's suspension and would result in no judgment of facts. Mr Wisdom told Ms Orlebar that the trial date was set for February 2018. There was no enquiry about the facts of the alleged offence. Mr Wisdom told Ms Orlebar about the confusion over the 'second offence', that the claimant was only arrested once for one alleged offence, and that Mr Rizzo thought that the claimant should be dismissed or suspended because this was a serious charge.

77. Initially Ms Orlebar invited the claimant to interview on 4 January 2018. The claimant was unable to attend however and therefore the meeting was re-scheduled for 25 January 2018.

78. The letter said,

'*Dear Mr Z,*

I have been asked by Ilid Davies (Head of Public Protection) to investigate the following in relation to you:

Bringing discredit on HMPPS and

Being charged with a serious criminal offence.

As part of my investigation, I would like to interview you so that I can get your view of things. The meeting will be on: ***Thursday 25th January 2018 at 10.30am at Mitre House, Room 3B***

You may be accompanied by a trade union representative or work colleague, however, you'll need to let me know at least one day before if anyone is coming with you and who it is.

You should be aware that a record of our meeting will form part of my overall investigation report to Ilid Davies. If she believes that there is sufficient evidence to charge any members of staff the full investigation report will be made available to them (in accordance with the Data Protection Act). If you have any concerns about this we can discuss them when we meet.'

79. The letter then referred the claimant to the Code of Conduct and Discipline.

80. By email dated 9 January 2018, Ms Orlebar wrote to Mr Rizzo with concerns about the investigation. She asked,

'*What are the parameters in terms of what I can discuss with him? My understanding is that any conversation should only centre on interview arrangements – he was unable to attend on 4th January and I am in the process of rearranging it – and anything outside of this, he should contact his manager or Union for guidance? Owing to the sensitivity of the case, I will need to discuss what question I can ask of him etc.*'

81. Mr Rizzo replied by email dated 12 January 2018. He said,

'*In respect of your remit on Monday, you mentioned that Z was subject to an ongoing criminal investigation. Should this still be the case, you may be limited to simply clarifying this point on Monday morning and asking him about the status of this investigation. In the knowledge that a Police Investigation is still underway, I would advise you do not ask him any questions about the incident as this may compromise the police procedures.*

It may just be a case of confirming the status of the case, what the investigation is concerned with and if he knows that it may be coming to an end. If he can provide any investigation numbers for the records this would be useful.

You may then have to adjourn until the Police process is closed but you could advise the commissioning manager of your findings and update them.'

82. Ms Orlebar therefore interviewed the claimant on 25 January 2018. The claimant told her that he was offended by the wording of the letter which appeared to say that he had in fact brought the respondent into disrepute. He said that he had not been found guilty and how could the respondent be brought into disrepute if this had not been proved? Ms Orlebar explained that the letter was a pro forma and the purpose of the meeting was to establish the circumstances surrounding his suspension and no judgment would be made. She would not make any decisions but present the facts.

83. The notes say,

'*DO Asked when ZZ had been charged and confirmed that this was not for any other criminal offences.*'

And later:

'*ZZ replied that he was annoyed and frustrated and wanted to know where, when and how HR had got information that this was a second sexual assault by ZZ. As an employer they were giving false information, HR had tried to sack him, he hadn't been charged and this was unacceptable.*

DO Confirmed that her investigation was in regards to one charge only, he could ask his Line Manager about this.'

84. We consider that what Ms Orlebar was doing was confirming her understanding that there was only one charge. Given the history (to which the claimant himself alluded, as set out above) we consider there was good reason to do this: she was confirming for the avoidance of doubt that there was one charge, not *asking* about a second charge.

85. On 31 January 2018, the claimant resigned. He wrote to the respondent saying,

'To whom this may Concern,

This is a letter to formally provide written notice of resignation of my position within the HMPSS.

I have been working within the organisation a wide range of roles, for almost 9 years. I am going through the most challenging part of my personal life. At such a time I would expect the organisation that I have given so much - hard work, dedication & provision, to provide support towards me within their capacity.

As you are aware, I'm currently suspended and under investigation for an allegation of sexual assault which I completely refute. I personally feel in this current situation I find myself insulted by HMPSS and victimised for an offence of which I have not even been convicted of.

I have been on bail for over a year and a half. The time I have been either off sick with stress or suspended the organisation have done very little to offer any form of support or take my personal feelings into consideration.

Whilst being off sick with stress, I had management threaten me with disciplinary and to make matters worse, I was on the verge of being dismissed, due to false and misleading information - In relation to this matter I was wrongly accused by my line manager of being charged of a previous sexual related incident. This information about me was given to a third party in Human Resources.

Not only was this information unjust, most disturbingly this is deformation of my character by the organisation which I hold them fully responsible for. This information about me that was published to a member of human resources was not factual in any way.

On Wednesday, 25 January 2018, I attended a meeting in relation to the investigation.

I was really disturbed by one of the two cases put forward to me

- *"bringing discredit on HMPPS"*

How can I bring discredit upon an organisation when I have not been convicted?

How can this above case be put forward to me by HMPSS without anyone in the organisation knowing the strength of the allegation I am faced against?

It seemed almost contradictory from HMPSS when in fact they had brought discredit to my name by providing incorrect information of a serious nature.

I feel the way HPMSS has managed both this case and most importantly myself, has damaged the trust and relationship.

Therefore, after careful consideration, I am left with no option other than to resign from my post giving 4 weeks' notice as of today's date.

Yours Sincerely

ZZ'

86. Although the claimant has given us several differently emphasised accounts of why he resigned, we consider that this letter gives the best account of his thought processes, because it is contemporaneous with his decision. Notwithstanding what he said in his grievance and at one point confirmed to us, he did not resign only because of Mr Wisdom's telephone call on 21 August.

87. The claimant's trial began on 12 February 2018 and he was acquitted on 14 February after 3 days.

88. On 15 February 2018 the claimant raised a grievance. He said in his grievance that the reason for his resignation was Mr Wisdom asking about a second offence.

89. There was some evidence before us about post resignation events relating to issue 5.6, however we do not consider that they shed light on the legal issues (correctly understood) which we have to decide.

90. A grievance meeting took place on 12 March 2018, heard by Mr Wisdom and a response to the grievance was sent to the claimant on 20 March. Mr Wisdom upheld the grievance. He did so because he took the view that M should have done more positively to support the claimant during his sick absence and suspension whilst also fulfilling his managerial responsibilities. He upheld the claimant's grievance about his own telephone call to the claimant of 15 August 2017 because he could not find any reasonable explanation for M having given wrong information to Mr Rizzo about a second charge.

Analysis

91. We have analysed this matter by reference to the issues before us.

Did the claimant terminate the contract under which he was employed?

92. Yes.

Did he do so in circumstances in which he was entitled so to do, by reason of the respondent's conduct, in that there had been a breach of the implied term of trust and confidence, namely by:

1. *the respondent's attempt to confirm that he had previously been charged with a sexual assault*;

93. On 21 August 2017 Mr Wisdom did not *attempt to confirm that the claimant had been charged previously with a sexual assault*, but he did telephone the claimant and confirm his own understanding that the claimant had only been charged with a single offence.

94. Then on 25 January Ms Orlebar confirmed to the claimant her understanding that there had been only one alleged offence.

95. Strictly then the respondent did not do exactly what the claimant alleges. Being pragmatic with the issues however, we look at what the respondent in fact did. Given that a confusion had arisen about whether there was one index offence or two, Mr Wisdom had reasonable and proper cause to telephone the claimant and ask for clarity about the number of alleged charges. Mr Wisdom was confident that there had been only one, but it was wise and reasonable, in the serious circumstances, to double check to be completely sure.

96. The issues do not impugn the confusion arising. Given the length of the delay between arrest and charge, and the ambiguity that arose – apparently, but not only, as a result of the conversation between M and Marian Madden of the Ilford Jigsaw team - it seems to us that confusion is likely to arise in a situation such as this while individuals attempt to grasp clearly what has taken place outside their direct knowledge. It is important then to speak to those who do have direct knowledge to achieve and maintain clarity. That is what Mr Wisdom did.

97. Ms Orlebar did not ask the claimant about a second offence: she *confirmed* that there was only one alleged offence: on the second occasion when she referred to the matter (as recorded in paragraph 83 above) she was responding to the claimant's own upset about the prior history of confusion about two arrests. In the circumstances she had reasonable and proper cause to do that. She was making it clear to the claimant that she knew that there was only one offence. Given his sensitivity on the subject and the need to convey to him that the respondent had a correct understanding of the case, she had reasonable and proper cause to do this.

2. *The level of support received by the claimant during his long-term sickness absence;*

98. The respondent accepts, as did Mr Wisdom in his grievance outcome, that the claimant did not receive proper support during the claimant's long-term sick absence, at least from M. We do not consider ourselves bound by Mr Wisdom's grievance outcome. He was not asking himself the same legal question that we are answering and he did not have the benefit of the same detailed evidence that we have heard.

99. In the circumstances although we would have expected M to be more proactive about contacting Occupational Health and employee assistance for the claimant, objectively we do not think this is so serious on all the facts of this case as to damage the relationship of trust and confidence. Indeed, as Mr Rizzo pointed out on 17 August, the benefit of an occupational health referral was limited given that the respondent knew that the claimant had been off sick because of the stress of court proceedings and he was not likely to be back at work until the trial was over. According to the respondent's attendance policy, the purpose of occupational health was to give '*specialist advice on preventing or resolving health problems which can affect the employee's ability to attend work or do their job effectively*.' It is not a support service. The respondent could not prevent or resolve the stress of the court proceedings which were outside its control. There was no problem in the workplace that was affecting the claimant's ability to attend work or to do his job properly.

100. Moreover, although the claimant was not given the contact details for employee assistance, Mr Wisdom himself was plainly providing quality support for the claimant, even if Mr M was not. The claimant's own evidence was that Mr Wisdom supported him through to July and August 2017. That support was unavailable while Mr Wisdom went away on holiday in August 2017. We note however that Mr Wisdom himself was in close contact with the claimant during August 2017 and, on his own initiative, was talking to the claimant every week from September 2017. Mr Wisdom was a manager who the claimant liked and trusted and who was obviously sympathetic to him. The claimant was happy for Mr Wisdom to manage and keep in contact with him.

101. The long-term sick absence ended with the suspension. The claimant did not continue submitting sick certificates when suspended (the last one expired on 14 September); he accepted being suspended with full pay (in the sense of not resigning instead); instead of being on sick leave, when his full sick pay would have been vulnerable to expiry. On one view, this was to his financial benefit. If the claimant considered that he remained ill and needed support, then we would have expected him to continue asserting illness in some way. He gave evidence about his stress post suspension, however he does not seem to have conveyed this in any formal way to the respondent.

102. The claimant was not expressing the need for support at this time and certainly not from the start of the suspension. More importantly he was in fact receiving support from Mr Wisdom.

103. In those circumstances we do not consider that M's failures of support amount to a breach of the implied term of trust and confidence.

104. If we were wrong about that then, if this were the only breach, we would consider that the claimant, by continuing on full pay on suspension for four months instead of resigning, had affirmed the contract of employment.

3. *the decision to suspend the claimant.*

105. We have accepted the respondent's explanation for the decision to suspend the claimant. Matters became more serious once the claimant was *charged* with a serious offence because a charge suggested to managers that the CPS had sufficient evidence to charge the claimant. The managers also had a situation where the claimant's sick certificate had run out. It was more appropriate to suspend because they could not ask the claimant to return to work with high risk offenders in approved premises. There was a duty to protect the public. It would be unfair to expect the claimant to provide the same quality of service when he was anxious about his own future. It would be insensitive to him to expect him to work with offenders who had been convicted of the same or similar offences and it might be insensitive to the offenders themselves. There were no other roles which the claimant could do which did not involve contact with offenders. Therefore, we consider that the respondent had reasonable and proper cause for suspending the claimant.

If there was a breach, was that breach of a fundamental nature going to the root of the employment relationship so as to entitle the claimant to treat the employment relationship at an end?

106. For the reasons set out above, we have found that there was no breach and therefore certainly no fundamental breach of contract.

1.4 *Did the claimant accept those breaches as bringing the contract to an end*?

107. This is not now relevant.

1.5 *Did the claimant resign in response to those breaches?*

108. This is not now relevant.

1.6 *Did the respondent act reasonably in accepting the claimant's resignation when it did, so as to be reasonable in all the circumstances of the case, sufficient the purposes of section 98(4) of the Employment Rights Act 1996?*

109. This is not now relevant. However, we would not consider this to be the correct expression of the law in any event. An employee's contract terminates when he accepts any breach by the employer, not when the employer accepts the resignation.

Direct Discrimination because of race and/or sex

Has the respondent subjected the claimant to the following treatment?

1. *deciding to investigate the claimant for bringing the respondent into disrepute as a result of being charged but not convicted of a sexual offence several months after the event and in circumstances where it knew or ought to have known that the criminal trial was less than 3 weeks away.*

110. The respondent did decide to investigate the claimant, but the decision was taken close to the event of the charge, not when the trial was less than three weeks away. M then resigned and a different manager had to be found to carry out the investigation. The decision to investigate was taken when the respondent did not know of the trial date. When they did interview the claimant and Mr Wisdom, it transpired that the trial date was now close, and the respondent rightly withdrew from investigating the facts of the index offence because that was manifestly improper.

2. *requested at the investigation meeting the claimant disclose the evidence and the particulars of his defence case in criminal proceedings to the respondent.*

111. The respondent did not do this and took care not to do it. The claimant fails on this issue because he has not established the primary facts of his case.

Has the respondent treated the claimant as alleged less favourably than it treated or would have treated a comparator?

If so, are there primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because the protected characteristic of race and/or sex?

If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

112. No actual comparator has been advanced before us and we have heard no evidence from which we could say that a hypothetical comparator would have been treated any differently or more favourably than the claimant as set out in either the issue or our paragraph 110 above. Indeed, the claimant has scarcely pressed his discrimination claim before us.

113. There has been no evidence from which we could properly conclude that someone of a different race or gender would have been treated differently from the claimant. In any event the 'reason why' Ms Davies decided to investigate at all was because the claimant had been charged with a serious criminal offence and she thought it necessary to investigate the facts of the situation. The decision to investigate was not in fact taken close to the trial: it was taken when the trial date was not known, but matters were delayed.

114. For all those reasons the claims are not well founded and are dismissed.

_____
Employment Judge Heal

Date: ……6 December 2019……..

Sent to the parties on: .....

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For the Tribunal Office