# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr J Fisher**

**Respondent:** **Secretary of State for Justice**

**Heard at:** **Leeds by CVP** **On: 19-21 December 2023**

**Before:** **Employment Judge Maidment (sitting alone)**

**Representation**
**Claimant:** **In person**
**Respondent:** **Mr R McLean, Counsel**

# RESERVED JUDGMENT

The claimant's claim of unfair dismissal fails and is dismissed.

# REASONS

**Issues**

1. The claimant's sole claim is of ordinary unfair dismissal. He worked as a senior manager at a youth offenders' institution. He was dismissal following a number of allegations made by colleagues of inappropriate behaviour.

**Evidence**

2. The tribunal had before it a bundle of documents numbering some 736 pages. Having identified the issues with the parties, the tribunal took some further time to read into the witness statements exchanged between the parties and relevant documentation. The tribunal heard firstly, on behalf of the respondent, from Peter Gormley, governing governor of HM Prison Wetherby and then from Heather Whitehead, at the time, deputy director of youth operations in the youth custody service. Her evidence was interrupted to enable the tribunal to hear, on behalf the claimant, from Mr Kevin Bettles of the Prison Governors' Association, who acted in the internal

process as the claimant's representative. The tribunal heard finally from the claimant himself. Both parties then made their closing submissions. In these reasons, the tribunal has chosen to anonymise the name of one of the officers who made allegations about the claimant on the basis that she is not a party to the proceedings and more personally sensitive information is included about her than other complainants.

3. Having considered all the relevant evidence, the tribunal makes the factual findings set out below.

**Facts**

4. The claimant was employed by the respondent as head of the residential team at HM Prison Wetherby at band 8, reporting to the deputy governor, Mr Lowe and the governor, Mr Gormley. The claimant was head of young people services and looked after the majority of the residential units. He was a member of the senior management team.

5. A grievance alleging sexual harassment was raised against him by Ms Buckler and thereafter other individuals raised complaints about his behaviour. As a result, Mr Gormley commissioned an investigation in accordance with the respondent's conduct and discipline policy. He approached a regional director to request the allocation of an independent investigating officer, which resulted in the appointment of Charlotte Mann who worked as deputy governor at Hull prison. The tribunal does not consider that Mr Gormley's evidence that he asked Mr Lowe to commission an investigation goes to the reliability of Mr Gormley's evidence. There was an element of delegation of responsibilities.

6. The claimant was issued with a standard letter from Mr Gormley on 2 November 2021 saying that he was under investigation. The claimant sought more information, but was told that he would receive the terms of reference of the investigation. They were not ready to be supplied to the claimant at that point.

7. On 10 November 2021, Ms Mann and Mr Gormley set out initial terms of reference (albeit the task of drafting them appears to have been delegated at least to some extent to Mr Lowe) which included five charges, the first four of forms of sexual harassment towards Ms Buckler, Ms Rothera, Ms Barnes and Ms Keenan. A fifth charge related to the claimant requesting access to Mr Slater's email account and deleting information. The claimant only saw the initial terms of reference document after his first interview by Ms Mann on 31 December 2021. Mr Gormley accepted in cross-examination that they should have been provided sooner.

8. Ms Barnes was at a similar level to the claimant but in a non-operational role. Ms Rothera was a custodial manager at band 5, Ms Keenan a band 4

specialist officer with responsibility for training on restraint techniques, Ms Y was an officer grade 3 or 4, Mr Slater was a band 3 youth justice worker and Mr Staff, a band 7 who deputised for the claimant. All had been working in the prison service for a number of years.

9. The claimant notes that many of the allegations had been submitted around 18 October, yet there were no term of reference prepared until 10 November. Mr Gormley said that it took some time to get Ms Mann on board as the independent investigator.

10. Ms Mann wrote to the claimant on 12 November advising him that she had been asked to investigate allegations of "sexual harassment, discrimination, and misuse of IT". The potential next stages were said to range from the taking of no action to holding a formal disciplinary hearing. She did not supply the terms of reference at this stage.

11. The terms of reference were revised on 15 November to include an allegation that the claimant had sent an electronic link to a firearm to Mr Staff and one of sexual harassment and discrimination towards Ms Y.

12. The claimant notes that there were 52 days between the allegations being made and the initial witness interviews. Mr Gormley accepted that was not ideal. He accepted that the respondent's procedures envisaged that an investigation would be completed within 28 days, but said that there were acceptable reasons for the delay. The claimant noted that the first witnesses were interviewed on 29 November, when the respondent's terms of reference required the investigation to be completed by 20 December.

13. On 17 December, Ms Mann advised the claimant of an extension for the date of the completion of the investigation and asked for a date convenient to him for his own interview. Other witness interviews had concluded on 9 December. The extension had been sought from Mr Gormley in writing and agreed on the basis of witness availability and annual leave. The claimant had not understood that he was himself also a witness (as well as the subject of the investigation). The new completion date was to be 17 January 2021.

14. A further extension to 11 February was sought on 12 January and granted on 17 January by Mr Gormley, with the reasons given again being witness availability and annual leave. At this point there were no witness interviews in fact outstanding. On 21 January a further extension was sought and granted until 11 March. Mr Gormley accepted that from 11 February there had been a period where the investigation had not been completed, yet no extension had been requested.

15. Ms Mann produced an investigation report which summarised the allegations referring to, evidence in support and evidence against each one, quoting from statements made during the witness interviews.

16. On receipt of the report, Mr Gormley had asked that Ms Mann reinterview Ms Y and the claimant as a result of Ms Y stating at the end of the interview that she had copies of emails between herself and the claimant, which were only subsequently provided to Ms Mann.

17. As a result of the investigation, Ms Mann recommended that 6 of the 7 allegations against the claimant should be tested at a disciplinary hearing. It was considered that there was insufficient evidence to consider the allegation brought by Ms Buckler.

18. Ms Rothera had submitted a grievance in respect of the claimant's behaviour on 19 October 2021. She expressed a reluctance to report his behaviour towards her due to his senior position. She referred to having sat on the information, not wanting to report it for fear of committing "career suicide". She also made reference to the Sarah Everard murder and how police colleagues had laughed about the police officer who had killed her. She said that she felt uncomfortable being around the claimant and considered that he was abusing his position which could impact on others as well. She described the claimant as "creepy, especially if I am alone with him." She said that on, she thought, 11 October the claimant gave her feedback from an interview board he had been part of saying that she had a given a good presentation, but a lack of experience had meant that another officer was successful. He was alleged to have said "… But on the plus side you look beautiful" and you've got "a cracking set of pins." Ms Rothera felt that it had been wrong for her to be given this official feedback and it was soured by a sexualised comment. It was "sleazy" and unnecessary. Ms Barnes, her line manager, said that Ms Rothera had reported this comment to her.

19. Ms Rothera also said that the claimant would make comments about her appearance noticing when she wore make up and that she had had her lips enhanced. This had not worried her and she had just thought that the claimant was quite attentive to detail. Also, in early October she said that, when she referred to having a bad cold and it going to her head, he had asked her if it had gone to her chest whilst looking at her breasts. She found the comment to be inappropriate.

20. The claimant denied making the alleged comments after the job interview, but said that he had complemented her on the dress she had been wearing. He recalled a conversation about her lips, but said that he had been joining in a general discussion amongst colleagues initiated by Ms Rothera herself.

Ms Rothera had on an occasion referred to herself as suffering from a chest infection.

21. Ms Barnes described herself and the claimant, who were on the same grade, as colleagues, but not friends. She recalled the claimant having said to her on one occasion: "you look really lovely today", which she said could have been taken as a compliment. Then, before a staff sports day, he had asked her if she was wearing fancy dress to which she replied that she was wearing her gym kit. He then followed that up by asking if she was going to wear a "little short gymslip?" She responded that she was way too old for wearing gymslips. She said that the claimant then said: "well if you wear a little short gymslip, your team will win because I will not be able to concentrate, because I'll be too busy looking at you, to which I just told him where to go, I just said, 'stop being a dick'". The claimant said, when he was interviewed, that he had made a comment that Ms Barnes would have looked good in a gymslip in response to her saying that she had heard that he looked good in lycra – a reference to him having worn lycra running shorts. He described himself as realising straightaway that he shouldn't have said what he had, but it was a "bite back" to her own comment. He said that he had endured a day of ribbing over him having been in a state of collapse at the sports day. He denied referring to a "little" gymslip and did not consider that he made the comment "in a sexualised way at all."

22. Ms Keenan alleged that, whilst sat in the claimant's office on 12 October 2021, he had put his foot on top of hers "playing footsie". She said that he then said to her: "I can't stop thinking about being on top of you" and alleged that he had asked about her relationship status and age. She explained that they had been in 2 restraint situations at work previously and on both occasions the claimant had landed on top of her, which explained the aforementioned reference. She said that she laughed "because it has been like a joke in the past, but I feel like in that context, where it was just us two in an office and he had his foot playing with mine, I felt a bit uncomfortable." She described feeling "horrendous" and said she was worried how far the conversation would have gone if another governor hadn't come into the room.

23. The claimant's account was that a meeting had taken place between them on 12 October. He denied the allegation and said that Ms Keenan had referred to her "being underneath a Governor". He said that she had also commented at some point that this had been the second time she had been under him. He said that their positioning in that room meant that he would not have been able to reach out to put his foot on hers.

24. Ms Y said that she had disclosed her address to the claimant after he said he could get it off the system anyway and then received roses sent to her stating happy birthday or "happy birthday little mouse". After Ms Mann had

spoken to the claimant, Ms Y provided emails from 29 January – 1 February 2021 which evidenced the claimant asking for her address and phone number. Ms Mann noted the claimant reassuring Ms Y that he is "not a stalker" and "… Promise I'm like a vampire, can't come into the home unless invited!!"

25. Ms Y said that she had received a Valentine's card from the claimant and it made her feel uncomfortable because of his position. She referred to him having children not much younger than herself. She said that her birthday was at the beginning of February and Valentine's Day followed on 14 February. She said that the claimant approached her at work saying she needed to come and see him because he had something for her. She said that she was not going to his place, in response to which he said that he had left it on his office desk. She collected what he had left and it was a Valentine's card. She said that she ignored it, as she didn't want her life at work to be difficult or to challenge him.

26. She said that the claimant had asked her "weird questions" which did not appear to be appropriate and were personal in nature. These included him asking her if she had missed him and she thought he had used the word "fancy me". She said that she used to laugh it off and say that he was a band 8 governor and a married man. These comments had not been made in the presence of any witnesses.

27. She alleged that she had gone for a walk with the claimant during which he commented on her appearance. She was wearing gym leggings and the claimant contrasted that with her uniform being baggy.

28. She said that the claimant had set up a personal email account to contact her. Ms Mann noted that this was confirmed by documentation she was shown. When interviewed, the claimant said that it was a quick impromptu email address that he had made up under the name of his favourite singer.

29. Ms Y said that the claimant called her "little mouse", commented on her teeth and eyes and asked to see her tattoos in spite of knowing that they were not in places she could show someone. The latter request she said made her feel a bit uncomfortable. The claimant accepted that he had called her "little mouse" because of a comment she had made early into their friendship that she felt like a little mouse.

30. Ms Y said that the claimant used to say how hot his office was and make comments like "it's so people will take their clothes off." He had said he would buy her a property in Italy which she thought was a bit strange, but assumed he was just joking. He often met her in the car park to walk into the prison with her.

31. Ms Mann noted evidence of correspondence provided by Ms Y that the claimant referred to her as “little mouse” or “mouse” frequently and signed emails off with an “x” and terms such as “sweet dreams”. When interviewed in the investigation, the claimant said that on going through various emails, he accepted that he shouldn’t have put those references on them and he accepted that this was not an appropriate way to correspond with a vulnerable junior member of staff. He accepted the same proposition with reference to him wishing her the wonderful Valentine’s Day. He described himself as “quite ashamed” and understanding how “stupid” he had been. He said that he thought they were mutual friends and that this was a consensual friendship that appeared to be blossoming – “it wasn’t a big bad wolf trying to manipulate a vulnerable junior member of staff.”

32. The claimant said that he sent her flowers for her birthday at her home address. He said that he considered her to be vulnerable and this to be a low point for her as she wasn’t going to see anyone on her birthday. He was referred to a communication where he had described himself as feeling like “Peter Pan”. The claimant explained that this related to conversations where he learned that he wasn’t as old as previous boyfriends of Ms Y.

33. Emails considered by Ms Mann included one where the claimant described Ms Y as an “amazing, beautiful, young woman and I think the world of you, will be thinking of you Sunday…” In another he said: “Fancy me? Just putting it out there!” She responded: “excuse me?” He replied that it was worth a try and he guessed he was barking up the wrong tree and would stop pushing his luck, continuing that he didn’t want to lose their friendship as “you mean too much to me mouse x”.

34. Ms Y said that the claimant’s contact with her ended when it became common knowledge that she was in a relationship with someone else (at work). She said that at that point she realised that the support the claimant had been providing was different when compared to her partner.

35. There was a further allegation that the claimant had accessed another member of staff’s email account (Mr Slater) and then deleted some content. The claimant confirmed that he had asked Mr Slater to delete an email which had been a confidential email sent to him in error. He attempted unsuccessfully to recall the email so had asked Mr Slater not to read it and to delete it. He hadn’t received a response and went to see Mr Slater, took over his mouse, accessed the email and deleted it whilst Mr Slater looked on.

36. Ms Mann’s conclusion was that the bulk of the evidence supported the aforementioned allegations. Whilst, with Ms Rothera’s allegation, it was one word against another, she considered there was a pattern of alleged

inappropriate behaviour emerging around the claimant providing feedback/guidance to female staff. Whilst the allegation of Ms Barnes came down to one word against another, the claimant had admitted making the comment regarding a gymslip which she felt was inappropriate. Ms Keenan's and the claimant's evidence conflicted, but again there was a pattern of alleged inappropriate behaviour. As regards Ms Y, there was an email trail which confirmed her evidence.

37. The claimant had admitted what he had done as regards the email sent in error to Mr Slater. Ms Mann quoted from the security policy that other users should not be allowed to access the system via another employee's login identity. She concluded that it was reasonable to acknowledge the pressure a band 3 employee would have felt under to allow access to his personal email account, breaching the section of the security policy.

38. She noted that the claimant had been in the prison service for 32 years and the seniority of his position. She commented that he should have known what was expected and required of him having progressed through the ranks. She concluded that there was enough evidence to test the allegations at a disciplinary hearing.

39. Mr Gormley wrote to the claimant on 21 March 2022 setting out the allegations being taken forward and making it clear that there would be no further action in respect of Ms Buckler's allegation. He said that, if proven, these allegations would constitute gross misconduct. Mr Gormley set out a range of potential outcomes up to and including the ending of his employment. He would be conducting the disciplinary hearing with Ms Mann presenting the findings of the investigation. A copy of the report was enclosed. The claimant was told that he had the right to be accompanied by a union representative or colleague. He listed those who would be required to attend including Ms Keenan, Ms Rothera, Mr Slater, Ms Barnes, Ms Y and Mr Staff. The hearing was arranged for 4 April 2022, but subsequently delayed until 23 May.

40. The claimant was contacted by Mr Lowe on 22 March. The claimant was by this time absent from work due to sickness and referrals had been made to occupational health. The claimant maintains that he was asked to consider leaving the respondent on capability grounds. Certainly, there was some exploration of the claimant's financial entitlements if he left his service on that ground. Mr Gormley was unaware of discussions during the process of managing the claimant's sickness absence. On 9 May an estimate of early retirement benefits was provided to the claimant. Mr Gormley was clear that his ultimate decision was not influenced by these discussions and that he approached the disciplinary hearing with all options open to him.

41. On 26 April 2022, the HR case manager, Ms McNally, provided to Mr Gormley a case analysis submission created, as was standard practice, to assist in his role as a decision-maker at the disciplinary hearing.

42. In advance of the disciplinary hearing, on 12 May, the claimant and Mr Gormley spoke. The claimant asked what was likely to happen at the hearing. Mr Gormley told him there were a range of possible outcomes and that it was best just to be honest and truthful at the disciplinary hearing. The claimant was not asked what he wanted as an outcome – Mr Gormley was clear to the tribunal that that would not be relevant and that he appreciated that he couldn't discuss the details of the claimant's case. Mr Gormley also had a telephone conversation with the claimant and his union representative during which he said that the allegations which most concerned him were those of Ms Y and Ms Keenan. Mr Bettles, the claimant's union representative, said that both were untrue and would be challenged at the disciplinary hearing. Mr Gormley referred to not wanting undue distress to be caused to them at the hearing. There is no evidence, as suggested by the claimant, that he was warned off asking questions or led to believe that, if he did not challenge witnesses, any sanction would be lighter.

43. Prior to the hearing, the claimant submitted a document making clear that he contested tie allegations of Ms Rothera and Ms Keenan. As regards Ms Y and Ms Barnes, he accepted that he did make comments, but not in the context of the report and with mitigation.

44. On 23 May 2022, Mr Gormley conducted the hearing. Ms Mann as investigating officer attended together with the claimant, Mr Kevin Bettles and Ms McNally. Ms Keenan, Ms Rothera, Ms Barnes, Ms Y and Mr Slater all attended as witnesses together with Ms Davies as their POA union representative.

45. At the outset of the hearing, Mr Gormley confirmed that the purpose was to test the allegations made against the claimant. Those in attendance were introduced and it was confirmed that a break could be taken whenever necessary. He asked Ms Mann to explain the basis of her recommendation that there was sufficient evidence for the allegations to go forward. Mr Gormley clarified that that the allegations were of sexual harassment and unprofessional conduct towards Ms Rothera, sexual harassment and unprofessional conduct towards Ms Barnes, sexual harassment and discrimination towards Ms Keenan, sexual harassment and discrimination and exploitation of the working relationship with Ms Y and the misuse of the IT system in respect of the conduct involving Mr Slater. A further allegation, already referred to, regarding the sending of a link to a firearm was discussed at the hearing but not upheld as a charge of misconduct. The tribunal deals with it no further in those circumstances.

46. The claimant was given an opportunity to confirm whether he contested or accepted the allegations. He contested the allegations of Ms Rothera and Ms Keenan. He accepted the alleged comments made to Ms Barnes but not the context in the investigation report and maintained that there were mitigating circumstances. He accepted the allegation concerning Ms Y but with mitigating circumstances and the misuse of IT, but again relied on mitigating circumstances. Mr Bettles' understanding was that the claimant accepted 4 of the allegations, but with mitigation.

47. The claimant and Ms Bettles raised questions, included the reason for delay in the investigation, which Ms Mann confirmed was due to witness availability. Mr Gormley agreed that the investigation had gone over the recommended timescales, but noted the additional evidence it was required to examine.

48. Mr Bettles questioned Ms Rothera in her interview raising additional allegations of sexual harassment involving the claimant sometime in the past at other prisons. Ms Mann said that she only took into consideration the allegations within her terms of reference. Mr Gormley reiterated at the hearing that, whilst comments had been made about other alleged misconduct on the claimant's part, they did not form part of the investigation and they would not be taken into account. Mr Bettles raised the issue of the risk of unconscious bias. Mr Gormley told the tribunal that he was confident that he was able to disregard the allegations outside the scope of the terms of reference and ensure that they did not influence his decision.

49. Despite Mr Gormley understanding that the claimant accepted a number of the alleged behaviours raised against him, he decided that the evidence of those bringing the complaints ought to be tested further, particularly in view of the claimant saying that there were mitigating circumstances. He said at the hearing that their giving evidence would be difficult for them, but he would control it and stop if he thought unnecessary questions were being put to them. The claimant was not prevented from asking witnesses relevant questions. Mr Gormley said he would be surprised if a union representative such as Mr Bettles had advised the claimant not to ask questions given that his employment was at risk. The tribunal agrees.

50. The complainants were therefore called to give evidence and the claimant and Mr Bettles had the opportunity, which again they took, to put questions to them. The tribunal notes that Ms Y was asked by Mr Bettles who her current partner was.

51. Mr Bettles raised that the claimant had given the names of 3 witnesses who could support what had been said between the claimant and Ms Keenan prior to their meeting in the claimant's office. Ms Mann confirmed that she had no reason to disbelieve that Ms Keenan had made comments about

having been "under" the claimant outside of and before that meeting. That evidence did not therefore add anything to what was being alleged. It is noted that at the hearing, Ms Keenan described their previous interactions as a bit of banter because the claimant had landed on her during inmate restraints. However, when this was raised by him in his office "it wasn't that banter anymore, it was just really uncomfortable."

52. When interviewed at the hearing, Ms Barnes said that at the time she had taken the gymslip comment as banter and didn't take it personally in any way. She said that she had a good working relationship with the claimant. Subsequently, she had considered that the comments were of a type that could potentially upset someone. The claimant did at the hearing apologise if his behaviour had caused her any distress.

53. Towards the end of towards the end of putting questions to Ms Y, Mr Bettles said that the claimant had held his hands up to some of the things but would just wish to clarify the circumstances and that there was something the claimant would like to say. The claimant said that there was a raft of questions and evidence which contradicted what was being said, but he did not wish to put Ms Y through anything further. Mr Gormley said that he could submit that to him afterwards. He said that he thought he and Ms Y were friends and he wanted to apologise unreservedly if any of his comments had made her feel the way she had expressed in her investigatory interview and today.

54. After Ms Y had left the hearing, the claimant said again that he had a raft of evidence that contradicted what was being said and it was Ms Y's own evidence not his i.e. her communications. Mr Gormley sought to clarify whether there was any additional evidence or he was referring to the same email correspondence in the pack of documents. The claimant confirmed that Mr Gormley had the same emails already which he was referring to. Mr Gormley said that he could make submissions as to any contradictions and that he had read all of the emails and accepted that there had been a bit of cutting and pasting. He had thought that the claimant was saying that he had additional information to present. Mr Bettles apologised and said that was not the case, but rather he just wished to point out that there were missing elements to it. On the basis of these discussions, the tribunal does not accept that Mr Gormley would not allow any additional evidence to be considered.

55. On finally adjourning the hearing, Mr Gormley considered the failure to adhere to the policy timeframes but felt that the policy had been correctly followed and due authority had been requested for any extensions. He was satisfied that a fair and reasonable investigation had been conducted and other procedural issues which had arisen did not impact upon the reasonableness of the investigation. The claimant had the opportunity to

question the relevant witnesses at the disciplinary hearing and indeed to request that any further witnesses were called but had chosen not to do so. The claimant's union representative had not suggested that the claimant was unable to state his case.

56. Mr Gormley did consider an allegation that there had been collusion between the complainants. Mr Gormley understood that witnesses had spoken to each other about their allegations and, whilst this was undesirable, there was no supporting evidence that they had colluded to invent or exaggerate any of the allegations made. He was clear that he was considering only allegations within the terms of reference of the investigation. Whilst the claimant had accepted a lot of what was alleged to have been said, the claimant had still been given the opportunity to test the evidence.

57. Mr Gormley believed that all of the witnesses raising complaints had given credible evidence. He found that their evidence was consistent with what they had said during the earlier investigation. He considered that the claimant had initially downplayed his relationship with Ms Y at the investigation stage but had changed his position on her providing various emails and had accepted the charges with mitigation.

58. He considered what the claimant had said as mitigation. He appreciated that the claimant had accepted some of the alleged behaviour and considered his seniority and length of service. However, he considered that the claimant, in his senior position, was required to demonstrate high standards of professional and personal conduct in order to deliver security and properly perform his duties. He considered that the claimant had undermined that core duty and that his actions were seriously unprofessional and negligent, constituting gross misconduct. The claimant had accepted 4 of the charges such that they were proven beyond reasonable doubt and Mr Gormley otherwise considered that there appeared to be a pattern of behaviour which corroborated the allegations having occurred as alleged.

59. Mr Gormley's decision that the claimant should be dismissed was on the totality of the allegations he upheld. The allegations of Ms Y on their own would have led him to a conclusion of gross misconduct. He felt the same about the allegation of Mr Slater, because it amounted to the harassment of a junior employee. The other allegations, if each viewed on their own, would have resulted in a finding of misconduct, i.e. at a lesser level than gross misconduct.

60. The disciplinary hearing was reconvened for Mr Gormley to explain his decision. The claimant was given the right of appeal. On 25 May 2022, Mr Gormley provided a written outcome letter. The claimant has suggested

that the outcome does not explain exactly how Mr Gormley came to prefer the other witnesses to the claimant, but his outcome letter did properly engage with each individual allegation. The claimant does not recognise that a decision can be evidence based if it is based on preferring one person's account to anothers. Upon receipt of the outcome, the claimant was suspended pending the final decision on any appeal.

61. The claimant appealed by letter of 10 June 2022 on the basis that there was an unduly severe penalty, new evidence had come to light, the proceedings were unfair and in breach of natural justice and the original findings were against the weight of evidence. The new evidence was a reference to photographic evidence of the office where he was alleged to have laid his foot on that of Ms Keenan.

62. Ms Whitehead, then deputy director of youth operations in the youth custody service and Mr Gormley's line manager, was designated to hear his appeal. The claimant initially raised that he did not want her to hear the appeal upon which Ms Whitehead took HR advice. Ms Whitehaed had been made aware by Mr Gormley of the initial allegations because she was asked to support the claimant's deployment to alternative duties. However, the claimant subsequently withdrew his objection. There is no evidence that she was unable to reach an unbiased decision. She noted the claimant's grounds of appeal. She noted that they did not relate to the allegations having been found proven.

63. Appeals, under the respondent's procedures, were to be held within 5 weeks of submission whereas the claimant's was held after that period. Ms Whitehead did not consider there to be any breach as there were justifiable reasons for the delay due to her own lack of availability. The outcome was issued much later than the 5 working days after the appeal envisaged. Ms Whitehead made it clear that her deliberations would take some time given the amount of information she had to consider.

64. The claimant submitted additional documentation the day before the appeal hearing on 15 July which Ms Whitehead reviewed after the hearing. This was attended by the claimant together with Mr Bettles and Ms Shakesby as HR case manager. The claimant agreed that he was happy to proceed with Ms Whitehead as decision-maker. The claimant then presented his grounds of appeal.

65. The claimant raised that the letter he had sent to Mr Gormley, where he accepted responsibility for his actions, had been taken out of context. He did not believe that Mr Gormley had taken into account the effect of the process on his mental health.

66. The claimant submitted the aforementioned photographic evidence saying that Mr Gormley had taken no action to try to explore this. He suggested that Ms Keenan had been coerced into making her allegation by Mr Staff. He also alleged that he had refrained from advancing evidence at the hearing to refute allegations in order not to distress witnesses. He said that that was a result of Mr Gormley suggesting that it was not necessary to call the witnesses as the claimant had accepted responsibility for some of the allegations. Ms Whitehead considered that this conflicted with the notes of the disciplinary hearing where Mr Gormley confirmed he would still call witnesses to ensure that the claimant had an opportunity to question their evidence. The claimant explained that he believed that, as a result of accepting some of the allegations and not questioning witnesses, he might not lose his job. The claimant raised the issue of delay in the terms of reference being provided to him and argued that this delay impacted adversely on his mental health. He complained more widely about the lack of timeliness in the investigation and disciplinary process as well as in the appeal process. He believed that there had been unconscious bias and collusion during the investigation. Ms Whitehead noted that Mr Gormley had confirmed that historic allegations made by Ms Rothera were not within the scope of his enquiry. The claimant alleges there had been a failure to corroborate his evidence or call witnesses in support of his case. He thought that Mr Gormley had not considered the full range of sanctions open to him before making the decision to dismiss the claimant. The claimant suggested that the policy guidance was to encourage improvement in an individual rather than impose a disciplinary sanction.

67. As regards the specific allegations, Ms Rothera's was said to be discredited, there being evidence to doubt her integrity. The claimant believed that allegations arose after a POA meeting and that they were a retaliation for the claimant's own resistance to the POA before his employment at Wetherby. Mr Gormley did consider that possibility but noted that a number of those complaining were not POA members. The claimant noted that the POA chair, Ms Davies, had still supported those individuals at the disciplinary hearing and that it was common for people to be represented by separate POA reps. He made a similar comment regarding the evidence of Ms Barnes being discredited. He acknowledged his behaviour towards Ms Y and confirmed that he should not have formed a friendship. As regards the breach of IT policy he said that it was Mr Slater who had breached the policy in allowing the claimant access. The claimant complained that Mr Gormley had not explained how he had reached his decision and, in particular, how the balance of probabilities led to him upholding the allegations.

68. Following the hearing, Ms Whitehead reviewed the investigation report, the notes of the disciplinary hearing, Mr Gormley's outcome letter and the claimant's appeal letter. As regards Ms Keenan's allegation, having

received a floor plan of the room, she considered that the behaviour of the claimant as alleged could still have taken place.

69. She wrote to the claimant 24 August saying that her appeal outcome would be delayed as she was about to go on annual leave.

70. Ms Whitehead wrote to the claimant 9 September with her decision to dismiss his appeal.

71. She considered that his relationship with Ms Y was inappropriate. He was aware that she was a vulnerable person yet continued to engage in wholly inappropriate correspondence. Her view was that this allegation was of such a serious nature that on its own it warranted the sanction of dismissal.

72. She found that the claimant had the opportunity to ask questions of witnesses and Ms Mann at the disciplinary hearing. He had taken the opportunity to do so as was clear from the transcript of the hearing. She could not see any reference to the claimant having requested that additional witnesses be questioned.

73. Whilst the claimant contended that he was not aware that dismissal would have been an outcome, she concluded that he was made aware prior to the disciplinary hearing of dismissal as a possible outcome. Further, the claimant had accepted some of the charges of gross misconduct and therefore dismissal was an outcome that was within the band of reasonable responses for the level of misconduct found to be proven. She believed that the decision to dismiss was the correct outcome, it being apparent that the claimant did not take responsibility for his actions and had apologised only because he thought it would result in him retaining his job.

74. Ms Whitehead accepted that there had been procedural errors in the investigation such as a mislabelling of the reasons for the delay and the overall investigation process had taken longer than provided for under the respondent's policies. However, she took the view that the procedural errors did not render the investigation unfair or prevent the claimant from putting forward his case. She considered the claimant should not have accepted the allegations against him if he believed that the investigation was fundamentally flawed.

75. For her, a senior member of staff, not understanding the gravity of his actions and not demonstrating that he had learned not to conduct himself in the same manner in the future, posed a significant risk to the respondent if he remained in its employment.

76. In a claim of unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to conduct under Section 98(2)(b) of the Employment Rights Act 1996 ("ERA"). This is the reason relied upon by the respondent.

**Applicable law**

77. If the respondent shows a potentially fair reason for dismissal, the tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the ERA, which provides:-

> *" [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case".*

78. Classically in cases of misconduct a tribunal will determine whether the employer genuinely believed in the employee's guilt of misconduct and whether it had reasonable grounds after reasonable investigation for such belief. The burden of proof is neutral in this regard. The tribunal agrees with the claimant, that more will be expected of a reasonable employer where the allegations of misconduct and the consequences for the employee are particularly serious, for example, potentially career ending.

79. The tribunal must not substitute its own view as to what sanction it would have imposed in particular circumstances. The tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.

80. A dismissal, however, may be unfair if there has been a breach of procedure which the tribunal considers as sufficient to render the decision to dismiss unreasonable. The tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

81. If there is such a defect sufficient to render dismissal unfair, the tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142**, determine whether and, if so, to want degree of likelihood the employee would still have been dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee

would have been dismissed fairly in any event had a fair procedure been followed, then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

82. In addition, the tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the claimant and its contribution to her dismissal – ERA Section 123(6).

83. Under Section 122(2) of the ERA, any basic award may also be reduced when it is just and equitable to do so on the ground of any kind conduct on the employee's part that occurred prior to the dismissal.

84. Applying the aforementioned legal principles to the facts as found, the tribunal reaches the conclusions set out below.

## Conclusions

85. The claimant was dismissed for a reason related to conduct. Mr Gormley came to the view that the allegations upheld, when looked at as a whole, amounted to conduct such as to justify the claimant's dismissal. The claimant has not suggested that there was any other reason for dismissal. He has argued that there was a degree of collusion between those making the allegations and that the POA exerted an influence over the complainants motivated by the antipathy towards that union in a previous position. There is no evidence that this was the case. In any event, Mr Gormley was certainly uninfluenced by any such factors.

86. The focus of the claimant's criticisms of the decision to dismiss relate to breaches of procedure. The claimant has spent some considerable time and effort in setting out all of the procedural defects upon which he relies. Whilst the tribunal in its reasons has not dealt with every one of them, it has considered all of the criticisms.

87. One of the primary criticisms was of delay. The investigation did take longer than the 28 days provided for in the policy. The policy also provided for extensions being applied for and potentially authorised. Such process was followed, with reasons given for the need for additional time stated variously as witness availability and annual leave. As well as the person under investigation, the claimant was also a relevant witness and he was interviewed after the complainants. There was then a further delay after the investigation report had been produced by reason of Mr Gormley wishing the claimant and Ms Y to be reinterviewed after the production further email evidence. The claimant's view is clearly that any breach of procedure goes to the fairness of the decision making. Employers who fail to meet the standards they have committed to in their own procedures do expose

themselves to an adverse finding. However, the tribunal must consider the failings in the round and whether they are capable of rendering the decision to dismiss unfair. Whilst undoubtedly additional stress was caused to the claimant in waiting for the process to be concluded, in no sense was there a delay such that recollections of witnesses became impaired or the claimant himself was unable to answer properly the allegations against him. Whilst the process may have taken longer than envisaged in the respondent's policy, this was a case of some complexity with a significant number of witnesses and where the respondent could not be said to have been in any sense dragging its feet. Indeed, leaving aside the policy timelines, the whole process was conducted as quickly as might have been reasonably expected in a case of this nature. Any delays in the time it took for the process to be completed certainly does not, in the circumstances, render dismissal unfair.

88. The claimant complains regarding the delay of the provision to him of the terms of reference for the investigation. Updated terms of reference were provided to him on 18 November in circumstances where they had only just been settled. This was before the claimant was interviewed. Whilst the original terms of reference were not provided to the claimant, he was not disadvantaged in any sense by only receiving the updated terms of reference. Fundamentally, before the claimant was interviewed as part of the investigation and certainly then during the disciplinary process, he was well aware of the nature of the allegations against him.

89. The claimant complains about the HR case adviser guidance document provided to Mr Gormley. This was not provided to the claimant, but the lack of provision of the HR advice to the decision maker is wholly unsurprising. It did not prevent the claimant from understanding the case against him or making all appropriate representations. The document sought to summarise the investigation report and gave guidance as to the options open to Mr Gormley as decision-maker. It did not prescribe any outcome and the tribunal accepts Mr Gormley's robust evidence that he made his own decisions on HR advice but not on their bidding. There is no evidence that he had any regard to advice to consider the effect on other members of staff of a lighter penalty.

90. The claimant complains that breaks were taken in the disciplinary hearing for Mr Gormley to take advice. Again, such breaks were entirely reasonable and permissible. There was no requirement for what was said during those breaks to be recorded and for the claimant to be advised of the nature of any advice obtained by Mr Gormley. The presence of the same HR adviser, who had drafted the written guidance, does not render the process unfair. Again, there is no evidence that Mr Gormley was told that he had to reach a particular conclusion.

91. The claimant complains that he was not in a position to adequately put forward his defence at the disciplinary hearing and question witnesses. The tribunal does not accept that he was so restricted. He was fully able, either directly or through his union representative, to state his case. Any misunderstanding as to the nature of questions which could be put to any of the witnesses is not evident from the disciplinary transcript. Indeed, it is clear that significant and searching questions including of a personal nature were put to individuals bringing the complaints.

92. The complaints against the claimant arose from August 2021 commencing with a grievance raised by Ms Buckler. In October Ms Rothera raised allegations and then a number of other allegations came forward. The respondent was presented with a number of complaints from a number of individuals which were, on their face, genuine and credible. Certainly, an investigation was justified.

93. The result of the investigation was a comprehensive report which summarised all of the interviews, broke down the precise nature of what was being complained about and recorded the claimant's own view of what was being said against him. It is clear that the investigation was a genuine attempt to balance evidence in favour and against the alleged behaviour having occurred. Whilst some allegations did amount to one word against another, there were a number of examples where there was at least a partial acceptance by the claimant as to the words used and certainly significant documentary evidence corroborating the allegations made by Ms Y. The claimant could recall complementing Ms Rothera on a dress she had worn at an interview. He realised that he should not have made the gymslip comment to Ms Barnes. He expressed himself as "ashamed" and "stupid" as to how he had conducted himself with Ms Y. The allegations were not all general in their nature and could be related to identifiable events within the workplace.

94. Again, during investigation, the allegations were all put to the claimant and he had an opportunity to respond. Ms Mann may have fallen into potential error by failing to reinterview the claimant, having received further email disclosure from Ms Y, but any defect was avoided by Mr Gormley appreciating that this further investigation ought to be undertaken and form part of the report and asking Ms Mann to effectively reopen her investigation.

95. An element of balance and genuine decision making can be observed in the allegations of Ms Buckler not being considered to be ones which ought to be taken to and tested at the disciplinary hearing. Indeed, the allegation regarding the sending of the link to a firearm, whilst progressed to the disciplinary stage, was not upheld against the claimant. There was within

the respondent's process a genuine enquiry seeking to get to the truth of what had occurred and evaluate what that truth amounted to.

96. Mr Gormley might not always have fully appreciated the extent of the claimant's admissions – whether they were admissions of what he had done and/or also his blameworthiness or what his actions amounted to. Nevertheless, he demonstrated, not least by his calling of witnesses at the disciplinary hearing, a desire to get to the truth and make his own evaluation of what had occurred. That is what he did.

97. Ms Rothera gave evidence about incidents occurring in October 2021 with some detail, providing a credible version of events and where it was open reasonably to Ms Mann and then Mr Gormley to accept and prefer her evidence rather than the claimant's denial. The claimant, again, accepted that he had complemented her on her dress and had been party to a conversation about her lips. There had been an interview feedback conversation, regardless of any dispute as to the exact day it occurred.

98. The allegations of Ms Barnes were with reference to an occasion in October 2021 and very specific in terms of the reference to the gymslip. What was alleged to have been said by the claimant was, at least in part, accepted by him. The respondent could reasonably conclude that comments had been made which were inappropriate in the workplace. Whilst Mr Gormley has referred (inaccurately) to the claimant having accepted a charge of harassment with mitigation and whilst Ms Barnes herself accepted that she had not felt harassed, Mr Gormley reasonably concluded that the claimant was guilty of unprofessional conduct.

99. Ms Keenan's allegations related to a specific date where she had met with the claimant. Again, whilst the claimant disputed her evidence, the respondent could reasonably prefer her version of events. The photograph of the room was available at the appeal stage and whilst it might reasonably have been sought earlier as evidence to be viewed by Mr Gormley (as he accepted), it was not conclusive as to the claimant and Ms Keenan's exact positions on the day in question. The claimant might easily have moved in his chair to a position whereby he was within reach of Ms Keenan. It did not render the acceptance of her evidence unsafe.

100. The evidence of Ms Y was substantially supported by corroborating contemporaneous email evidence and admissions at least in part by the claimant of what had been said. The claimant's case was that this was an ordinary friendship rather than a senior member of staff seeking to promote a different kind of relationship. On the basis of the evidence before him, Mr Gormley could and did reasonably conclude that there was unwanted conduct of a romantic nature by the claimant in terms of the gifts provided and the way in which the claimant addressed Ms Y. Mr Gormley reasonably

concluded that this caused Ms Y some legitimate disquiet, given not least the difference in seniority between her and the claimant.

101. As regards the breach of IT policy, Mr Gormley reasonably concluded on the basis of the claimant's own evidence that he had taken control of Mr Slater's computer and deleted an email in his inbox. He reasonably concluded that Mr Slater felt in no position to prevent a much more senior member of staff from doing so. The primary argument as regards this allegation is that the policy relied upon referred to staff accessing the network through another person's login details. The tribunal appreciates that this is not the exact nature of the conduct alleged against the claimant but does not consider there to have been any misunderstanding on the respondent's part as to what the claimant had done and that it was impermissible regardless of the exact identification of a breach of policy. Mr Gormley was clear in the disciplinary hearing that he was aware that the claimant had not entered Mr Slater's account using Mr Slater's login details. It was reasonable to conclude that it was inappropriate for a more senior member of staff to take control of a more junior member of staff's email account.

102. The respondent was faced with credible allegations which were hard to determine. However, not least on the partial admission of the words used (albeit in contested contexts) they were on their face words with the potential to be harassing in nature.

103. There was no evidence of collusion which ought reasonably to have resulted in a different decision. Complainants had discussed between them some of their issues with the claimant, but there is no evidence of invented or coordinated accounts of the claimant's behaviour. The risk of unconscious bias had been effectively reduced by the claimant raising the very danger and the need for prejudicial and irrelevant, sometimes wild and historic, allegations against the claimant to be disregarded. Mr Gormley was completely aware of the need to dismiss those from his thoughts so as to avoid the potential of unconscious bias. He reasonably concluded that he was still able to consider the allegations of Ms Rothera which did fall within the terms of reference.

104. Mr Gormley was then left with a number of allegations which were credible, corroborative of each other and which did suggest a wider and more serious issue of the trust and confidence the respondent could have in the claimant.

105. The respondent had reasonable grounds after reasonable investigation for believing that the claimant was guilty of the acts of misconduct as found.

106. The question for the tribunal is then whether dismissal fell within a band of reasonable responses. The claimant had a long record of good service. This was weighed in the balance. On the other hand, he was in a position of seniority and with a level of experience which meant he could not have been reasonably unaware of the standards of conduct and behaviour expected of him and the potential consequences of him falling short of those standards. Whilst the claimant did accept a number of things which he had said and which again was considered by Mr Gormley to go to his credit, the claimant was reasonably concluded to have shown a lack of insight into his actions and their effect. Nothing the claimant said was reasonably regarded as not representing any form of undertaking or assurance that a previous pattern of behaviour would not be repeated.

107. The tribunal recognises with proper care and sensitivity that allegations of inappropriate conduct including sexual harassment vary in terms of their objective seriousness. Not every allegation of such conduct will justify the ultimate sanction of dismissal. Dismissal was based on the totality of the claimant's inappropriate conduct as determined by M Gormley. Much of what the claimant individually said and done might have been tolerated in many workplaces some years ago and the claimant may in the early days of his service have failed to recognise where appropriate boundaries, in particular with more junior members of staff, ought to be drawn. The world of work, however, has clearly changed and behaviour which might have been tolerated in the past is certainly not always now and rightly so. No one should be made to feel powerless or vulnerable in their workplace and that risk is greatest in circumstances of an imbalance in power. The claimant cannot reasonably have failed to be aware of that. It is very sad that the claimant's lengthy prison service career has ended in this manner and in circumstances where he perhaps did have a lack of self-awareness rather than necessarily any nefarious intent. Nevertheless, the nature of the respondent's conclusions, reasonably reached, when considered against the claimant's level of responsibility are such as to render dismissal in all the circumstances as falling within the band of reasonable responses.

108. The claimant was fairly dismissed.

Employment Judge Maidment

Date 17 January 2024

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/