Case No: 2305457/2019

EMPLOYMENT TRIBUNALS

Claimant: **Dr P Orji**

Respondent: **The University of Brighton**

Heard at: **Croydon (by video link)** **On:** **Monday 21 September 2020**
Tuesday 22 September 2020

Before: **Employment Judge S Shore**

Representation:

Claimant: **In person**
Respondent: **Mr S Crawford, Counsel**

RESERVED JUDGMENT AND REASONS

The Judgment of the Tribunal is that:

1. The claimant's claim of unfair dismissal
2. The claimant's claim of breach of contract

Reasons

Background

1. By a claim presented on 10 December 2019, the claimant made claims of unfair dismissal and breach of contract (failure to pay notice pay), following a period of early conciliation that had begun on 18 September 2019 and ended on 18 October 2019.

2. The claim was initially listed for a final hearing in person that was to have taken place on 1, 2 and 3 June 2020, but that hearing was removed from the list in line with all other proposed hearings, due to the Covid-19 pandemic. It was relisted for a final hearing by video link for 21, 22 and 23 September 2020.

3. The hearing was at risk of postponement because of lack of judicial resources. I was available for the first two dates proposed for the hearing and the

Regional Employment Judge decided that the case could be heard over two days and assigned me to hear it.

Issues

4. Both parties had drafted a list of issues, which I read over the weekend before the hearing. I did not feel that either list set out the full list of issues in the case. I drafted my own list that I sent to the parties for comment. I discussed the issues with the representatives at the start of the hearing and the following matters were agreed as the issues in the case:

5. <u>Unfair dismissal</u>

   5.1. Was the claimant dismissed?

   5.2. If the claimant was dismissed, what was the reason or principal reason for dismissal?

   5.3. Was it a potentially fair reason?

   5.4. What was the reason or principal reason for dismissal? The respondent says the reason was a substantial reason capable of justifying dismissal, namely:

      5.4.1. Failure to notify R of his attendance at Court, which could constitute unauthorised absence;
      5.4.2. The criminal convictions and the potential impact these could have on the reputation of R, and;
      5.4.3. Dishonesty, including fraud or criminal conviction, which could affect R's operation.

   5.5. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

   5.6. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

   5.7. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

   5.8. If so, should the claimant's compensation be reduced? By how much?

6. <u>Remedy for unfair dismissal</u>

   6.1. Does the claimant wish to be reinstated to their previous employment?

   6.2. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

   6.3. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and,

if the claimant caused or contributed to dismissal, whether it would be just.

6.4. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

6.5. What should the terms of the re-engagement order be?

6.6. If there is a compensatory award, how much should it be? The Tribunal will decide:

6.6.1. What financial losses has the dismissal caused the claimant?
6.6.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
6.6.3. If not, for what period of loss should the claimant be compensated?
6.6.4. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
6.6.5. Did the respondent or the claimant unreasonably fail to comply with it?
6.6.6. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
6.6.7. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
6.6.8. Does the statutory cap apply?

6.7. What basic award is payable to the claimant, if any?

6.8. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

7. Wrongful dismissal / Notice pay

7.1. What was the claimant's notice period?

7.2. Was the claimant paid for that notice period?

7.3. If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

8. As I found that the claimant had not been unfairly or wrongfully dismissed, I did not consider the points at paragraphs 6 above.

Housekeeping

9. The hearing was conducted by video on the CVP platform. There were a few problems with frozen screens, poor audio quality and connectivity, but these

did not prevent the hearing progressing. I am grateful to the claimant, Mr Crawford and the respondent's witnesses for their patience and good humour in the light of the technological glitches that they had to endure.

10. At the start of the hearing, I introduced myself and the participants to one another. Everyone confirmed that they could see and hear everyone else.

11. I confirmed with the claimant that his claims were for unfair dismissal and breach of contract (failure to pay notice pay), before discussing the issues with the parties, as set out above.

12. The parties had prepared an agreed bundle of 288 pages. If I refer to any pages from the bundle, the page number will be in square brackets (for example [76]). I did not find the bundle to have been set out in a particularly logical or helpful way. I was also a little surprised and disappointed that a document titled "Response to Management's Case" that the claimant had submitted to the Appeal had not been produced in the bundle. The claimant supplied me with a copy, which was added to the bundle and numbered [289-292].

13. The claimant had prepared a witness statement dated 4 May 2020. The respondent produced witness statements from Kirsty Smallbone, Head of School, Environment and Technology, dated 20 April 2020; Debra Humphris, Vice Chancellor, dated 27 April 2020, and; Janey Walker, Deputy Chair of the Board of Governors, also dated 27 April 2020.

14. I explained to the claimant that the Tribunal has an overriding objective to deal with cases fairly and justly and that this meant that there were five matters that I had to consider at all times. I set out what these were. I advised the parties that I regarded the first of the five matters; the requirement to ensure that the parties are on an equal footing as particularly important, as the claimant was not professionally represented. I tried to ensure that I explained the procedure that we would follow and tried to make clear to the claimant what would be required of him at the various stages of the hearing. I heard closing submissions from Dr Orji and Mr Crawford and considered them carefully before making this decision.

Evidence and Findings of Fact

15. I have not recorded every piece of evidence, discussion and submission in this decision. I made a full note of the hearing. I have only recorded in this decision, the matters that I consider relevant to my determination of the issues in the case.

Facts not in Dispute

16. The respondent is a university with a workforce of approximately 2,600. The claimant was employed as a Senior Lecturer in Law in the Respondent's Business School from 1 September 2015 until his dismissal on notice effective on 12 August 2019.

17. He was dismissed following his conviction at Southampton Magistrates' Court on 31 January 2020 for five offences:

17.1. Threatening, abusive or insulting behaviour against three individuals on 25 March 2018;

17.2. Criminal damage on 25 March 2018;

17.3. Threatening, abusive or insulting behaviour against three individuals on 26 March 2018;

17.4. Assault by beating on 26 March 2018, and;

17.5. Theft of various hand tools on 26 March 2018.

18. Dr Orji appeared at the Magistrates' Court with his wife, who was convicted of seven offences, which do not need to be set out here. He successfully appealed all his convictions, at the Southampton Crown Court on 23 December 2019. She was successful in appealing six of her seven convictions.

19. Following a disciplinary hearing on 8 Aril 2019, Dr Kirsty Smallbone recommended that the Vice Chancellor of the University dismiss the claimant with notice. The recommendation was said to have been on for the reason of 'some other substantial reason', which is one of the five potentially fair reasons for dismissal provided for by section 98(1)(b) of the Employment Rights Act 1996. Dr Smallbone said that the recommendation was due to:

    19.1. It being necessary to protect the reputation of the University given the damage that had already resulted from the convictions to Brighton Business School (the part of the respondent for whom the claimant worked), but also as a potential place of study for future students and for future employees;

    19.2. The loss of trust and confidence between the claimant and the respondent, and;

    19.3. The loss of trust and confidence between the claimant and his colleagues.

20. The Vice Chancellor, Professor Debra Humphris, met with the claimant on 3 May 2019, before deciding what action to take as a result of Dr Smallbone's recommendation. Her decision was to dismiss the claimant by letter dated 9 May 2019, to take effect on 12 August 2019, for the reason of 'some other substantial reason' due to an irretrievable breakdown of trust and confidence.

21. The claimant exercised his right to appeal to the Board of Governors of the University. He chose not to attend the appeal hearing, which was held on 12 June 2019. He had submitted a letter of appeal and further written submissions. The Board of Governors, chaired by Mrs Janey Walker upheld the decision to dismiss the claimant in a decision that was sent to him in an email dated 18 June 2019.

22. My findings of fact on the evidence I heard and saw are as follows. If I do not explain why I made a particular finding, it is because it was either agreed or never disputed:

22.1. The claimant started his employment with the respondent on 1 September 2015 in its Business School and at the time of his dismissal was employed as a Senior Lecturer. He is also a non-practising solicitor.

22.2. He was sent a letter dated 14 September 2015 with a statement of main terms and conditions attached [28-41]. The respondent had a policy titled "Suspension and Dismissal of Staff" dated 1 May 209 [42-45], a document titled "Disciplinary Guidance and Procedure" dated November 2013 [46-53] and a Disciplinary Policy dated November 2013 [54-59]. It was never disputed by the claimant that he had either been given or had access to all these documents or that they were not the applicable policies and procedures relevant to his employment.

22.3. The claimant's direct line manager was Lucy Jones, who was Deputy Head of School at Brighton Business School. She reported to Professor Toni Hilton, who was Head of School.

22.4. The claimant was involved in incidents on 25 and 26 March 2018 relating to a residential property that he was renting. I have set out the decision of Southampton Magistrates' Court above, which was made on 31 January 2019. It is relevant to note that the claimant received a prison sentence of eight weeks, suspended for 12 months insofar as it demonstrates the seriousness of the offences. It is also relevant that he was acquitted of all offences on appeal in December 2019.

22.5. The first major dispute on the evidence concerns what the claimant did or did not tell the respondent about his court appearance before it happened. At paragraph 19 of his witness statement, the claimant says that once he had been charged with the offences, he emailed Toni Hilton on 23 October 2018 (sic), informing her of the charges and pending proceedings. His statement says that the email was attached to a document titled "Appellant's Comments on Management Statement" at page 231 of the bundle. That page of the bundle is actually the first page of the minutes of the appeal meeting on 12 June 2019.

22.6. As became clear at the hearing, the document was the claimant's document titled "Response to Management's Case", which was not in the bundle at the start of the hearing and was added [289-292] during the hearing. That document did not contain or refer to any email dated 23 October 2018. The document did, however, contain an email from Lucy East (Toni Hilton's PA) to the claimant timed at 17:03 on 25 October 2018 asking him if he could have "a very quick meeting" with Ms Hilton. The claimant's response timed at 17.30 on the same date informed Ms East that he would be free on the following morning between 9:00am and 11:00am. Ms East responded at 17:34, asking the claimant to attend a meeting with Ms Hilton at 9:15am the following morning (26 October 2018).

22.7. I was not referred to and cannot find any document that states or even implies that the claimant told anyone at the respondent about his criminal charges or court appearances before 25 October 2018. I was not referred to and cannot find anything in the investigation documents, email correspondence, minutes of meetings, appeal documents or outcome letters that shows that the claimant expressly mentioned to the respondent at any time before 1 February 2019, when he met with Lucy Jones (minutes at 117-118) that he had told Toni Hilton or anyone else at the respondent about his charges or conviction.

22.8. The very height of the corroboration of his evidence that he did tell someone at the respondent about the charges or proceedings before 1 February 2019 is a reference during cross-examination to the "Response to Management's Case" document.

22.9. That document says it is produced to rebut what he says is the management's case, which "is **now** (my emphasis) the propriety of the manner of disclosure about the court process and the charges I faced." I will return to the issue of whether that is a reasonable summation of the situation.

22.10. In the document, the claimant says that there were two meetings between him and Toni Hilton. He goes on to say that the facts as to what was said at the first meeting (which he says took place on 25 October 2018) and the second meeting (which he says took place in November 2018) would be best resolved by the production of minutes or notes. He does not say what his recollection of what was said at either meeting in any detail.

22.11. Instead, he quotes part of Ms Hilton's statement to the disciplinary hearing about the first meeting, where she is reported as saying "TH confirmed that she had gone out of her way to speak to [the claimant] regarding whether any support was required…"

22.12. He then states in the document:

"I and TH discussed these matters to the extent of the mix of issues involved, as I see it – housing, the police and criminal allegations. And indeed, I did not ask for assistance nor did I accept any offer for help. This is clearly captured in the extract above" [the part quotation from Ms Hilton].

22.13. I find that this is the first document in which the claimant says he told the respondent about the criminal charges. I make that finding for a number of reasons.

22.14. Firstly, when Paul Frost of the respondent was asked to investigate the claimant's conduct, he interviewed the claimant, Zoe Swan (a colleague of the claimant's) and Lucy Jones all on 13 February 2019. He received a written submission from Toni Hilton dated 9 February 2019.

22.15. Paul Frost reports that in his interview with the Dr Orji, he (the claimant) had been clear that he was not required to raise the matter with his employer, or even to notify them as it was not impacting work and there had been nothing traceable between work and the case. The claimant said he was innocent until proven guilty. He also said that it would not have been to his advantage to have notified his employer. Nowhere did Mr Frost record that the claimant had said he had told Ms Hilton about the criminal proceedings in October 2018.

22.16. The claimant did not challenge this version of events until his somewhat obtuse reference in the document produced for the appeal hearing approximately four months after the investigation. His statements to Mr Frost are entirely inconsistent with his evidence today that he had mentioned the matters to Ms Hilton in October 2018.

22.17. Secondly, in the interview [134-136], Mr Frost had asked the claimant why he had not informed Ms Hilton about the charges and court case. His response was that it had not crossed his mind as it was not impacting work.

22.18. Thirdly, in the same interview, the claimant was asked if he had talked to anyone at the University about his trial or convictions. He said he had spoken to Lucy Jones, at his instigation. He had emailed Ms Hilton, but had received an out of office response from her, so he contacted Ms Jones.

22.19. Fourthly, at page 135, Mr Frost asked the claimant whether, with hindsight, he would have alerted the university about the proceedings. His response was that he would not, as the university should have presumed he was innocent until proven guilty. He flatly denied that he had shown a lack of judgement by not informing his employer.

22.20. Fifthly, in her written submission [137-138], Toni Hilton said she had had cause to meet the claimant during the previous term regarding concerns that had been raised about him, particularly an allegation that he had been sleeping in the office. She did not say that the claimant had told her about the criminal proceedings.

22.21. Sixthly, Ms Hilton also said that Lucy Jones had contacted her on 30 January 2019 [115] about the press coverage of the first day of the claimant's trial and that she"…was completely unaware of [the claimant] being involved in any sort of legal proceedings up to that point."

22.22. The claimant was given permission to talk to staff about the disciplinary process on 21 March 2019 [157f-157g]. He did not speak to Ms Hilton.

22.23. Seventhly, Ms Hilton attended the disciplinary hearing and was not challenged by the claimant at all about her recollection of the

meeting they had and her denial of any prior knowledge of the claimant's involvement in any legal proceedings.

22.24. Eighthly, in the disciplinary hearing itself, the claimant was asked to sum up his case. Almost the first thing he said [174] was that the reason he had not notified the university was because he strongly believed he would get an acquittal. That statement is at odds with his stated case at this hearing that he told Ms Hilton about it in October 2018.

22.25. Ninthly and finally, in the first conversation between the respondent and the claimant about the criminal trial, which was on 1 February 2019, Lucy Jones asked him why he had not let the university know about the prosecution case beforehand, even though she and Ms Hilton had spoken to him about welfare matters in October and November 2018 [118]. His responses were:

22.25.1. He was embarrassed about it;

22.25.2. He did not want any further mention of it;

22.25.3. He had thought about telling Ms Hilton when she had met with him (as he had been told that that the prosecution was proceedings at that time), but had decided he could deal with it, and;

22.25.4. He had been charged with a different criminal offence in 2012, but had been acquitted at the Crown Court.

22.26. I therefore have no hesitation in finding that the claimant has failed to reach the standard of proof required to show that either he told Ms Hilton about the criminal proceedings in October 2018 or that no reasonable employer would come to that conclusion in the circumstances of the disciplinary hearing chaired by Dr Smallbone, the meeting with Professor Humphris or the Appeal Board.

22.27. The claimant's first explanation for failing to deal with the issue of whether he had notified the respondent of the criminal charges and proceedings was that he was focussed entirely on proving his innocence of the criminal matters in the Magistrates' Court and that he believed that his disciplinary proceedings at work were about the same issue: was he guilty of the criminal charges he faced?

22.28. The criminal charges were not produced in the bundle, but the claimant said in cross-examination, that he had been arrested on 26 March 2018 at the scene of the incidents and been interviewed at the police station. He had not been charged immediately, but was notified of the charges "by October". He could not recall if he had been notified of a court date with the charges.

22.29. He could not remember when the first hearing was, but, via a "wild guess" imagined that it would have been in November or December [2018]. It would obviously have been helpful to know whether the claimant had been charged and received a court date by 25 October 2018.

22.30. The second explanation for failing to deal with the issue of whether he had told the respondent about the criminal matters is the second major dispute on the evidence - what the claimant believed the disciplinary matters he had been accused of were and which disciplinary offences were found as proven against him.

22.31. The claimant has a doctorate in law and is qualified as a solicitor. He must therefore have some legal skills and is obviously of high intellect. He is a specialist in property law, rather than employment law, but demonstrated an understanding of the process of the Tribunal and the statutory and legal principles that are its foundations.

22.32. It is reasonable for the claimant to suggest that the respondent's disciplinary process started on one premise and ended on another. The message that Ms Jones received on 30 January 2019 from a friend [115] which contained an extract from and a link to a newspaper article about the first day of the claimant's trial clearly caused some shock. Ms Jones forwarded it to Ms Hilton with the message "I have just forwarded this – it is the first I have heard – I assume other staff and students may have seen it." That message is corroborative of the respondent's case that it was unaware of the proceedings until 30 January 2019, as I find it highly unlikely that if Ms Hilton knew that one of her staff was facing criminal proceedings, she would not have shared that information with her deputy.

22.33. I find that throughout the timeline of this case, right up to the hearing itself, the claimant has not grasped what the respondent's issue with him was. His reaction throughout the investigation, disciplinary and appeal process was that he was innocent of the criminal charges, it was his business and it was nothing to do with work. The proverbial penny appears to have dropped only when he wrote his witness statement and included an assertion at paragraph 19 that he had told Ms Hilton about the matters.

22.34. Even then and at this hearing, however, he refused to acknowledge that there was an issue for the respondent in dealing with the reputational damage that his conviction had caused it, the operational impact that his failure to advise the university of the impending proceedings had had on its ability to manage the fallout from the case and the effect on teacher/student and colleague relationships of his acts and omissions.

22.35. I find his position to be unsustainable. He was contacted by a journalist at the LegalCheek website on 31 January 2019 about his trial and was asked for a comment, as the site was about to run a piece. The bundle had many examples of the media coverage of his trial and conviction. Much of the coverage was salacious. I find that even if the claimant was naïve, he should have realised that the trial and conviction of a solicitor and senior law lecturer at a University would have attracted media interest. His assertion that there was no connection between the trial and the University is unsustainable.

22.36. I find that the claimant's apparent naivety is most likely a mechanism by which he sought to deflect responsibility for what must (or should) have been obvious to him.

22.37. Going back to the process, the minutes of the first meeting between the claimant and Lucy Jones on 1 February 2019 is instructive. I should mention here that the claimant did not dispute any of the minutes of any of the meetings he attended until points that undermined his case were put to him in cross examination. Even then, his objection was not that he had not said something; just that he may not have used those exact words. I find that the records of meetings in the bundle are accurate, although mostly not verbatim.

22.38. At the 1 February 2019 meeting, the claimant admitted what had happened at Court and that he was due to be sentenced in late February. He then spent some time explaining the circumstances of the case and professing his innocence.

22.39. Ms Jones' first question was why the claimant had not let the university know about the prosecution case before hand. She added that both she and Ms Hilton had talked to him in October and November 2018 about his welfare and he "had not disclosed that there was a prosecution case pending." [118] His responses are set out at paragraph 13.25 above. I therefore find that the claimant should have realised that the respondent was concerned about his failure to notify it of the criminal proceedings themselves.

22.40. On Ms Jones' recommendation, the claimant was suspended by a letter from Professor Humphris dated 1 February [119-120]. I find that this letter listed three reasons for suspension:

22.40.1. His criminal convictions;

22.40.2. His failure to notify the university of his attendance at court, which could constitute unauthorised absence, and;

22.40.3. Dishonesty including fraud or criminal conviction which could affect the university's operation.

22.41. I find that this letter did not state that the failure to notify the respondent about his criminal charges was a reason for his

suspensions and the respondent is at fault for that omission. However, I do not find that this omission outweighs the large number of facts that led me to finding that the claimant knew, or ought to have known that his failure to notify the respondent of the criminal charges and proceedings was a significant issue in the disciplinary proceedings that followed.

22.42. I find that the investigation by Mr Frost, which produced an investigation report dated 8 March 2019 [121-157], included in its opening paragraph a note that, at the time that the matter of the convictions was raised by the respondent, its senior officers and staff were unaware of the case or the verdict.

22.43. The scope and coverage of the investigation was stated to be to assess the facts and assess the impact of the three issues set out at paragraph 13.40 above [122]. It was also to seek clarification on:

> 22.43.1. The detail of the charges laid against the claimant, the verdict of the trial and any consequences;
>
> 22.43.2. The claimant's future as a solicitor and his ability to practice;
>
> 22.43.3. Perceptions of the claimant's relationship with the university and his professional responsibilities, and;
>
> 22.43.4. Staff and student perceptions of the claimant as a university law lecturer in the future.

22.44. The report referred to the meeting on 1 February 2019 with Lucy Jones [124]. On the same page, it reported that Ms Hilton had taken the view that the claimant's actions had deliberately hidden such a serious matter. She is reported as saying that the claimant's decision to withhold the proper disclosure of his situation had put the Business School and the university in a difficult position with staff and students. Had he made a timely disclosure, they would have been able to make more appropriate arrangements for students that would not look like they had been caught on the hop – which they had been. It had not been necessary to be in a situation where the Business School had to respond to student queries before it even had an opportunity to speak to the claimant about what was happening.

22.45. I find that this is another very clear indication to the claimant that the university was not only concerned about the fact of his conviction. It was also concerned about his failure to notify.

22.46. The first thing that Mr Frost notes in his conclusions is that the claimant's decision not to notify the respondent until compelled to because "he would not have done himself any favours" was consistent with his views of his relationship with his employer. Mr Frost then went on to list six key issues:

22.46.1. The appropriateness of continuing to employ a law lecturer who had been convicted of serious offences;

22.46.2. The claimant's understanding of his professional obligations and responsibilities to his employer, colleagues and students;

22.46.3. The impact of guilty verdicts on perceptions of the claimant's integrity;

22.46.4. The very different assessments of the appropriateness of the claimant's behaviour to date that were made by the claimant and his managers;

22.46.5. The potential for future impact as a result of the claimant's views of his professional responsibilities and his assessment of the impact of the guilty verdicts, and;

22.46.6. The belief of Ms Hilton and Ms Jones that students, staff, alumni and colleagues would regard the employment of anyone guilty of serious offences as a breach of the trust that students place in the integrity of the university to deliver a first-class education – i.e. reputational damage.

22.47. Mr Frost recommended that a disciplinary hearing be convened. I find that the investigation was as thorough as could reasonably be expected, given the circumstances and the size and resources of the respondent. The steps taken by the respondent were in the band of reasonable responses. I find the decision not to interview individual students to be within the band of reasonable responses because of the nature of the disciplinary allegations. Students were one part of the cohort of people who were potentially affected by the claimant's actions, but by no means the only one. The claimant had the opportunity to present evidence of support from his students, which the respondent could take into account. However, I find that it is almost so obvious as to not require saying that the claimant's convictions must have had at least some negative effect on the reputation of the respondent and its Business School amongst its current, past and future students, his colleagues and amongst the local community.

22.48. Dr Smallbone invited the claimant to a disciplinary hearing by a letter dated 15 March 2019 (which was not in the bundle). The hearing took place after some delays, which are not relevant to my decision in this case, on 8 April 2019. At the start of the hearing, Dr Smallbone outlined the three disciplinary allegations:

22.48.1. Failure to notify the university of your attendance at Court, which could constitute unauthorised absence;

22.48.2. Recent criminal convictions, including common assault and threatening behaviour and the potential impact that these could have on the University of Brighton, and;

22.48.3. Dishonesty, including fraud or criminal conviction which could affect the university's operation.

22.49. I find that the allegation of failure to notify the respondent was limited to the failure to notify it of his actual attendance at court. On the two days of his trial, he was meant to be available to attend an Enrichment Programme for students.

22.50. The staff who had provided witness evidence for the investigation were called as live witnesses for the disciplinary hearing and were available to be questioned by the claimant. The investigating officer was also at the hearing. In his opening remarks, Mr Frost listed one of the key aspects of the investigation as being "not informing the university of the court case.

22.51. The hearing appears to have been a thorough discussion of all the issues in the case. The notes run to some 17 pages [158-175]. On 11 April 2019, Dr Smallbone wrote to the claimant with her decision [176-178]. She found the first allegation (failing to advise the university of his attendance at court) proven. The sanction was a final written warning that would remain on the claimants file for 18 months.

22.52. On the second allegation, Dr Smallbone found that there had been reputational damage to the respondent due to the press coverage of court proceedings. The rationale for the decision was set out and made the following points (amongst others):

22.52.1. He had said he had not disclosed the prosecution because he would not have been doing himself any favours;

22.52.2. He had wilfully chosen not to tell the university because he hoped the matter would not come to its attention;

22.52.3. Due to his failure, the university was unable to respond to the matter because it knew nothing about it;

22.52.4. The claimant could have told Ms Hilton about the proceedings during a meeting, but did not do so, despite her specifically questioning him about his welfare;

22.52.5. Ms Hilton had said that she had lost trust in the claimant and could not believe what he said in future;

22.52.6. The matter had affected the claimant's credibility, authenticity and gravitas with Ms Hilton, the claimant's colleagues and with students.

22.53. The third allegation of dishonesty was not upheld.

22.54. Dr Smallbone then stated that:

"It is my view that your failure to inform your Head of School of the charges, your required attendance at Court, your failure to enable the University to plan for the resultant press coverage, which was covered widely in both national and local publications, and the impact on your relationships with the University, your colleagues and students, are evidence of a fundamental breach in the trust implicit in the employment relationship and constitute grounds for dismissal as 'some other substantial reason'.

22.55. She went on to set out the necessity to protect the University's reputation, given the damage done to the Business School and the potential impact on future recruitment of students and employees and the loss of trust and confidence between the claimant and the University and his colleagues.

22.56. The letter confirmed that the decision to dismiss has to be confirmed by the Vice Chancellor and the matter would go to a meeting with her.

22.57. I find that the claimant could not have been in any reasonable doubt that the reason that the respondent was considering dismissing him was for breach of the duty of trust and confidence occasioned by the matters set out in paragraph 22.54 above. No reasonable person of the claimant's experience, qualifications and intelligence could have mistaken the reason for the recommendation of dismissal as being because of the fact of his conviction and the incidents that led to the criminal case being brought.

22.58. It therefore follows that I find that the claimant's assertions about the reasons that he failed to address the issue of not informing the respondent about the alleged conversation with Ms Hilton did not meet the required standard of proof.

22.59. The claimant met Professor Humphris on 3 May 2019. By that date, his anticipated appeal date was still some four months away. In the event, it did not conclude until more than seven months later.

22.60. The claimant submitted a substantial set of representations to Professor Humphris dated 3 May 2019 [184-211]. These consisted of a two-page letter and testimonials from students; correspondence between the claimant and Kent Social Services; proof of the ongoing appeal and correspondence with The Daily Mail. I do not find any of the documents as being relevant to the matters that Professor Humphris had to decide.

22.61. The claimant's representations can be summarised as follows:

22.61.1. His working hours were determined by his workload;

22.61.2. The Court had taken into account his availability when listing the case for 30 and 31 January 2019;

22.61.3. Enrichment Week is not obligatory;

22.61.4. If it was, it would amount to a redefinition of his contract of employment;

22.61.5. The test for appropriate conduct by an employer was "what would a reasonable employer do?";

22.61.6. There was guidance in the SRA paperwork appended;

22.61.7. A knee jerk reaction to corridor conversations and on Facebook does not resolve matters before a court of law;

22.61.8. The principle of subjudice extends to appeals. No responsible employer would put out public comments, and;

22.61.9. Were a responsible employer to consider unverifiable materials as evidence of character, the employer must, at the very least, test such evidence with any available credible evidence from any other identifiable sources.

22.62. I find that the above points of appeal illustrate the claimant's failure to understand what his disciplinary case was about. I cannot say whether that failure was deliberate or not.

22.63. I am very surprised that no minute of the meeting between the claimant and Professor Humphris on 3 May 2019 was produced to this hearing. However, I find that as the claimant did not challenge her evidence as to what was said at the meeting (paragraph 5 of Professor Humphris' statement), that evidence is an accurate summary. I find that at the meeting, the claimant presented the document dated 3 May 2019 with enclosures. He maintained that he did not need to inform his manager of his unavailability for Enrichment Week because he was attending Court on 30 and 31 January. The respondent was making a "knee-jerk" reaction and should await the outcome of any appeal against conviction before taking action. No weight should be put on press coverage and the adverse comments about him on Facebook could have been from students who were unhappy with their grades.

22.64. Professor Humphris was not challenged on her statement (paragraph 6), that she carefully reviewed the documents that

the claimant had submitted and made further enquiries about the issues that he raised, so I make a finding that she did both things.

22.65. Her decision was to dismiss the claimant. Her factual decisions as set out in her witness evidence were:

22.65.1. The claimant had a responsibility to request leave during Enrichment Week and did not do so;

22.65.2. He should have at least notified his line manager;

22.65.3. He was not available to work during the two days of the trial;

22.65.4. The University should not wait for any appeal before acting because there was adverse press attention, the respondent had obligations to students, parents and colleagues to be seen to be addressing matters, there was no guarantee that the conviction would be overturned and it was not reasonable to suspend the claimant to an unknown end date.

22.66. Professor Humphris then wrote to the claimant on 9 May 2019 [212-213] with her decision. The rationale was set out in the final paragraph of the first page of the letter [212], in which she said:

"As Vice-Chancellor, I must have confidence in my colleagues that they will act in an appropriate manner and demonstrate appropriate probity and standards in a wide range of complex situations. Your lack of insight and lack of acceptance of your own accountability lead me to the conclusion that there is a fundamental breakdown in trust. I have to be convinced in situations where you would exercise judgement in terms of transparency and compliance that your decision making would be beyond reproach."

22.67. The letter confirmed that the reason for dismissal was 'some other substantial reason' due to irretrievable breakdown in trust and confidence in accordance with the respondent's Suspension and Dismissals for Staff document. The claimant was given three months' notice of termination, with an effective date of termination of 12 August 2019. He remained on suspension during his notice period and was advised of his right to appeal to the Board of Governors.

22.68. Dr Orji submitted his appeal [215-223] by email on 22 May 2019. In it, he argued that there was no reputational damage to the respondent because the Court process had not ended and he may be acquitted. He should not be judged on media reports following the first day of his trial. Further, he stated that the statements of Zoe Swan, Lucy Jones and Toni Hilton about the prospect of his returning to work did not "align with the law and

practice on the consequences of the outcome of an appeal." If one took away the fact of the conviction, the views of colleagues were "arbitrary".

22.69. He said that there had been no independent investigation as to the actual reputational damage caused to the University. The statements from staff about the comments of students on the claimant's situation were not credible.

22.70. The claimant was alleging institutional malpractice (although he did not say by which institution) and had acted in the way that any law lecturer would do if his legal rights were threatened.

22.71. He quoted from the University's policy that said that whether it was reasonable or not to dismiss a member of staff for a crime committed would depend on a number of factors that influenced the employment relationship. He drew from the quote that the sanction was only triggered at the end of the legal process.

22.72. Under the heading "Breach of Trust and Confidence", the claimant said that the University did not have a mechanism for dealing with allegations of institutional harassment of staff, allegations of the use of Social Services agencies to bully and intimidate the family of a member of staff and the overarching criminal proceedings.

22.73. He set out a typical 'trust and confidence' clause that an employee "would not, without reasonable and proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee." He did not say whether this clause was in his own contract.

22.74. Dr Orji then broke down the clause into its constituent parts and submitted that it would always be relevant to consider the reason for the breakdown of trust and confidence. If such consideration was given to his case, a different outcome would be reached.

22.75. He then went on to make a point about the gossip culture in the Business School and quoted from three emails that he had sent Toni Hilton on 26 April 2019. I must say that I am at a loss to see how this point and the documents quoted are relevant to the claimant's case.

22.76. Dr Orji, in a section headed "My Response to the Vice-Chancellor's View" asserts the "fact, rather than an opinion" that he was available for work during Enrichment Week. He had never been in the Business School during Enrichment Week. He did other work at home. Enrichment Week is not obligatory. Other staff do not face disciplinary action for failing to attend. A written warning for his offence was indefensible.

22.77. He had been treated in a manner that was inconsistent with colleagues in a similar situation "majorly in relation to participation requirement regarding Enrichment Week."

22.78. Facebook comments could have been from students dissatisfied with their grades.

22.79. The University should wait for the outcome of his appeal, which was likely to be in September 2019.

22.80. He did not say that he had told Toni Hilton or anyone else at the University about the criminal charges or court proceedings before 1 February 2019.

22.81. The appeal took place on 12 June 2019. The claimant chose not to attend. The appeal considered the claimant's appeal, the management response [227-229] written by Professor Humphris and the claimant's Response to Management Case [289-292]. The note of the hearing is at pages 231-233.

22.82. I refer back to my findings about the Response to Management's Case document at paragraphs 13.6 to 13.13 above. In the document, the claimant implies that the respondent's case that his failure to report the criminal charges and/or the criminal proceedings was a new matter that had first appeared in the Management Case.

22.83. Dr Orji compared and contrasted the disciplinary charges he faced following the investigation, which he says were about the fact of his conviction and alleged dishonesty, with the case of breach of trust and confidence that he says is new in the Management Case. I find this comment to have some merit, but also that it is disingenuous because:

22.83.1. He failed to mention one of the three disciplinary charges, which was of "failure to notify the university of your attendance at court, which could constitute unauthorised absence", and;

22.83.2. I have already found that it was not reasonable for the claimant to take the position that he was not aware of the issue that his failure to notify caused the respondent.

22.84. I acknowledge that he was disciplined with a final written warning for the failure to notify by Dr Smallbone, but as I have set out above, he should have known that the failure to notify had broader implications. I find that his quote of the respondent saying that "this complaint was not relevant to the case of dismissal on the grounds of some of (sic) substantial reason" was disingenuous because it does not reflect the clear wording of Dr Smallbone in her letter of 11 April 2019. In dealing with the failure to notify, it is clear that the disciplinary offence is the claimant's failure to book leave for the Court case. Dr Smallbone

did not accept that the claimant had been available for work and therefore dealt with the matter as unauthorised absence.

22.85. For the reasons set out above, I do not accept his comment that this was his first opportunity to respond to the new basis. I reject his argument that he had not made representations to Dr Smallbone, Professor Humphris or his first submission to the Board for the same reason. I find that the claimant was seeking to reinvent the past.

22.86. Dr Orji then turned to the actual point at hand – what he did or did not say to Ms Hilton. His first point is that Ms Hilton could not remember when the two meetings were. That may be true, but she was clear that the claimant had never told her that he had been charged with criminal offences or was required to appear at Court. Further, he had never challenged her on those assertions until the day of his appeal against dismissal.

22.87. Dr Orji concentrated on the fact that no minutes of either meeting had been produced. Given the nature of the meetings as evidenced in the investigation by Ms Hilton's statement and appearance at the disciplinary hearing, I do not find this suspicious or unusual. She was looking at welfare issues that had been raised by colleagues about his behaviours. She was never challenged on that fact.

22.88. As I have set out in paragraphs 22.11. and 22.12. above Dr Orji quotes part of Ms Hilton's statement to the disciplinary hearing about the first meeting, where she is reported as saying "TH confirmed that she had gone out of her way to speak to [the claimant] regarding whether any support was required…"

22.89. He then states in the document:

> *"I and TH discussed these matters to the extent of the mix of issues involved, as I see it – housing, the police and criminal allegations. And indeed, I did not ask for assistance nor did I accept any offer for help. This is clearly captured in the extract above"* [the part quotation from Ms Hilton].

22.90. As I set out above, I find that this is the fist and only time that the claimant ever states that he told anyone at the respondent about the criminal matters. Even then, he gave little detail. His partial quote of Ms Hilton was designed to support an assertion that the full quote does not. I find that Ms Hilton was clear that her conversation with the claimant was about the concerns expressed about his behaviour and any mention of support was about the fact that colleagues suspected he was sleeping in the office.

22.91. I therefore prefer the respondent's evidence to that of the claimant on the critical point of whether he told Toni Hilton about the charges and/or the Court appearance before 1 February 2019. His evidence is vastly outweighed by that of the respondent on the point.

22.92. I find his closing remark (that management had said that his failure was to make a "proper disclosure") is not a denial that he made any disclosure is simply not plausible in the light of all the evidence and documents.

22.93. I therefore find that the claimant has not shown on the balance of probabilities that he told Toni Hilton or any other member of staff at the University that he had been either charged with criminal offences or had been required to appear at Court in October or November 2018 or at any time before 1 February 2019.

22.94. The claimant did not challenge the notes of the appeal hearing [231-233]. Those notes set out 15 findings of fact. The most relevant of these was number 5:

> *"Breach of trust and confidence. Dr Orji did not advise his manager of the trial, or of his subsequent conviction. He withheld important information from the school. It was noted that there was no express contractual duty to advise his manager of the trial, but the Committee felt that it was common sense that he should have brought this to hi manager's notice. Dr Orji did not appear to have any insight that this might be important for the University to know."*

22.95. I find that this finding implicitly includes a consideration of the claimant's assertion that he had told Ms Hilton about the criminal matters in October or November 2018 and rejection of that assertion.

22.96. The Committee found that the claimant had breached the duty of trust and confidence and upheld the Vice-Chancellor's decision to dismiss. That decision was confirmed in an email to Dr Orji dated 17 December 2019.

22.97. Dr Orji was acquitted of all criminal convictions on 23 December 2019.

Applying the Facts to the Issues and the Law

43. Under section 98(1)(a) of the Employment Rights Act 1996 it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The burden in showing the reason is on the respondent.

44. The respondent in this case says that the reason is 'some other substantial reason' (SOSR). There have been a number of decisions of the EAT that concern SOSR dismissals where an employer could have alleged misconduct as the reason for dismissal, but instead chose to claim that the reason was a breakdown of trust and confidence, which is some other substantial reason. Keith J in **Ezsias v North Glamorgan NHS Trust [2011] IRLR 550** said that the EAT had "no reason to think that employment

tribunals would not be on the lookout in cases of this kind, to see whether an employer is using the rubric of 'some other substantial reason' as a pretext to conceal the real reason for the employees dismissal."

45. Both parties quoted the case of **Governing Body of Tubbenden Primary School v Sylvester UKEAT/0527/11**, in which Langstaff J recognised potential dangers for employees in the application of SOSR. In that case, the EAT held that in a loss of trust case, a Tribunal can look at the facts behind the loss of trust and confidence and whether, on all the facts, the dismissal was unfair. At §38, the President said:

> *"38. We are not at all unhappy, as a matter of principle, to reach the view that that is so, because as a matter of principle if it were to be open to an employer to conclude that he had no confidence in an employee, and if an Employment Tribunal were as a matter of law precluded from examining how that position came about, it would be open to that employer, at least if he could establish that the reason was genuine, to dismiss for any reason or none in much the same way as he could have done at common law before legislation in 1971 introduced the right not to be unfairly dismissed. Lord Reid in **Ridge v Baldwin** [1964] AC 60 observed that the law of master and servant was not in doubt; that an employer could dismiss an employee for any reason or none. It was to prevent the injustice of that that the right not to be unfairly dismissed was introduced. The right depends entirely upon the terms of the statute, but there is every good reason, we think, depending upon the particular facts of the case, for a Tribunal to be prepared to consider the whole of the story insofar as it appears relevant and not artificially, as we would see it, be precluded from considering matters that are relevant, or may be relevant, to fairness."*

46. I have followed the guidance above in making the decision in this case.

47. The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (see **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**.)

Summary of Facts

48. I have set out my findings on the facts above, which can be distilled into the following key points:

    48.1. The claimant, was charged with serious criminal offences following incidents on 25 and 26 March 2018. I find that he should have advised his employer of the charges to enable it to prepare for the inevitable press coverage that would follow his trial and the enquiries that would come from colleagues, students, alumni, sponsors and other stakeholders.

    48.2. There is an implied term of trust and confidence in every contract of employment.

    48.3. The claimant failed to advise his employers of the criminal charges or his court appearance before it became aware through social media on 30 January 2019.

48.4. The claimant was not available for work on 30 and 31 January 2019, when he was required to be available for Enrichment Week. His evidence did not meet the standard of proof required to show that he was not required to work or that he was doing other work. Common sense suggests that his attendance at a criminal trial over two days would have made him unavailable for work.

48.5. The claimant failed to tell his employer about the criminal charges for a number of reasons that he himself set out at various times. Those included his belief that the charges had no connection to his employment, and his belief that he would do himself no favours by telling the respondent about the charges.

48.6. The claimant did not tell Toni Hilton about the charges or Court appearance in October or November 2018. I find it highly unlikely that the Head of School would have either forgotten that one of her law lecturers had revealed that he had been charged with serious criminal offences or that she would not have told at least one other colleague about the charges if they had been revealed to her.

48.7. Whilst the investigation and disciplinary proceedings appear to have started out as a disciplinary matter, I find that the claimant was, or should have been, aware that one of the major issues at the disciplinary hearing was his failure to advise the respondent of the charges and Court proceedings.

48.8. It is obvious that an institution like the respondent would suffer reputational damage if one of its lecturers was convicted of serious criminal offences. I find that this would be the case whether or not the matter was reported in the media. I do not find that the respondent's decision not to undertake the sort of forensic assessment of reputational damage that the claimant says it should have was outside the band of reasonable responses.

48.9. I find the reason of the claimant's failure to notify the respondent was a substantial reason that is capable of being SOSR. I find that the respondent considered the whole of the story so far as it was relevant.

48.10. I find that the process that the respondent used was within the band of reasonable responses in every regard. I do not find that the change in emphasis between the investigation and the disciplinary hearing renders the subsequent dismissal unfair.

48.11. Dismissal was in the band of reasonable responses.

48.12. There was no lawful imperative that required the respondent to pause the disciplinary process until the hearing of the claimant's criminal appeal. As it turned out, the appeal was not completed for nearly eleven months after the original convictions.

48.13. The respondent is entitled to take the fact of conviction as determinative of the claimant's guilt and is under no compulsion to hold its own enquiry into his guilt (see **P v Nottinghamshire County Council [1992] IRLR 362**)

48.14. In any event, the claimant was not dismissed because he had been found guilty.

48.15. The claimant has retrospectively created a set of circumstances that seek to exonerate him from acts for which he was clearly responsible and accountable as an employee of the respondent.

48.16. The claimant's claim for notice pay had little reasonable prospect of success. He was entitled to three months' notice and was given notice on 9 May 2019 to expire on 12 August 2019. He did not dispute that he was paid for that period whilst on suspension, so he received more than the notice pay due to him.

Applying Findings of Fact to the Issues

49. I make the following decision on the issues in the light of my findings of fact;

50. Unfair dismissal

50.1. The claimant was dismissed.

50.2. The reason for dismissal was SOSR.

50.3. SOSR is a potentially fair reason.

50.4. The respondent SOSR was a breakdown in trust and confidence caused by the claimant's failure to notify the respondent that he had been charged with criminal offences and was summonsed to appear at Court.

50.5. The respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant.

50.6. I did not consider contributory fault or Polkey, as I found that the claimant was not unfairly dismissed.

51. Remedy for unfair dismissal

51.1. I did not consider remedy, as the claimant was not unfairly dismissed.

52. Wrongful dismissal / Notice pay

52.1. The claimant's notice period was three months.

52.2. The claimant was paid for that notice period.

53. The claimant's claims of unfair dismissal and breach of contract fail.

Employment Judge Shore
Dated: 29 September 2020

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