EMPLOYMENT TRIBUNALS

Claimant: 'AB'

Respondent: The Commissioners For Her Majesty's Revenue And Customs

RESERVED JUDGMENT

Heard at: North Shields **On: 13th and 14th January 2020**

Before: Employment Judge Sweeney

Representation:

For the claimant: Paul Sangha, counsel
For the respondent: Mr Simon Lewis, counsel

The Judgment of the Tribunal is as follows:

1. **The Claimant's claim of unfair dismissal is well founded and succeeds.**

2. **The Basic Award is reduced by 66% pursuant to section 122(6) Employment Rights Act 1996 ('ERA').**

3. **The Compensatory Award is limited to losses from 22 March 2019 to 30 November 2019 to reflect the fact that the Claimant would have been fairly dismissed on that date; and in respect of the period 14 September 2019 to 30 November 2019 is reduced by 50% to reflect the chance that his pay would have reduced to nil during that period.**

4. **The Claimant contributed towards his own dismissal. The Compensatory Award is reduced by 50% pursuant to section 123(6) ERA.**

5. **The parties should inform the Tribunal whether a remedy hearing is required within 21 days of receipt of the reserved judgment.**

REASONS

The Claimant's claim

1. By a Claim Form presented on 27 July 2019, the Claimant brought a claim of unfair dismissal arising out of the summary termination of his employment on 22 March 2019. The Respondent contends that the Claimant was dismissed for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the Claimant held, and that it acted reasonably in treating the reason as a sufficient reason for dismissing the Claimant.

The Hearing

2. The claimant was represented by counsel, Mr Paul Sangha. The Respondent was also represented by counsel, Mr Simon Lewis. The parties had prepared an agreed bundle running to 350 pages.

3. The Respondent called two witnesses:

   (1) RU, (dismissing officer),
   (2) TM (appeal officer).

4. The Claimant gave evidence on his own behalf.

The issues

5. At the outset of the hearing, counsel agreed the issues as follows:

   5.1. What was the reason or principal reason for dismissal? The Respondent relies on the following as constituting the reason for dismissal:

      5.1.1. The cost to the public purse of continuing to employ the Claimant whilst suspended on full pay pending completion of a criminal prosecution against him;

      5.1.2. The reputational risk to the Respondent in continuing to employ the Claimant given the nature of the criminal offence with which he was charged and the nature of the work that the Claimant was employed to do;

   5.2. Did that reason constitute a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the Claimant held?

   5.3. Did the Respondent act reasonably in treating that reason as a sufficient reason for dismissing the Claimant?

5.4. Should the Tribunal conclude that the Claimant was unfairly dismissed, might or would he have been fairly dismissed in any event at the time or at some future point in time?

5.5. Should the Tribunal conclude that the Claimant was unfairly dismissed, should there be any reduction to the basic award under section 122(2) Employment Rights Act 1996 ('ERA') and to the compensatory award under section 123(6) ERA?

Finding of facts

6. Having considered all the evidence (written and oral) and the submissions made by the representatives on behalf of the parties, I find the following facts.

7. The Claimant was employed as an Administration Officer ('AO') within the Respondent's BC department. By the time of his dismissal he had been employed for 13 years.

8. On 03 April 2018 he was arrested by police following an allegation of sexual assault on his 15 year old niece and released on police bail. The Claimant was arrested on 03 April 2018 when undertaking volunteer activities. He was not arrested in front of the parents of the volunteers (as was suggested by the Respondent during the hearing). I accept the Claimant's evidence that whilst there was a police car outside which would have been visible to those coming and going, he was not arrested in public view of parents or of the volunteers.

9. The Claimant subsequently informed the Respondent of his arrest and of the allegation against him. He was then suspended at a meeting on 05 April 2018 ('suspension meeting').

The Respondent's suspension policy

10. The Respondent's policy at page **271** reads as follows:

"The decision to remove an employee from normal duties or suspend them from duty is a serious one and is only taken when absolutely necessary.

…Employees may be moved from their normal duties or suspended during the criminal investigation. In these circumstances, HMRC must balance its responsibilities to individual employees, the criminal justice system and the wider public interest."

11. Under the section dealing with 'Suspension' (page **272**) the policy states:

"The employee's senior manager (G7 or above) in discussion with the IG Civil manager will:

- *Decide whether to authorise the employee's suspension;*

- *Decide whether the suspension is with pay or whether in exceptional and in consultation with CSHR Casework cases to withhold part or all of the employee's pay;"*

12. Mr Lewis accepted that the Respondent had the contractual power to suspend employees with pay, without pay or on reduced pay. The Claimant was suspended with pay.

13. During the hearing, there was a dispute between the parties as to whether the Claimant had told the Respondent at the suspension meeting that he was not to have contact with anyone under 18 as a condition of his bail. The Respondent said that he did say this, as referenced in emails on pages **79** and **80** and in the meeting notes at page **83** – **84**. On page **80**, JR explains to others in the organisation that the fact that the Respondent had under 18s in the office contributed to the decision to suspend him, along with the seriousness of the allegation. The Claimant denied saying there were any such restrictions. He says there never had been. This dispute was relevant to issues 5.1.1, 5.2 and 5.3. The Claimant argued that if he had been suspended on the basis of an unreasonable belief that he was to have no contact with anyone under 18 years of age, this was wrong and that it subsequently unreasonably influenced RU's views on lifting his suspension.

14. I conclude that it is more likely than not that a reference to under 18s was made at the suspension meeting – the reference appears in the contemporaneous documents more than once. The Claimant worked with young people in undertaking volunteer activities with the cadets. On 05 April 2018, the Claimant mentioned his suspension from the cadets the previous day and that the reason for his suspension from those activities was because he worked with under 18s. It is likely that management took this as a general restriction on him being in contact with under 18s. However, he did not say at the suspension meeting that there were police restrictions on him coming into contact with those under the age of 18.

15. In fact, despite the reference on page **80** to those restrictions having played a part in the decision to suspend, the Claimant's suspension was automatic and not because of the presence of anyone under 18 in the workplace. This was confirmed by TM in her evidence when she said that where an employee is accused of a serious criminal offence suspension is a matter of routine and that she confirmed the reason for the suspension in the Claimant's case directly with the HR caseworker to be the seriousness of the allegation. Ultimately, the issue had no effect on the decision to dismiss (see paragraph 44 below).

16. Returning now to the sequence of events. At the time of his suspension it was agreed between the Claimant and the Respondent that, rather than communicate to staff that he was suspended, it would be explained that he was absent on sick leave due to a back problem.

17. The Claimant remained on suspension up to the termination of his employment although staff were not told that he was suspended. During that period he met with

or spoke on the telephone to his managers regularly. These were referred to as 'keeping in touch' or 'KIT' discussions. Within the bundle there were notes of 48 KIT discussions on dates from 09 April 2018 to 07 March 2019. Most of those were by telephone. There were 3 home visits (02/05/2018, 06/08/2018, 26/11/2018) and one meeting in a café (05/11/2018). It is clear that the managers undertaking those visits were enquiring of his well-being, offering support and keeping him informed with what is going on in the workplace with regard to any structural or work-related changes.

Review of suspension

18. The Claimant's suspension was reviewed on the following dates:

    18.1. 07/05/2018
    18.2. 07/06/2018
    18.3. 09/07/2018
    18.4. 31/07/2018
    18.5. 31/08/2018
    18.6. 28/09/2018
    18.7. 05/11/2018
    18.8. 05/12/2018
    18.9. 07/02/2018

19. There was no evidence as to what those reviews consisted of, or of what, if any, consideration was actually given to lifting the suspension and returning the Claimant to some work pending an update on criminal proceedings. The note on page **109** of a discussion between PW (who was keeping in touch with the Claimant) suggests that suspension was continued simply on the basis that there had been no update on the criminal allegation. This is also clear from the KIT note of 06 September 2018 (page **129**). I conclude from the evidence of the Respondent's witnesses and from the contemporaneous documents that no consideration was given during these suspension reviews as to whether the Claimant could be returned to any meaningful work and that the suspension reviews (which never involved speaking to the Claimant by those undertaking the reviews) consisted simply of asking whether there had been any update in respect of the criminal proceedings. If there was no update, suspension on full-pay simply continued.

20. During the home visit on 02 May 2018 (page **100**) the Claimant referred to the fact that the complaint's mother had told other members of the family what had happened and that she had been discussing it on facebook. The Claimant was concerned that others might find out about the allegation.

21. During the second home visit on 06 August 2018, the Claimant spoke of the strain on his family and that he had blocked his family on facebook and that he was concerned that his name might one day appear in the papers.

22. During the discussion on 14 September 2018 the Claimant said he was worried that his paid suspension was approaching six months and that he did not feel it could continue much longer. He was urged not to worry about that as the Respondent was following a process.

23. On 01 November 2018 the Claimant was charged with an offence contrary to section 3 of the Sexual Offences Act 2003. He rang his manager, JR to tell her (page **140)**.

24. On 05 November 2018, the Claimant's suspension was reviewed for the 7th time. This time, the letter which was issued (page **141**) differed from the earlier letters. It noted that he had been charged with sexual assault on a female aged 15 years, under the Sexual Offences Act 2003. The Claimant was asked to provide a detailed response by 16 November 2018 which was to be included in an investigation report, prepared by a senior officer. He was told that his next suspension review would be 06 December 2018. On the same day (05 November 2018) he met with managers at a supermarket café. The note at page **145** records the Claimant as asking about his pay and pension; that he asked when he would stop getting paid and that he was most concerned about his pension.

25. Further to the request to provide a statement, the Claimant did so on 12 November 2018 (page **156-167**).

26. There was a telephone call on 26 November 2018 between officers of the Respondent (page **160**) where it appears that the Respondent was considering its options. The note records JG (CHSR) as advising that there were two choices; the first choice to wait, the second choice to move to dismiss the Claimant now due to a breakdown of working relationships, due to the working relationship being no longer viable. The HR caseworker is recorded as advising management to contact the HR Director for B&C (Benefits & Credits).

27. During the KIT call on 30 November 2018 (page **162**) the Claimant asked again about his pension and if he were to be dismissed whether there would be a compensation package. He was told to contact HR regarding the pension matters and that compensation would be discussed should he be dismissed and would form part of the process. By this time, the Claimant himself was clearly contemplating the possibility that his employment might be terminated.

28. On 19 December 2018 the Claimant entered a plea of not guilty at the Magistrates Court. He was committed for trial at the Crown Court.

29. On 16 January 2019 the Claimant appeared before the Crown Court where he entered a not guilty plea. He was remanded on bail with no conditions other than a requirement that he was not to contact directly or indirectly prosecution witnesses (see page **172**). The trial date was set for 27 August 2018. Reporting restrictions were put in place in respect of the allegations and the reporting of them.

30. On 22 February 2019, HH sent an 'Internal Governance' report to RU (page **179**). In paragraph 6 of that report (on page **183**) she says:

'The serious nature of the criminal offences with which AB has been charged, especially in view of the responsibilities of our business, the continuing receipt by him of full pay (£1,638.33 per month) whilst on suspension together with the potential risk to HMRC leads me to refer the facts to a Decision Manager for consideration of whether or not dismissal for some other substantial reason is now appropriate.'

31. On page **186**, HH said:

"AB has been suspended on full pay for 11 months. The Decision Manager should now consider if it is appropriate for him to continue to be paid from the public purse given the current information that the trial will not begin for a further 6 months. Also the Decision Manager should consider the reputational risk to HMRC of continuing to employ AB given the serious nature of the criminal offences with which he is charged."

32. By letter dated 04 March 2019 RU wrote to the Claimant requiring him to attend a formal meeting on 15 March 2019 to:

"consider if your dismissal for some other substantial reason is appropriate…The substantial reasons which are being considered as grounds for your dismissal are:

(1) The reputational risk to HMRC of continuing to employ you given the nature of the criminal offence with which you are charged and the nature of the work you are employed to do;

(2) The cost to the public purse of continuing to employ you whilst suspended on full pay pending the completion of the criminal prosecution against you."

33. A copy of the report (at page **180**) was enclosed with the letter.

34. Shortly after this report was sent, during a KIT discussion on 07 March 2019 (page **203**) the Claimant was told that the Decision Maker (RU) would consider whether the Respondent could continue to support his suspension. The Claimant said that it was the Respondent who had suspended him and that he was willing to work. It seems that JR, who was conducting the KIT discussion on behalf of the Respondent was of the impression that the Claimant's bail conditions were that he could not mix with under 18 year olds and that within the building they have apprenticeships and sometimes work experience young people. That was of course incorrect. The Claimant had no such bail conditions.

35. On 08 March 2019, JR forwarded to RU an email she had previously sent to Helen Hinchcliffe on 18 February 2019 (page **204-205**), The email sets out a number of aspects of the Claimant's role and the systems he would access in undertaking parts of that role.

36. The Claimant did not work directly or indirectly with children. His role was not one in respect of which DBS clearance was required.

37. On 15 March 2019 the Claimant attended a meeting with RU. He was represented by a trade union representative. RU asked about the Claimant's bail conditions and specifically if he could be around anyone under the age of 18. The trade union representative confirmed that there were no restrictions. The outcome of the meeting was that RU decided to terminate the Claimant's employment with effect from 22 March 2019. She sent a letter of dismissal dated 21 March 2019 (page **213-212**). In that letter RU said that she upheld the 'allegations'. They were not allegations as such. What she meant was that she decided to dismiss for the reasons set out in the letter. RU attached to the letter her deliberations (pages **215-219**). Those deliberations show her reasons for terminating the Claimant's employment.

38. RU told the tribunal that in arriving at her decision she did not consider whether the Claimant was guilty of the allegations. She did not look at any of the KIT discussion notes as she did not want to be influenced by anything in them. She concentrated only on the two points that were raised in the report and which were put before her. However, in considering whether the Claimant's suspension could be lifted so that he might return to meaningful work, she did take account of how other staff might perceive there to be 'no smoke without fire'.

The first 'allegation' (reputational risk to HMRC')

39. RU's reasoning on this can be seen from page **217**. She concluded that:

"There is a risk to HMRC if the charges against AB were to come into the public domain in that HMRC would be seen to have continued to employ a jobholder charged with a serious sexual offence against a minor."

40. Although she had the email at page **204** which outlined systems the Claimant would have access to in his role, in her evidence before the Tribunal she said that she did not believe there was a risk that the Claimant would go looking through systems for information relating to children. Her main concern in terms of risk to the Respondent was internally from colleagues, what she described on page **217** as 'reputational risk to the relationship between AB and his colleagues. RU concluded:

"If this information was to come into the public domain I consider that it is likely that colleagues within HMRC would not be comfortable working alongside a jobholder charged with a serious sexual assault against a minor. The department has a duty of care to its employees and there is a risk in allowing a jobholder charged with a serious sexual offence against a minor to work alongside them, and currently this would be without their knowledge."

41. In simple terms, what RU was worried about was what might happen should the Respondent lift the suspension and allow the Claimant to return to work pending trial.

She believed that the Respondent could not put other staff in this position because 'if' the charge did come to light, those colleagues would be uncomfortable and would have a negative view of the Respondent for putting them in that position. As to the likelihood of the charge coming into the public domain RU does not address this in her deliberations section (page **217-218**). She does not refer to the 'public' nature of the Claimant's arrest. However, she did refer to this in paragraph 27 of her witness statement, where she says:

"Despite reporting restrictions, I believed there was an unacceptably high risk that the Claimant's charge would be revealed. Court hearings are ordinarily conducted in public, the Claimant had been arrested in a highly public setting at Air Cadets and it is incredibly difficult to keep idle gossip (not least in light of social media)."

42. I find on the balance of probabilities that these considerations were not in her mind at the time and did not form part of her thinking or reasoning. Even if they were, her belief was not based on any reasonable grounds. She did not see the KIT notes; she did not ask the Claimant about the setting of his arrest; there had been two court hearings to date which did not result in any wider dissemination of information, there was no evidence of idle gossip.

43. In response to the Respondent's 'public 'purse' concern the Claimant and his trade union representative had suggested he return to meaningful work pending trial. In response to the trade union representative's request that, if there was a concern regarding access to information regarding children, to move the Claimant to another part of the Respondent's business where there would be no such access, RU said (page **218**):

"I have considered whether it would be reasonable to end the suspension and to redeploy AB to a business area outside of Benefits and Credits where he does not have access to information regarding minors. Whilst this does minimise the risk to departmental system use it does not mitigate the risks regarding the relationship between AB and his colleagues."

44. In the end, even the dispute regarding restrictions on the Claimant coming into contact with anyone under 18 years old was not of significance because by the time the Claimant was dismissed it was clear to the dismissing officer that there were no conditions restricting him from having contact with under 18s - certainly as of 16 January 2019 (see page **172**). I am satisfied that the reference to any restrictions regarding under 18s played no part in RU's rationale for dismissing him in March 2019.

45. RU, therefore, believed and concluded that she would be unable to return the Claimant to any role because it would mean the Claimant having to work alongside at least some people and that if this were to be done, the Respondent would be duty bound to tell those people alongside whom the Claimant would be working of the nature of the charge against him, which it would not want to do and which the Claimant would not want it to do. She was of the view that the Respondent would be

in breach of its duty of care to other staff were it to return the Claimant to work pending trial in circumstances where it kept from them the fact that he had been charged with an offence of sexual assault on a minor. RU believed that the only two realistic options, therefore, were to continue the suspension of the Claimant on full pay or to dismiss him.

The second 'allegation' (cost to the public purse)

46. In respect of the cost of continuing to suspend the Claimant pending trial, RU's reasoning on paper is found at page **218**.

47. RU concluded that (emphasis added in bold):

"Whilst AB remains suspended from HMRC, there is a continued cost to the public purse. HMRC have supported AB whilst suspended on full pay since 5th April 2018 for 11 months. However, circumstances changed in January 2019, in that the court set the trial date for 27th August 2019. This would require the Department supporting the suspension for at least another 5 months. There is a risk that the trial could be delayed and there is a risk that AB could be found guilty of the charges.

I have considered above whether it would be appropriate to end the suspension and therefore remove the risk to the public purse and the reputational damage of HMRC, however for the reasons I have given above, in my opinion it is not reasonable to do so. ***As it is my view that it is not reasonable to end the suspension, I then considered the fact that AB has been suspended for almost 12 months at this point. HMRC has made the decision to suspend AB. However, HMRC does not currently have a clear end date or outcome to the criminal proceedings and therefore it is my view that HMRC cannot continue to support the suspension based on the cost to the public purse under these circumstances****.*

I have considered the impact that dismissal would have on AB's personal circumstances and I have also considered the point raised by Mr C regarding the reputational risk to HMRC in dismissing a jobholder later found to be innocent of charges. HMRC has supported AB until this point, however, it is my view that continuing to support this suspension until the trial is not longer reasonable due to the cost to public purse and the reputational risk to HMRC and the wider Civil Service."

48. In the decision section of her deliberations RU said (emphasis in bold):

"There is a risk to both the reputation of HMRC and to the relationship between AB and his colleagues, in the continued employment of AB.

As the above precludes ending the suspension this means the cost to the public purse of employing AB on suspension of full pay remains*.*

The department has been reasonable previously supporting this suspension for almost 12 months at this point however, circumstances have changed, and there is now at least another 5 months and much possibly longer to await the outcome of the trial. I am satisfied that given it is no longer reasonable for the Department to continue supporting the suspension for this extended period of time due to the reputational risk to the department and the continuing cost to the public purse."

49. Although there is no reference to it in the deliberations of RU or elsewhere in the bundle, RU spoke to the HR caseworker from whom she sought advice about the option of continuing the Claimant's suspension without pay. She was told that it was not appropriate and not an option. However, it clearly was an option. The Respondent retained the contractual power, in exceptional cases, to suspend on reduced or no pay. Whilst the circumstances might not be said to have been exceptional at the initial point of suspension, no consideration was given to whether they might be said to be exceptional at the point at which RU was considering matters (a year on) and in circumstances where she was of the view that the Claimant could not be returned to meaningful work pending his trial which was now confirmed to be in some 5 months' time.

50. In practice, suspension without pay within the Respondent's operations (at least in the North East) is a rare event. However, it has happened before. TM had experience of one case, about 20 years ago, where an employee accused of fraud had been suspended without pay pending a trial for a period, she recollected, of about 6 months.

The Claimant's appeal

51. The Claimant appealed the decision to terminate his employment challenging the following conclusions of RU (by way of summary):

    51.1. RU's conclusion that the charges may come into the public domain:- the Claimant in his appeal letter referred to the court reporting restrictions making the chances of any publicity highly unlikely, a fact borne out by the complete confidentiality surrounding the case thus far;

    51.2. RU's conclusion that there is reputational risk due to his role: - the Claimant in his appeal letter said that alternative roles were not explored properly and that there was a vague reference to the feelings of colleagues and that he was innocent until proven guilty;

    51.3. RU's conclusion that there was a risk the trial could be delayed:- the Claimant in his appeal letter said this was not based on any fact and was at best an assumption;

    51.4. RU's conclusion that it is not reasonable to remove the suspension:- the Claimant in his appeal letter said he was being prevented from undertaking

meaningful work to justify his salary; that the Respondent had taken a very narrow view of how they could accommodate him in work;.

52. The appeal was heard by TM on 23 April 2019. TM rejected the appeal in an outcome letter dated 30 April 2019 (page **229**). She enclosed her deliberations and reasoning (**230-235**).

53. TM's view was as set out in page **232-233**:

"the charges could come into the public domain, aside of the reporting restrictions, there are other family members involved and AB himself stated in a KIT on 2/5/18 that his sister-in-law was openly discussing it on social media. In addition, the general public can attend court hearings. I agree with the DM that there is a risk to HMRC, should the charges come into the public domain, in that HMRC would be seen to have continued to employ a jobholder charged with a serious sexual offence against a minor."

54. TM added:

"I agree with the DM's view that HMRC has a duty of care to its colleagues and there is a risk in allowing a jobholder charged with a serious sexual offence against a minor to work alongside them. However, I do not think it would be appropriate to allow AB to work alongside colleagues without their knowledge of the charge and I agree with the DM that it's likely that some colleagues would not be comfortable with these circumstances."

55. TM spoke to Internal Governance who confirmed to her that the reason for suspending the Claimant initially was because of the very serious charge of sexual assault and not because of any bail conditions or restrictions regarding contact with those under 18 years. In evidence, TM explained that in her experience a serious criminal allegation would always lead to automatic suspension of an employee and that it did in the Claimant's case, as she had confirmed with an HR caseworker.

56. TM rejected any suggestion of home working or working in a private office primarily because "*the risk in allowing AB to be amongst colleagues without their knowledge of the charge remains*" (page **234**).

57. In relation to the 'duty of care' issue TM agreed with RU that:

"If the charges were to become widely known, there is a risk of a strong critical and negative response towards AB from his colleagues."

58. TM agreed with RU on the risk of delay to the criminal trial and that even without delays the cost to the public purse would be a further 5 months when the Claimant had already been suspended for almost 12 months.

59. Neither RU nor TM gave any proper consideration to the possibility of alternative working arrangements for the Claimant pending trial.

60. On 30 August 2019 the Claimant was convicted by a jury of the sexual assault on his niece. He was sentenced on 27 September 2019 to 21 months imprisonment suspended for 2 years, a Rehabilitation Activity Requirement ('RAR') x 30 days and 300 hours unpaid work.

61. Although he has submitted an appeal against that conviction, the Claimant accepted that following his conviction, he would have been fairly dismissed. The Claimant also agreed with Mr Lewis in cross-examination that, had suspension without pay been suggested to him, he would have said no to this because of his financial situation at the time. However, the Claimant would have had no choice in the matter. He was not required to agree with the decision.

Relevant law

Unfair dismissal

62. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section 98(2) or that it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The reference to the 'reason' or 'principal reason' in section 98(1)(a) and s98(4) is not a reference to the category of reasons in section 98(2)(a)-(d) or for that matter in section 98(1)(b). It is a reference to the actual reason for dismissal (**Robinson v Combat Stress** UKEAT/0310/14 unreported). The categorisation of that reason (i.e. within which of subsection 98(2)(a)-(d) it falls) is a matter of legal analysis: **Wilson v Post Office** [2000] IRLR 834, CA.

63. A reason for dismissal 'is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA. In a more recent analysis in **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240, CA, Underhill LJ said that the 'reason' for dismissal connotes the factor or factors operating on the mind of the decision maker which causes them to take the decision. It is a case of considering the decision-maker's motivation.

Some other substantial reason ('SOSR') – s98(1)(b)

64. Section 98(1)(b) does not prescribe any particular reason for dismissal as being potentially fair. In principle any reason for dismissal may be relied on by an employer provided it is a *substantial* reason *of a kind such as to justify the dismissal of an employee holding the position which the employee held*.

65. A reason which is trivial or frivolous could not qualify as a 'substantial' reason. A frivolous or trivial reason could hardly be said to justify the dismissal of any employee irrespective of the nature of the job being performed by that employee.

66. That substantial reason must, however, have an additional quality. It must be of *a kind such as to justify the dismissal of an employee holding the position which the employee held*. So, the statute directs us to consider the nature of the position which the dismissed employee held and to ask: 'considering the job in question is the employer's reason capable of justifying dismissal of an employee doing that job. The focus is not on the particular employee at this stage. That comes later, if the employer establishes 'SOSR', when considering section 98(4).

67. In **Leach v Office of Communications** [2012] I.C.R. 1269, CA, Mummery LJ said in relation to the question of the employer establishing 'SOSR' (emphasis added):

*"52. First, the question for the Employment Tribunal was whether the employer's reason for dismissal of the Claimant was 'some other substantial reason' within the meaning of section 98(1)(b) of the 1996 Act. Was it a reason which a reasonable employer **could** rely on to justify a decision as fair for the purposes of section 98(4)? That is essentially a question for the Employment Tribunal's assessment of the facts found in the particular case…*

53….in order to decide the reason for dismissal and whether it is substantial and sufficient to justify dismissal the Employment Tribunal has to examine all the relevant circumstances…"

68. In **Z v A** [2013] UKEAT/0203/13/SM, at paragraph 24 Langstaff P, commenting on Leach v Office of Communications said:

"Hence the Court of Appeal plainly contemplated that the assessment by a Tribunal of whether a disclosure of potential risk merited dismissal was one for its judgment."

69. Therefore, in any case where an employer puts forward as the potentially reason for dismissal, 'SOSR'; in considering whether the employer has established such a reason it is for the Tribunal to assess whether the reason advanced was indeed of a kind such as to justify dismissal of an employee holding the position which the employee held.

Reasonableness – section 98(4)

70. Section 98(4) poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. It requires the Tribunal to apply an objective standard to the reasonableness of the investigation, the procedure adopted and the decision itself. However, they are not separate questions – they all feed into the single question under section 98(4). Whilst an unfair dismissal case will often require a tribunal to consider what are referred to as 'substantive' and 'procedural' fairness it is important to recognise that the tribunal is not answering whether there has been 'substantive' or 'procedural' fairness as separate questions.

71. The approach to be taken when considering s98(4) is the well-known band of reasonable responses, summarised by the EAT in **Iceland v Frozen Foods Ltd v Jones** [1983] I.C.R. 17. The Tribunal must take as the starting point the words of s98(4). It must determine whether in the particular circumstances the decision to dismiss was within the band of reasonable responses which a reasonable employer

might have adopted. In assessing the reasonableness of the response it must do so by reference to the objective standard of the hypothetical reasonable employer (**Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387, CA @ para 49). The Tribunal must not substitute its own view as to what was the right course of action.

Fair procedures

72. A dismissal may be unfair because the employer has failed to follow a fair procedure. In considering whether an employer adopted a fair procedure, the range of reasonable responses test applies: **Sainsbury plc v Hitt** [2003] I.C.R. 111, CA. The fairness of a process which results in dismissal must be assessed overall.

Polkey

73. What is known as 'the Polkey principle' (**Polkey v AD Dayton Services** [1988] I.C.R. 142,HL) is an example of the application of section 123(1). Under this section the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. A tribunal may reduce the compensatory award where the unfairly dismissed employee could have been dismissed fairly at a later stage or if a proper and fair procedure had been followed. Thus the 'Polkey' exercise is predictive in the sense that the Tribunal should consider whether the particular employer could have dismissed fairly and if so the chances whether it would have done so. The tribunal is not deciding the matter on balance. It is not to ask what it would have done if it were the employer. It is assessing the chances of what the actual employer would have done: **Hill v Governing Body of Great Tey Primary School** [2013] I.C.R. 691, EAT.

74. Whilst the Tribunal will undertake the exercise based on an evaluation of the evidence before it, the exercise almost inevitably involves a consideration of uncertainties and an element of speculation. The principles are most helpfully summarised in the judgment of Elias J (as he was) in **Software 2000 Ltd v Andrews** [2007] I.C.R. 825, EAT (paragraphs 53 and 54).

Contributory conduct

75. If a dismissal is found to be unfair, under section 123(6) ERA where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding even in cases where the parties do not raise it as an issue (**Swallow Security Services Ltd v Millicent** [2009] ALL ER (D) 299, EAT). The relevant conduct must be culpable or blameworthy and (for the purposes of considering a reduction of the compensatory award) must have actually caused or contributed to the dismissal: **Nelson v BBC (No2)** [1980] I.C.R. 110, CA. For the purposes of the compensatory award there must be a causal connection between the conduct and the dismissal. The conduct must be to some extent culpable or blameworthy (**Nelson v BBC (No.2)** [1980] I.C.R. 110, CA). Langstaff J offered tribunals some guidance in the case of **Steen v ASP**

Packaging [2014] I.C.R. 56, EAT, namely that the following questions should be asked: (1) what was the conduct in question? (2) was it blameworthy? (3) did it cause or contribute to the dismissal? (for the purposes of the compensatory award) (4) to what extent should the award be reduced?

76. There is an equivalent provision for reduction of the basic award, section 122(2) which states that '*where the tribunal considers that any conduct of the complainant before the dismissal…was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*'. The tribunal has a wider discretion to reduce the basic award on grounds of any conduct of the employee prior to dismissal. It is not limited to conduct which has caused or contributed to the dismissal.

77. Unlike the position under section 98(4) ERA where the Tribunal must confine its consideration of the facts to those found by the employer at the time of the dismissal, the position is different when the Tribunal comes to consider whether, and if so to what extent, the employee might be said to have contributed to the dismissal. In this regard, the Tribunal is bound to come to its own view on the evidence before it. Decisions on contributory fault are for the Tribunal to make, if a decision is held to be unfair. It is the claimant's conduct that is in issue and not that of any others. The conduct must be established by the evidence.

78. When considering the extent to which the compensatory award should be reduced for contributory conduct under section 123(6) ERA, the tribunal is entitled to take into account the amount by which the compensatory award has already been reduced on just and equitable grounds under section 123(1) (by way of a Polkey reduction). This may also entitle the tribunal to reduce the basic award by a greater percentage than the compensatory award: **Rao v Civil Aviation Authority** [1994] I.C.R. 495, CA.

Submissions on behalf of the Claimant

79. For the Claimant, Mr Sangha contended that the Respondent cannot show that it had a potentially fair reason for dismissal. The reasons in the outcome letter do not amount to 'SOSR'. Even if they did, reliance on them was unfair. Mr Sangha referred me to the case of **Z v A** [2013] UKEAT/0203/13/SM and in particular, paragraph 12 of that decision. He also referred to **London Underground Ltd v Strouthos** [2004] I.R.L.R. for the principle that a person could only be found guilty of the charge that had been levelled against him.

80. As regards allegation 1: 'reputation' – the natural reading of the allegation is a focus on external reputation. Relevant considerations would be the scale of the matter being made public in the press. It cannot just be a case of someone becoming aware of the allegation somehow on a local basis. As the respondent witnesses described in this hearing, what they regarded as being 'reputational' damage was getting further and further away from the allegation on paper. Relying on principles found in the **Strouthos** case, an employee should only be found guilty, so to speak, with

something with which he is charged. The unfairness to the Claimant consists of going along to a hearing and not knowing what it is fully about. He submitted that the goalposts were moved. He submitted that TM's decision was not solely based on what RU concluded.

81. As to the likelihood of the charge coming into the public domain and the scale of it if it did, Mr Sangha submitted that if it was addressed at all by the dismissing officer, the wrong conclusion was reached upon it. However, he submitted that it wasn't considered. RU and TM merely considered the consequences of the charge coming into the public domain but not the likelihood of that happening. If the Respondent had turned its mind to it, the only conclusion would be that there was no significant likelihood of it doing so having regard to: reporting restrictions in court; there was no evidence that it had really come into the public domain – even to the extent that it had been mentioned outside work, these were token, passing references.

82. As to whether the Claimant could have been returned to meaningful work, Mr Sangha referred to TM's evidence that the Claimant's suspension was and would always be automatic, in light of the allegation against him. Mr Sangha submitted that, if that were the case, the decision should have been an evaluative one in accordance with the suspension policy and that his automatic suspension from the outset was questionable. The emails at pages **79 – 80** themselves do not reference automatic suspension; they say that the restriction to coming into contact with under 18s contributed to the decision to suspend. This should have prompted an investigation into that issue. Instead TM closed that line of thought because the result would have been the same (i.e. the Claimant would have been suspended). She was wrong to do so, submitted Mr Sangha.

83. As to allegation 2 and the cost of continuing with paid suspension, Mr Sangha submitted that the Respondent was looking for an unreasonably high level of uncertainty as to when the Claimant was likely to come back to work. They had the trial date and any reference to a possibility of the trial going off was speculative. There was a natural or inherent unfairness in that the further in time the Respondent was looking (without any evidential basis for so doing) the more likely the situation would be adversely assessed against him.

84. Mr Sangha further submitted that the Respondent had a closed mindset. He pointed to the judgment in the bundle as an indicator of this – that the Respondent had taken the same wording from that case and used it for the purposes of the Claimant's case. He said there is evidence in RU of A closed mind, referring to page **200**, whereby the disciplinary invite letter was sent out to the Claimant before RU had a full understanding of what the Claimant's role entailed.

85. Mr Sangha also submitted that the managers did not make any inquiries of getting the Claimant back to work if they were concerned about continuing his suspension on full pay. That, he submitted, is indicative of a closed mindset.

86. As to the issue of 'contributory conduct', Mr Sangha accepted that there would have to be a reduction to the basic and compensatory award for contributory conduct. He reminded the Tribunal, should it be inclined to make a 'Polkey' reduction, to step back and consider the overall level of reductions so as to ensure that the Claimant was not penalised twice. The most percentage that can be levelled here is 50%. He submitted that in no way is the claimant's contribution more than the employer's; that an accurate and fair assessment would be 75% employer and 25% Claimant in respect of both the basic and compensatory award.

87. On the issue of Polkey, it is a question of looking at the time frame by which a fair dismissal could and would have occurred. Mr Sangha accepted that the Claimant would have been fairly dismissed upon being convicted. However, the Respondent would still have been required to follow a process. He referred to TM's evidence that following the conviction on 30 August 2018 it would have taken a minimum of three months in order to investigate, organise a hearing and dismiss the Claimant.

Submissions on behalf of the Respondent

88. Mr Lewis started at the end. He sought a 100% reduction in both the basic and compensatory award should the Tribunal find the dismissal to be unfair. He relies on the fact that the Claimant was convicted of sexual assault, that the circumstances of the offence reveal a breach of trust given the familial relationships and that the victim was potentially vulnerable. He submitted that there was also an element of dishonesty in that the Claimant told the Respondent that he had not committed any offence and as a result of that misrepresentation had benefitted from the receipt of pay whilst on suspension.

89. Mr Lewis submitted that there should be no material benefit given to the claimant because he is a civil servant and committed a criminal offence. There is no case for a 'penny of compensation', submitted Mr Lewis.

90. As to Polkey, He submitted that a process would have kicked in immediately on conviction; it would have been very swift. In addition to that, he submitted– had the Claimant not been dismissed by then – he might even fall into the exceptional situation of warranting a suspension without pay at that point prior to the disciplinary hearing being convened.

91. As to the reason for dismissal, the reason was indeed a substantial reason justifying dismissal of an employee holding the position which the Claimant held. The Claimant's role was indirectly related to children, in the sense that he would have access to information regarding children; he was in a position of trust and had access to sensitive information.

92. On the issue of the public purse, Mr Lewis submitted that the evidence is that RU did dismiss for both the stated reasons but she would have dismissed on the cost issue alone. Mr Lewis submitted that there are operational costs on top of salary costs, so that even suspension without pay would not have removed the 'cost' issue. The trial

set to commence in August was at least 5 months off – by which time the Claimant would have been suspended for 17 months in total. Mr Lewis submitted that the trial could have been delayed or postponed. He also submitted that there was a possibility that the Claimant would not have returned to work anyway, although he candidly recognised this was not his best point.

93. Mr Lewis drew an analogy with ill health cases, referring to paragraph 13, page **287** of the bundle and the case of **Spencer v Paragon Wallpapers Ltd** [1976] IRLR 373. He also relied on the fact that there was a real risk of conviction (in that the CPS had decided to charge, thereby believing in a realistic prospect of conviction). There was, he submitted, no confidence in a reasonable return to work date. It was reasonable of the Respondent not to wait any longer;

94. As regards the 'reputational' issue Mr Lewis invited the tribunal to accept that there were two aspects to this: how HMRC would be seen by the public as a public body but secondly how staff would view it as an employer. Taking the second aspect first, the Respondent came to the reasonable view that there were real concerns about the risks as to how employees would view HMRC should the Claimant be brought back to work alongside them, only for those staff to learn later that he had been charged with or convicted of a sexual offence. He said that this created a practical problem for the Respondent as to how it might bring the Claimant back into work. The Respondent was faced with a 'catch 22' scenario: if it brought the Claimant back it would have to tell staff of the allegation; if it told staff of the allegation this would breach the Claimant's confidentiality. The claimant expressed acute concern not to have details of the charge known. If the Respondent brought the Claimant back pending trial and did not tell staff of the nature of the allegation, it would be breaching its duty of care towards the members of staff. Mr Lewis submits that the Respondent not unreasonably took the position it had to let others know some details of the charge if they were to work with the Claimant. He said there was a significant distinction between an internal disciplinary allegation (in respect of which management might be expected not to divulge to staff) and a serious criminal allegation

95. On the first aspect of 'external' damage to the Respondent's reputation, Mr Lewis submitted that it was not unreasonable of the Respondent to take the view that there was an unacceptably high risk, should the charge turn out to be true and should members of the public discover that HMRC had continued to employ a member of staff with a charge of this nature hanging over him, that this would damage the reputation of HMRC in the eyes of the public which must be seen to have a high reputation given the importance and sensitivity of its work

96. Mr Lewis relied on the public nature of the Claimant's arrest, the fact that members of the Claimant's family knew about the allegation and charge; the fact that there had been a reference on social media and that the family had cut ties with the Claimant – all in support of the Respondent's assessment that the risk of public disclosure of the allegation was unacceptably high. He also referred to evidence from the Claimant that neighbours saw some equipment being taken from his home by police and that

some colleagues at work apparently knew about the allegation. Scale does not matter, submitted Mr Lewis. It makes no difference if the matter is front page of a national newspaper or known very locally: it still raises significant reputational issues.

97. The reason was a substantial reason within the meaning of the statute; the Respondent acted reasonably in treating it as a sufficient reason for terminating the Claimant's employment and the procedure adopted was good enough in the sense that it was not outside a band of reasonable responses open to a reasonable employer.

Conclusions

Reason for dismissal

98. Applying the law to the facts, the first issue I must determine is the Respondent's reason for dismissal. The Respondent dismissed the Claimant principally because It believed that the cost to the 'public purse' of continuing to employ him whilst suspended on full pay pending the completion of a criminal prosecution against him could not be justified.

99. Although the deliberations document prepared by RU refers to 'substantial reasons' for dismissal as being the reputational risk and cost (see **pages 200 and 215**), in fact the principal reason was the cost of continued suspension on full pay. That was the principal factor that operated on RU's mind. This is clear from the record of her decision on page **219** and also from her evidence to the tribunal that she believed the 'cost' issue in itself as sufficient to justify dismissal. In her assessment, what she described as 'reputational risk' meant that the suspension could not be lifted so as to return the Claimant to work pending trial.

100. The 'risk' of what was called 'reputational damage' was nothing other than a consideration of how some colleagues might feel if suspension was lifted and the Claimant returned to work pending trial. However, that was not the reason for the Claimant's dismissal. RU's view on that issue informed her decision whether to dismiss and is relevant to the reasonableness of the decision to dismiss, which I consider below.

101. RU's main consideration being whether the Respondent could be expected to continue employing the Claimant on paid suspension, it was relevant to consider whether there were any alternatives to paid suspension – such as lifting the suspension and returning the Claimant to work pending the criminal trial, whether in his old role and unit or elsewhere in the organisation, or continuing the suspension on reduced pay or on no pay.

102. The two 'reasons' set out in the disciplinary invite letter and dismissal letter (referred to in paragraph 32 above) are materially identical to those referred to by the Respondent in a previous case from 2016 (**page 284**, paragraph 5.8). While I do not accept Mr Sangha's submission that by using the same wording this demonstrates a closed mind on the part of RU or TM, I do conclude that the Respondent – by

adding the 'risk' issue - was searching for something extra to add to the 'cost' issue, probably out of a belief that it should be seen to rely on something additional to cost alone. That addition of 'reputational risk' has served only to confuse matters because, in truth, this was not a case of reputational risk to the Respondent at all, as demonstrated by RU's evidence.

103. RU's conclusion that the Claimant could not return to paid work (as opposed to suspension) in turn resulted in her deciding to terminate the Claimant's employment for the principal reason that the ongoing cost of employing the Claimant on paid suspension could not be justified.

104. Having decided the actual reason for dismissal, I must now determine whether the actual reason was a 'substantial reason', applying the principles in **Leach** (see Mummery LJ para 52). The question is whether this was a reason which a reasonable employer 'could' rely on to justify a decision as being fair? I conclude that a reasonable employer could rely on this reason in the circumstances. Employers can be expected to anticipate on a purely general basis the possibility that some may be suspended on full pay for a period of time (and reflect this in their policies). However, it is not generally expected that an employee will be paid full pay for a period of 12 – 18 months while on suspension. In this case, the events driving the length of suspension and the associated cost of it were outside the Respondent's control. Time passes. Meanwhile, the employer gets nothing in return for paying the employee. In this case, the suspension was getting on for a year and was looking at running to a total of about 17 months before trial. The Claimant himself had contemplated the possibility of his employment being terminated given the length of time (see paragraphs 22, 24 and 27 above).

105. The Respondent's reason for dismissing the Claimant was not trivial. It was substantial. I have considered the nature of the role of AO and whilst there is nothing specific to that role which feeds into the analysis, I am satisfied that a reasonable employer could dismiss an employee holding that position in the circumstances of this case: where it was paying the jobholder monthly without the benefit of any work in return and where the duration of the suspension – and therefore the cost - was driven by events outside its control. In the circumstances, I conclude that the Respondent dismissed the Claimant for a potentially fair reason (that being 'SOSR' by abbreviation).

Reasonableness of decision to dismiss – investigation and procedure

106. I next have to consider section 98(4) ERA, where the burden is neutral. Did the Respondent act reasonably in treating that reason as a sufficient reason for dismissing the Claimant? I remind myself that it is not for me to substitute my view of the facts for those of the Respondent. It is a case of examining whether the Respondent acted within a range of reasonable responses open to it in arriving at the decision to terminate the Claimant's employment. Having given the matter careful consideration, I have concluded that it did not for the reasons set out below.

107. Central to the conclusion that the Claimant's employment should be terminated on grounds of cost was the belief that the Claimant could not be returned to meaningful work pending trial. Part of RU's thinking on that was what she described as the risk of the allegation coming into the public domain. Neither RU or TM in fact assessed the risk of the allegation against the Claimant coming into the public domain. What they did was merely to form a view as to the 'consequence' of it doing so.

108. Even if I were wrong about that and RU and TM did in fact assess the actual risk of the allegation coming into the public domain, they acted unreasonably in so doing, in that a reasonable employer would have acknowledged:

108.1.1. The fact that the allegation was first made about a year earlier and confidentiality had been maintained very successfully, bar a few passing references to the incident in the early stages outside the workplace;

108.1.2. That the criminal proceedings were the subject of restricted reporting orders and any concern about publicity during the proceedings was not based on any evidence;

108.1.3. That there had already been an appearance at the Magistrates Court and at the Crown Court, neither of which resulted in any leaks or publicity;

108.1.4. That there was no evidence of idle gossip in the workplace;

109. Considering the issue of 'risk' (as opposed to the 'consequence)' of public disclosure, had the Respondent taken account of the matters referred to above It – and any reasonable employer - would have concluded that the risk was low and certainly not 'high' as described by the Respondent. RU was not able to say what evidence or material she relied on or had access to at the time that suggested a high risk that the charge would be revealed (see para 41 above). In truth there was none. In evidence RU referred to the forthcoming court hearing being in public. That was a reference to the forthcoming trial on 27th August 2019. However, that was 5-6 months off, and the Claimant's case was that he should not be dismissed pending that trial. Quite how the risk of someone identifying the Claimant at that public hearing 6 months down the road could possibly be relevant to the risk of the charge becoming public knowledge between 15th March and 27th August 2019 was wholly unclear to me. Further, RU had material from which she could assess the risk of public court hearings increasing the risk of leakage – there had been a Magistrates Court appearance, a Crown Court appearance and nothing was leaked following those hearings.

110. As to the reference to the Claimant being arrested in a 'highly public setting' he was not arrested in a public setting, let alone a 'highly' public setting (see para 3 above). RU did not have that in mind at the time of her decision – there is no reference to it in her deliberations and in any event she has no evidence of it to

support the statement in her witness statement. It appears to be taken from one of the KIT notes, but those notes were never shown to the Claimant prior to these proceedings and RU did not look at them prior to deciding to dismiss him.

111. As to the reference to it being highly difficult to keep idle gossip and the reference to social media, there was no evidence of idle gossip and no evidence of recent social media content that could be said to have had increased the risk that the charge might come into the public domain. Any reference to members of the Claimant's family posting a comment on facebook was to an event shortly after his arrest. That had happened almost a year earlier and in that time confidentiality had been largely maintained – to the credit of those working at the Respondent offices and managing the situation.

112. As the assessment of 'high' risk clearly influenced the decision not to return the Claimant to the workplace pending trial and thus the decision to dismiss, the Respondent acted outside the band of reasonable responses open to a reasonable employer.

113. What then of the Respondent's assessment of the 'consequence' of the charge coming into the public domain? RU and TM's conclusion that 'if' the allegation came into the public domain there was a 'risk' that the Respondent would be seen to have continued to employ an employee who had been charged with a serious sexual offence. That is not a 'risk'. It is a fact that the Respondent had continued to employ the Claimant who faced an allegation of a serious sexual assault. The Respondent continued to employ the Claimant (and not dismiss him) for good reason, namely that he was innocent unless and until proved guilty.

114. RU's main concern about lifting the suspension and returning the Claimant to paid work was how staff would feel 'if' they subsequently learned that the Claimant had been charged with this offence. She believed the consequence would be that staff would be 'uncomfortable'. I dare say they might. All right-thinking people would be uncomfortable about the prospect of a colleague being charged with such an offence. However, they too must respect the principle of 'innocent until proved guilty'. There was no reasonable basis for concluding that their feelings of discomfort or distaste for the Claimant would outweigh their acceptance or acknowledgment of that principle.

115. I asked RU whether she made her decision based on any assessment or belief of the Claimant's guilt, whether she felt it was a case of 'no smoke without fire'. She said that she did not, but that she took account of the possibility that other employees might think there was no smoke without fire and that they would be uncomfortable working alongside the Claimant. She agreed that in terms of outcome, taking account of others' views that there is 'no smoke without fire' is substantially the same as if she personally had proceeded on that basis.

116. What RU believed (and TM agreed with her) was that the Respondent could not return the Claimant to work in these circumstances because the Respondent had a

duty of care to its staff. In order to meet that duty of care it would have had to tell those members of staff that the Claimant had been charged with the sexual assault. If it returned him and did not do this, and those members of staff subsequently got to learn that he had been charged – or after trial that he had been convicted - this would make them uncomfortable and would make those employees view the Respondent negatively, which would damage the Respondent's 'reputation'.

117. I found this a most unconvincing analysis and one which no reasonable employer would have undertaken. There was simply no evidential basis for it. Further, it was, in my judgement, an attempt to eke out some kind of rationale for what in truth was a very straightforward state of affairs from the Respondent's perspective, namely: '*do we continue to pay the Claimant full pay on suspension pending his trial or do we terminate his employment on the basis that continued suspension can no longer be justified?*'. The Respondent has made heavy weather out of addressing that issue by introducing concepts such as 'reputational risk' and 'duty of care'.

118. No one was able to explain to me the ambit of the duty of care in this case, or what harm would be caused to staff should they work alongside the Claimant only to learn of the charge against him prior to trial (other than some discomfort or distaste at the thought of the Claimant being guilty of the offence). It was not made clear to me how (should this have happened) the situation could not have been managed by sensitively explaining to those who heard of the charge that the situation was being managed well, and that everyone must respect the principle of innocent until proved guilty. How the Respondent arrived at a conclusion that there would be a breach of a duty of care or damage to the Respondent's reputation was not explained.

119. The reality is that the Respondent's approach to suspension where an employee has been accused of a serious criminal offence is to suspend as a matter of routine. That was confirmed by TM in evidence. Of course, it should not be a matter of routine. The Respondent's own policy requires that the decision to suspend should be an evaluative one. That there is a requirement to 'review' the suspension also shows that it is expected to be an evaluative exercise. There was no evidence at all that the suspension was reviewed in that sense. It was simply a case of continuing the suspension in the absence of any news on the criminal proceedings.

120. The Respondent gave no proper consideration either on those reviews or at the dismissal stage to alternative working arrangements because it was firmly of the view that 'any' arrangements involved the Claimant working alongside other colleagues to some extent and this was not something they were prepared to permit in light of the serious nature of the allegation.

121. Against a background and mindset of automatic suspension when the matter was put in front of RU, it was simply a case of whether she was going to decide to continue the paid suspension until trial or dismiss. I conclude that neither RU nor TM would have been prepared to return the Claimant to work pending trial, come what may. They were influenced by the nature of and the seriousness of the offence itself and RU was influenced by the perceived concerns of others whom she believed

might consider the Claimant to be guilty on a 'no smoke without fire' basis. There was simply no way they were going to return the Claimant to the working environment pending trial no matter what the role. That is why RU stated that returning the Claimant to work in an area where he would not have access to records with information on children she concluded that this would not deal with the issue of having to work alongside other staff and that the Respondent would breach its duty of care to them if they did not tell them about the nature of the offence with which the Claimant was charged.

122. I reject Mr Lewis's submission that the Respondent was in a 'catch 22' situation in that they could not tell staff about the charge but they could not return the Claimant to work without telling staff of the charge. There was no catch 22. The Respondent was not obliged to tell staff about the criminal charge. In fact, it had already explained to staff that the Claimant's absence from work was due to back-ache. It did not feel compelled to tell staff of the allegation then. It was not concerned about mis-leading staff at that stage. It was not reasonable to conclude that, upon the Claimant returning to work, by failing to tell staff that he had been charged with a sexual offence it would be misleading them to such an extent that they would be somehow harmed, or that the reputation of the Respondent would be harmed.

123. The Respondent's belief that it could not lift the suspension and return the Claimant to any form of meaningful work for the next 5 months was not, therefore, based on reasonable grounds and was outside the range of reasonable responses open to a reasonable employer in the circumstances. RU's views on not lifting the suspension took her to the next stage (consideration of the 'public purse') and led her to dismiss on grounds that the cost to the 'public purse' could not be justified (see paragraph 47 above).

124. On the subject of cost, the Respondent's case was put firmly on the basis of the cost to the 'public purse' – i.e. taxpayers' money, the Respondent being a state employer. However, it carried out no analysis of the costs to the public purse. It gave no consideration to the cost to the wider public purse which would flow from the Claimant being dismissed and being without an income. The reference to the public purse implies that different issues apply than in the case of a private employer with a private purse. There was no explanation or evidence as to how the state could not reasonably bear the cost of continuing the suspension on full pay until trial. There was no attempt to weigh these costs against the rights of the Claimant. There was no evidence of any particular budget restraints or pressures within the department.

125. There was no reasonable basis for concluding that the length of the Claimant's continued suspension was likely to be longer than 5 months by this stage. The Respondent had the best information it could get: a trial date fixed for 27 August 2019. That the trial might not happen was certainly a possibility. However, there was no information in the Respondent's possession which would have rendered it anything other than a possibility. Further, the suspension could in any event have been reviewed at that point.

126. Mr Lewis drew an analogy with ill health cases. However, I do not feel that I am assisted by drawing any such comparisons. There is no need to do so, and there is myriad of possible different factual scenarios that might apply to any given ill health case. I am required to determine this case on the facts and by considering the issues relevant to these proceedings.

127. I have concluded for the reasons set out above that the Respondent acted unreasonably in treating the reason for dismissal as a sufficient reason for terminating the Claimant's employment. I have asked what would or might have happened had it acted reasonably. I have concluded that the Respondent would have waited until the trial and would have continued the suspension on full pay. There is no evidence that would warrant any other conclusion. The options were as described by the caseworker (see paragraph 26 above): dismiss the Claimant or wait. Had it acted reasonably, it would have waited and would have assessed the position on conclusion of the criminal trial.

Polkey

128. The Polkey issue is largely agreed. Given my conclusion that the claimant would have continued on full pay pending the conclusion of the criminal trial (30 August 2019) and in light of the fact that he was in fact convicted and further given his concession that he would then have been fairly dismissed; the only issue is how long after conviction would it have taken to fairly dismiss the Claimant. I was surprised to hear TM's evidence that it would have taken at least 3 months to organise a hearing and dismiss the Claimant. That seems like a very long time to me. Nevertheless, that was her evidence. Therefore, the Claimant's employment would have continued until 30 November 2019.

129. However, I accept Mr Lewis's submission that, at the point of conviction, the Respondent would have reviewed the suspension and at that point could have regarded the circumstances as exceptional such as to continue his suspension on no pay pending the convening of a disciplinary panel. I have asked myself can I be certain that this would have happened? There was little positive evidence advanced by the Respondent on this matter and it arose in Mr Lewis's submissions. I have regard to the evidence from RU that HR told her that suspension on no pay was not an option. However, I also have regard to the existence of the contractual power to do so. Therefore, although I cannot say that it certainly would have happened, I conclude that there is a good chance that (following the conviction on 30 August 2019) the Respondent would have reviewed the suspension and reduced the Claimant's pay to nil pending the convening of a disciplinary panel.

130. It is likely to have taken a couple of weeks after conviction to make a decision on suspension with no pay. I conclude that there would have been a 50% chance that the Claimant's suspension from 13 September 2019 to 30 November 2019 would have been on nil pay.

131. Therefore, in terms of 'Polkey', had he not been unfairly dismissed on 22 March 2019, the Claimant's employment would have continued until 30 November 2019 on

which date he would have been fairly dismissed. The Claimant is entitled to a compensatory award for losses from the date of termination on 22 March 2019 to 30 November 2019. However, the award should be reduced by 50% in respect of losses from 13 September to 30 November 2019. I turn now to consider whether there should be any further reduction for contributory conduct.

Contributory conduct

132. Mr Lewis urged me to reduce the basic and/or compensatory award by 100%. I do not do so. Whilst superficially attractive, I do not accept his argument that the Claimant misled the Respondent by lying to it when asked whether he was guilty or innocent and that he **thereby** gained from being paid in circumstances where he would not have had been honest with his employer. Leaving aside the principle of 'innocent until proved guilty', the reality is that the Claimant could have said nothing to his employer about the allegations. He could have adopted a position that it was better for him to say nothing at all as he was facing the possibility of a serious criminal charge. Had he done so, he would still have been suspended and he would still have been paid full pay. The Respondent was not compelled to suspend him as a result of the allegation or as a consequence of anything he said. I do not say it was unreasonable to suspend the Claimant but it had the option not to do so. The receipt of pay was a consequence of the decision to suspend, not the Claimant's denial of the allegations.

133. Mr Lewis's submission that there should be no material benefit given to the Claimant in light of his conviction sounded like a policy based submission. However, Mr Lewis agreed that there is nothing to prevent a sex offender from working in gainful employment save in those roles where he would be prevented from doing so because of the nature of the role or following DBS clearance and he did not suggest that the Claimant's role was such a role.

134. Did the Claimant contribute to his own dismissal? It is clear that – on the basis of the Respondent's approach – a truly innocent man would also have been dismissed for the same reason: the cost of continuing to employ the Claimant without getting any benefit in return. To that extent, the Claimant might reasonably say that his criminal conduct did not cause his dismissal. It is right that it did not directly cause the dismissal. However, on any proper analysis it contributed to it. There was no dispute as to blameworthiness or culpability. Mr Sangha submitted that a fair proportion would be 25% reduction. I do not agree. I am bound by the conclusion of the criminal trial after which the Claimant was convicted of a serious sexual offence. I conclude that the Claimant's contribution to his own dismissal is much higher than that. The Claimant sexually assaulted his niece. That led to his arrest, which led to his suspension, which ultimately resulted in his dismissal. Without doubt his contribution to his own dismissal is significant. However, it was not the whole cause. I bear in mind that I have already reduced the compensatory award (in respect of the period from 13 September to 30 November 2019). Standing back and looking at matters overall I conclude that it would be just and equitable to reduce the **Basic**

Award by 66% and – applying the principles in **Rao v Civil Aviation Authority** (paragraph 78 above) – the **Compensatory Award** by 50%.

Summary of reductions

135. The **Basic award** is reduced by 66% in accordance with section 122(2) ERA.

136. The **Compensatory** award is to be assessed by awarding loss of earnings from 22 March 2019 to 13 September 2019 on a full basis without any Polkey reduction; and from 14 September 2019 to 30 November 2019 with a reduction of 50% to allow for the chance of the Claimant's pay being reduced to nil during that period. The **Compensatory Award** will then be further reduced by 50% by reason of the Claimant's conduct in accordance with section 123(6) ERA.

Employment Judge Sweeney

6 February 2020