



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr David Pickering

**Respondent:** Secretary of State for Justice

**Heard at:** Reading (by CVP)

**On:** 11-13 March 2024  
8 May 2024 (in  
chambers)

**Before:** Employment Judge Reindorf KC  
Mrs A Brown  
Mr D Wharton

**Representation:**

Claimant: In person

Respondent: Mr J Allsop (counsel)

## RESERVED JUDGMENT

- (1) The Claimant's complaint that the Respondent directly discriminated against him because of his sex when it decided to suspend him on 16 July 2020 was not presented within the time limit in s.123 of the Equality Act 2010. Therefore the Tribunal does not have jurisdiction to hear it and it is dismissed.
- (2) The remainder of the Claimant's complaints of direct sex discrimination fail and are dismissed.

# REASONS

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## INTRODUCTION

1. In an ET1 lodged on 29 July 2022 the Claimant presented claims of unfair dismissal and direct sex discrimination. ACAS notification had taken place on 7 June 2022 and the ACAS certificate was issued on 9 June 2022.
2. The Respondent denied the claims in its ET3 of 12 September 2022 and argued that the complaints were presented out of time.
3. At a Preliminary Hearing on 5 July 2023 the Employment Tribunal dismissed the unfair dismissal claim on the basis that it had been presented out of time and accordingly the Tribunal did not have jurisdiction to hear it. No decision was made as to whether the sex discrimination complaint had been presented out of time. This point was left to be decided by the Tribunal at the final hearing.

## THE EVIDENCE AND HEARING

4. The hearing was conducted remotely by video (CVP) over three days.
5. The Claimant gave evidence on his own behalf. For the Respondent, the Tribunal heard evidence from Dean Donoghue (Deputy Governor, HMP/YOI Feltham), Heather Whitehead (Deputy Director of Operations) and Emily Martin (Governor, HMP High Down).
6. All witnesses produced written witness statements and were subjected to cross-examination. There was an agreed trial bundle consisting of 563 pages. Several further documents were provided separately by the Claimant. The Tribunal was also provided with two videos containing CCTV footage.

## THE ISSUES

7. An agreed list of issues was produced at a Preliminary Hearing of 2 March 2023, as follows (save that the unfair dismissal elements have been removed):

### Liability

1. *Was the discrimination complaint made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:*
  - 1.1. *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates? The parties accept it was not.*
  - 1.2. *If not, was there conduct extending over a period? The Claimant alleges there was conduct extending over the period from 9 June 2020 to 25 April 2022.*
2. *Were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:*
  - 2.1. *Why were the complaints not made to the Tribunal in time?*
  - 2.2. *In any event, is it just and equitable in all the circumstances to extend time?*
3. *Did the Respondent do the following things:*
  - 3.1. *Decide to suspend the Claimant on or about 9 June 2020?*
  - 3.2. *Fail to adhere to timescales for reviews and for updates during the period of the Claimant's suspension between 9 June 2020 and 20 September 2021?*
  - 3.3. *Fail to offer the Claimant support during his suspension in the period between 9 June 2020 and 20 September 2021?*
  - 3.4. *Decide to proceed to a disciplinary hearing in relation to the*

*allegation of sexual assault against the Claimant on or about 24 June 2021?*

- 3.5. *Ignore the Claimant's character statements at the disciplinary hearing on 14, 15 and 20 September 2021?*
  - 3.6. *Assess evidence favouring the female complainer's account more favourably than evidence favouring the male Claimant's account during the disciplinary hearing ending on 20 September 2021.*
  - 3.7. *Decide to dismiss the Claimant on 20 September 2021.*
  - 3.8. *Refuse to uphold the Claimant's appeal on 25 April 2022.*
4. *In each case, was that less favourable treatment?*

*The Tribunal will decide whether the Claimant was treated worse than a woman was treated in materially the same circumstances or than a woman would have been treated in materially the same circumstances.*

*When making this comparison, there must be no material difference between their circumstances and the Claimant's.*

*If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.*

*The Claimant says he was treated worse than [Officer B], a female colleague who was accused of sexual assault by a male Prison Officer, [Officer C]. The Claimant says that the same investigating Governor investigated the allegations against [Officer B] and those against him but that he was treated less favourably than [Officer B].*

5. *If so, was it because of the Claimant's sex?*
6. *Did the Respondent's treatment amount to a detriment?*

#### Remedy

7. *Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the claimant? What should it recommend?*
8. *What financial losses has the discrimination caused the claimant?*
9. *Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?*
10. *If not, for what period of loss should the claimant be compensated?*
11. *What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?*
12. *Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?*

13. *Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?*
14. *Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*
15. *Did the Respondent or the claimant unreasonably fail to comply with it?*
16. *If so is it just and equitable to increase or decrease any award payable to the claimant?*
17. *By what proportion, up to 25%?*
18. *Should interest be awarded? How much?*

## **ANONYMISATION**

8. Before sending this judgment to the parties the Tribunal decided of its own initiative to make an anonymisation order in respect of Officers A, B and C.
9. In respect of Officer A, the Tribunal considers that the provisions of s.1(1) of the Sexual Offences (Amendment) Act 1992 ("the 1992 Act") are engaged. That provision prohibits identification or publishing of material likely to lead to identification of a complainant where "an allegation has been made" against a person that the person has committed an offence to which the 1992 Act applies against the complainant. The allegation must have been a formal allegation made in the context of potential criminal proceedings, where a criminal charge may be brought (*Ajao v Commerzbank* [2024] EAT 11). We heard undisputed evidence that Officer A had reported an allegation of a sexual offence against her by the Claimant to the police, who investigated the allegation. We therefore conclude that she is entitled to the protection of the 1992 Act, which we give effect by making an anonymity order under Rules 50(1) and (3)(b) of the ET Rules 2013.
10. If we are wrong and the 1992 Act does not apply to Officer A, we make an anonymisation order in her favour on the same basis (and for the same reasons) as the order made in favour of Officer C (below).
11. In respect of Officers B and C, the Tribunal takes account of the following factors:
  - 11.1. Officer B was alleged by Officer C to have conducted herself in a manner which amounted to serious sexual misconduct.
  - 11.2. The Tribunal heard and saw a considerable volume of evidence relating to Officer C's allegations against Officer B, and we make findings of fact about the details of those allegations below because the Claimant relies upon Officer B as a comparator in his sex discrimination complaint. We have found that the allegations made by Officer C against Officer B were as serious as those made by Officer A against the Claimant.

- 11.3. Officer C did not, as far as we were aware, make a complaint to the police or to any other person in circumstances which could lead to a criminal charge being brought against Officer B. Therefore he is not entitled to anonymity under the 1992 Act.
  - 11.4. The complaint made by Officer C against Officer B was dealt with by the Respondent in the context of confidential internal employment procedures.
  - 11.5. Neither Officer B nor Officer C was called as a witness in these proceedings. Therefore Officer B had no opportunity to refute or rebut the allegations of sexual misconduct made against her by Officer C, and Officer C had no opportunity to seek a privacy order on his own account or to inform the Tribunal's findings of fact which related to him.
  - 11.6. We do not consider there to be any pressing public interest in the identity of Officer C being revealed in these written Reasons. He is not a party to the proceedings and we can identify no reason why his identity as the alleged victim of sexual misconduct should be a matter of public interest.
  - 11.7. We consider that there may be some minimal public interest in the identity of Officer B being revealed as a former public office holder against whom allegations of sexual misconduct had been made. However, we consider this to be heavily outweighed by the fact that, as stated above, she did not have any opportunity to defend her reputation in the course of these proceedings. Furthermore she did not have a proper opportunity to do so during her employment by the Respondent, since the details of the allegations made against her by Officer C were never properly put to her.
12. Against that background the Tribunal is satisfied that Officers B and C had a reasonable expectation of privacy in relation to the allegations made by Officer C against Officer B. The publication of their identities in these written Reasons would therefore amount to an interference with their rights to privacy under Art 8 of the European Convention on Human Rights ("ECHR").
  13. The Tribunal is mindful that the principle of open justice is a strong one which promotes confidence in the administration of justice and the rule of law, and that this Tribunal has a limited power to derogate from it. The mere publication of embarrassing or damaging material is not a good reason for restricting the reporting of a judgment (*In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593).
  14. Nonetheless the Tribunal is satisfied that the officers' privacy rights substantially outweigh the principle of open justice and any freedom of expression rights under Art 10 ECHR which may be engaged. We do not consider there to be any pressing public interest in the identity of Officer C being revealed in these written Reasons. He is not a party to the proceedings and we can identify no reason why his identity as the alleged victim of sexual

misconduct should be a matter of public interest. We consider that there may be some minimal public interest in the identity of Officer B being revealed as a former public office holder against whom allegations of sexual misconduct have been made. However, we consider this to be outweighed by the fact that, as stated above, she did not have any opportunity to defend her reputation in the course of these proceedings. Furthermore she did not have a proper opportunity to do so during her employment by the Respondent, since the details of the allegations made against her by Officer C were never properly put to her. The Tribunal does not consider that the identities of Officers B and C are of any particular importance in the present case. Disclosure of their identities has the potential to cause significant harm to them.

15. Accordingly the Tribunal considers it to be necessary to make an anonymisation order in respect of Officers A, B and C. The order will be sent separately.

## **FINDINGS OF FACT**

### **The Claimant's disciplinary process and dismissal**

16. The Claimant was employed by the Respondent from 9 May 2016 in Feltham Young Offenders Institute ("Feltham"). At the relevant times he was a Prison Officer working on Feltham B Side.
17. During the Claimant's employment there was a culture of sexualised and otherwise inappropriate workplace banter amongst the staff at Feltham. The Claimant took a full and active part in this culture.
18. One of the Claimant's colleagues was Officer A. She began work in the Claimant's team in or around mid 2019.
19. On 29 June 2020 as the Claimant entered Swallow Unit he encountered a group of other staff comprising two male and two female officers, one of whom was Officer A and the other of whom was Officer Sarah Page. The Tribunal saw two 12 second CCTV clips which showed this encounter from different angles. Both show the Claimant embracing a male officer with a full body hug, and then walking towards Officer A who was facing him. She was standing and eating something out of a pot which she was holding in her left hand with an item of cutlery which she was holding in her right hand. The Claimant approached Officer A face on to pass her on her right hand side. As he did so he quickly reached out his right arm with the palm of his hand open and facing forward as if to pat Officer A in her crotch. The Tribunal is quite satisfied that the Claimant was aiming his right hand towards Officer A's crotch, and that he would have placed his hand on her crotch if she had not quickly batted his hand away with her right hand. By this time the two other male officers had passed out of sight. Immediately after this Officer A looked at the other female officer, who was standing facing her, and shook her head from side to side. The Claimant then performed a small jig or dance as he went into a door

behind Officer A. Officer A continued eating her food and appeared to be in conversation with Officer Page.

20. Officer A submitted an Intelligence Report on 13 July 2020 in which she complained about the Claimant's conduct. An Intelligence Report is the mechanism by which the Respondent's employees can bring a grievance or complaint. The matter was also reported to the police.
21. The Claimant was suspended by letter dated 16 July 2020 from Deputy Governor Dean Donoghue. The letter stated that the suspension was being implemented because of the serious nature of the allegations against the Claimant, that it would be kept under review and that the Claimant could make representations against the suspension to Governor Martin. The Claimant did not do so.
22. The Respondent decided not to investigate the Intelligence Report until the police investigation was concluded. During this period the Respondent maintained weekly contact with the Claimant through Governors Dixon and Barney. On 19 October 2020 Deputy Governor Donoghue again informed the Claimant's union representative that the Claimant could challenge his suspension by writing to Governor Martin. Deputy Governor Donoghue also stated that he might review the suspension if there were new factors to consider and might consider putting the Claimant on Detached Duty.
23. On or about 22 December 2020 Deputy Governor Donoghue was informed that the CPS did not intend to proceed with any charges against the Claimant. By letter of that day he informed the Claimant that a misconduct investigation would be carried out by Governor Emma Laws. He also stated that he had reviewed the Claimant's suspension and that he felt that because there was still an alleged victim it would not be appropriate for the Claimant to return to Feltham, but that a move to an alternative workplace would be suitable whilst the investigation was carried out.
24. Governor Laws conducted her investigation between 22 December 2020 and 10 June 2021.
25. Governor Laws interviewed Officer A (on 18 January and 8 February 2021), the Claimant (on 22 January and 8 February 2021), Officer Page (on 20 January 2021), Officer Chloe Harle (on 25 January 2021), and Officer Mandizvidza (on 4 March 2021). She examined the two CCTV clips and a WhatsApp message.
26. In her interviews Officer A said that the culture on the team was laddish and included a lot of sexual banter. She had not challenged the Claimant's behaviour previously because she was burying her head in the sand.
27. The Claimant said that in the incident of 29 June 2020 he had not been aiming for Officer A's crotch but for her thigh, and that he had in fact made contact with her thigh. He said that there was a culture of banter on the team, which included physical contact (hugging each other) and a WhatsApp group in



which the messages were not professional and were often of a sexual nature. He said both he and Officer A participated in this. He felt that Officer A's complaint was retribution for an argument he had had with her about her treatment of an inmate. He complained that the investigation was taking a long time, and again declined the offer to work at another prison pending the outcome.

28. Officer Page said that she had encouraged Officer A to report the incident of 29 June 2020 and had told her "it wasn't normal behaviour".
29. Officer Harle said that Officer A had a crush on the Claimant and had previously invited him back to her house, but he had declined. She said that Officer A had flirted with the Claimant. In a separate Intelligence Report Officer Harle stated that Officer A had expressed having feelings for the Claimant, but that he had a girlfriend who also worked at Feltham.
30. Officer Mandizvidza had been on long term sick for post-Covid complications and it had not been possible to interview him earlier. He said that there was banter between the Claimant and Officer A which was "both oral and touchy feely". He said he had witnessed the Claimant slapping Officer A on the bottom and that Officer A did not seem perturbed by it. He had raised it with her and she had said "That's just Pickering". He gave other examples. He felt that the Claimant had blurred boundaries. He had raised the issue of unprofessional conduct at a staff meeting on 19 February 2020, which resulted in an email being sent to staff on Swallow Unit from Custodial Manager Rittey on 22 February 2020 saying that inappropriate behaviour must cease immediately and would be dealt with as gross misconduct.
31. By email to Deputy Governor Donoghue on 25 January 2021 Governor Laws stated that the information she had so far would lend itself to suggest that Officer A may have been involved as an active participant in the behaviour that the Claimant was under investigation for. She said that she would await Deputy Governor Donoghue's "decision on Officer A".
32. In her investigation report, Governor Laws recommended that the case against the Claimant should proceed to a disciplinary hearing on the basis of three broad allegations. Allegation 1 was of "sexual assault / inappropriate touching" and related to the incident of 29 June 2020. Allegation 2 was of "inappropriate / sexual contact", namely that the Claimant had slapped Officer A's bottom on several occasions and had sent her an obscene WhatsApp message in April 2020. Allegation 3 was of "unprofessional conduct", namely that the Claimant had pretended to throttle Officer A on one occasion whilst making inappropriate sexual comments.
33. Governor Laws said that the commissioning body (Deputy Governor Donoghue) should consider whether Officer A's role should just be as a witness, or whether there was sufficient evidence about her involvement in inappropriate behaviour to place her at risk of investigation as well. The Tribunal accepts Deputy Governor Donoghue's evidence to the effect that he did not consider it appropriate to place Officer A under investigation because

no allegations of sexual harassment had been made against her by any purported victim.

34. On 24 June 2021 the Claimant was sent an investigation to a disciplinary hearing by Governor Emily Martin. The letter stated that the disciplinary charge was “Your inappropriate/unprofessional sexual conduct towards Officer [A]” which was said to constitute, if proven, “serious unprofessional conduct which would amount to gross misconduct”.
35. The Claimant’s disciplinary hearing was heard on 14, 15 and 20 September 2021 by Governor Martin. The delay between the letter of 24 June 2021 and the hearing was said to be accounted for by difficulties in obtaining the Claimant’s paperwork and summer leave commitments.
36. At the disciplinary hearing the Claimant maintained that in the 29 June 2020 incident he had been making a friendly gesture towards the Claimant and not aiming for her crotch. He said that on another occasion he might have touched her bottom inadvertently while trying to move around the office.
37. During the investigation and the disciplinary hearing the Claimant produced a number of statements from colleagues. It was not entirely clear to the Tribunal which of these was shown to Governor Martin before she reached her decision, since several of them were undated and the Claimant was not able to clarify their dates or whether they had been shown to her (or if so, when).
38. Several of these statements took the form of character references for the Claimant. These were an email from Custodial Manager Donna Copland dated 22 December 2020, a letter from Sophie Charles (rank not stated) dated 22 December 2020, an email from Officer Lee Brewster to Governor Martin dated 15 September 2021 and an undated document from Luke Butler (rank not stated). Two further undated statements produced by the Claimant related to Officer A: one from Officer Jordan Bryant which said that Officer A was flirtatious and had a reputation for sleeping around and made various other similar allegations against her; and one from Officer James Yaxley which was to the effect that Officer A was confident and self-assured.
39. We accept that Governor Martin considered such of these statements as she had sight of before she reached her decision. She principally considered them to be presented as mitigation evidence, and also took them into account as part of the overall picture.
40. At the reconvened disciplinary hearing of 20 September 2021 and by letter dated 29 September 2021 Governor Martin informed the Claimant that she had upheld allegations against him of unprofessional conduct and sexual harassment / assault, and that he was dismissed. Governor Martin found that in the 29 June 2020 incident the Claimant’s conduct was inappropriate, that the allegation that he had slapped her bottom was collaborated by Officer Mandizvidza and that the Claimant spoke to Officer A in a sexualised manner on occasion. She said that the Claimant’s boundaries were very blurred and

he had lost inhibition in the workplace. Governor Martin made no findings about the WhatsApp message as she could not be clear of its provenance.

41. A further character reference for the Claimant from Andrei Geica (rank not stated) was sent to Governor Martin on 21 September 2021. This email also contained allegations that Officer A had made sexually inappropriate comments.
42. The Claimant appealed against his dismissal by letter dated 6 October 2021 to Heather Whitehead (Deputy Director of Operations). His grounds of appeal were that the penalty was unduly severe, new evidence had come to light, the disciplinary proceedings were unfair and breached the rules of natural justice and the decision to dismiss him was against the weight of evidence.
43. In advance of the appeal hearing the Claimant sent a six page document to Ms Whitehead. Under the heading "New evidence" the document contained an excerpt from an Intelligence Report submitted by a male officer ("Officer C"), which was stated to have been "submitted on the 22/09/21". After some confusion, it became clear to the Tribunal that Officer C had submitted the Intelligence Report to the Respondent on or about 10 May 2021, and the Claimant had brought it to the Respondent's attention in connection with his appeal on 22 September 2021. This was two days after the final day of his disciplinary hearing at which Governor Martin had informed him of her decision to dismiss him.
44. The excerpt from Officer C's Intelligence Report contained a number of allegations that Officer B, a female colleague, had behaved in an unsolicited and unwanted manner towards him which had made him uncomfortable. He said that he was concerned that if he was alone with Officer B, accusations could be made against him. He alleged that Officer B had:
  - 44.1. approached him while he was sitting at a desk and sat on his leg, and then manoeuvred herself more squarely onto his lap, where she stayed for about 30 seconds;
  - 44.2. given him a full body hug, forcing her breasts into his chest;
  - 44.3. rubbed his knees while sitting next to him;
  - 44.4. suggestively stroked the end of his baton, which was hanging near his crotch area;
  - 44.5. leaned over the computer where he was working and opened her mouth, saying "Is this wide enough? I can open wider";
  - 44.6. said to him "That's what you lads are good at isn't it? Bashing them out?"; and
  - 44.7. tapped her knees whilst sitting to indicate to him that he should sit on her lap.

45. The Tribunal makes the following findings of fact about what occurred after Officer C submitted his Intelligence Report (although this information was not before Ms Whitehead at the Claimant's appeal hearing):
- 45.1. On 11 May 2021 Officer B had an informal meeting with Custodial Manager Paul Bonner about Officer C's allegations.
- 45.2. By email on 13 May 2021 CM Bonner informed Deputy Governor Donoghue that he had met with Officer B and that she had "accepted what was put to her and took responsibility for her action".
- 45.3. CM Bonner summarised his meeting with Officer B of 11 May 2021 in a letter to her dated 14 May 2021. In this account, the description of Officer C's allegations that he put to Officer B was that she had made "inappropriate gestures". He stated:
- When this was put to you clearly remembered an incident where you had sat on his lap. At the time you were open and honest and admitted to this happening.*
- I then explained this had made Officer C very uncomfortable, and what could have happened if the roles were reversed and the need for all staff to challenge inappropriate behaviour in the work place as it is unacceptable.*
- 45.4. The Tribunal finds that what CM Bonner meant when he referred to "what could have happened if the roles were reversed" was that if Officer C had treated Officer B in the alleged manner, it would have been a more serious matter because Officer C was a man and Officer B was a woman.
- 45.5. CM Bonner went on in his letter to set out the mitigation put forward by Officer B, which was that she was new to the team and was trying to fit in, that she did not mean to make Officer C feel uncomfortable and that she would apologise to him. CM Bonner then stated that he had decided not to take formal action on this occasion, because Officer B had been "upfront" and had "made a positive start" in the team. He said that if the conduct happened again he would not hesitate to take formal action.
- 45.6. On 8 July 2021 Officer B submitted an Intelligence Report containing a complaint that Officer C continued to be "handsy" with male members of staff and that there continued to be inappropriate banter. She said that she did not understand how this was allowed to continue given his previous complaint against her.
46. The Claimant's appeal hearing took place on 18 February 2022 chaired by Heather Whitehead (Deputy Director, Operations). The Claimant repeated that he had not made sexual contact with Officer A and accepted that nonetheless his behaviour had fallen below professional standards. During

the hearing Governor Laws gave an account of the delays that had taken place in the disciplinary process. She said that these were in part accounted for by delays in being able to speak to witnesses due to illness.

47. By letter of 25 April 2022 Ms Whitehead dismissed the Claimant's appeal. She found that although Officer A had been complicit in some of the inappropriate behaviour, she was newer in post than the Claimant and had felt that she had to fit in with the culture. As to the incident of 29 June 2020 she found that although the Claimant had not made contact with Officer A's crotch, this was only because she had batted his hand away. She accepted that Officer Mandizvidza had witnessed the Claimant slapping Officer A on the bottom. She found that these were not minor lapses in judgment but a pattern of behaviour. She found that Officer C's complaint about Officer B was not comparable, because it had not been raised to Governor Martin and she had no knowledge of it.
48. The Claimant gave evidence that at some point after the conclusion of his appeal he had seen Officer Page at his partner's graduation ceremony. He said that Officer Page told him on that occasion that she was very sorry for lying about him, that she had been off sick with stress at the time of his disciplinary hearing and that she had been told that she "had to come in". The Claimant did not call Officer Page to give evidence about this. He did not suggest that Governor Martin or Ms Whitehead were aware of it at the time that they made their decisions in his disciplinary process.

## THE LAW

### Direct sex discrimination

49. By s.13(1) of the Equality Act 2010 ("EqA") an employer directly discriminates against an employee if it treats him less favourably because of a protected characteristic than it treats or would treat others. By s.4 EqA the protected characteristics include sex.
50. In a discrimination case, the Claimant must prove on the balance of probabilities facts from which the Tribunal "could conclude", in the absence of an adequate explanation, that the Respondent has committed an act of unlawful discrimination ("the first stage"). This means that the Claimant must show facts from which the Tribunal could conclude that:
  - 50.1. the Claimant has been subjected to a detriment (s.39(2)(d) EqA); and
  - 50.2. in being subjected to the detriment the Claimant has been treated less favourably than a real or hypothetical comparator was or would have been treated (s.13(1) EqA). There must be no material difference between the circumstances of the claimant and the comparator (other than the protected characteristic) (s.23 EqA); and

- 50.3. that an effective cause of the difference in treatment was the protected characteristic (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor* [1997] ICR 33 EAT).
51. At the first stage the Tribunal should consider all the primary facts, not just those advanced by the Claimant. The Tribunal should assume that there is no adequate explanation (*Hewage v Grampian Health Board* [2012] ICR 1054 §31, Guideline 6 in *Igen*). “Could conclude” means “a reasonable tribunal could properly conclude” from all the evidence before it (*Madarassy v Nomura International plc* [2007] ICR 867 CA).
52. There does not have to be positive evidence that the difference in treatment is the prohibited ground in order to establish a prima facie case (*Network Rail Infrastructure Ltd v Griffiths-Henry* UKEAT/0642/05/CK at §18).
53. The decision that the Tribunal “could conclude” that there was discrimination may rely on the drawing of inferences from primary facts: guideline 5 in *Igen v Wong* [2005] IRLR 258 CA.
54. If the burden of proof shifts, the Respondent must show that it did not commit those acts and that the treatment was not on the prohibited ground: guidelines 9 and 10 in *Igen* (“the second stage”).
55. At the second stage the Tribunal must assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the prohibited ground was not a ground for the treatment in question: guideline 12 in *Igen*.
56. Tribunals should be careful not to approach the *Igen* guidelines in too mechanistic a fashion (*Hewage* §32, *London Borough of Ealing v Rihal* [2004] EWCA Civ 623 §26). The question is a fundamentally simple one of asking why the employer acted as he did (*Laing v Manchester City Council* [2006] ICR 1519 at §63).
57. In every case the Tribunal should consider the totality of the primary facts and examine indicators from the surrounding circumstances and the previous history (*King v Great Britain China Centre* [1992] ICR 516 CA).
58. By s.124 EqA where the Tribunal upholds a complaint of discrimination it may make a declaration as to the rights of the parties in relation to the matters to which the proceedings relate and/or an order for compensation and/or a recommendation. The Tribunal is not obliged to make an order for compensation if it does not consider it just and equitable to do so.

### **Time limits for complaints of discrimination**

59. Generally, complaints of unlawful discrimination must be presented to the Tribunal within three months of the act complained of (taking account of any automatic extension to allow for mandatory ACAS Early Conciliation), unless

the Tribunal concludes that it is just and equitable to extend the time for bringing the complaint (s.123 EqA).

60. If a number of different acts are complained of the Tribunal may conclude that they form a single “act extending over a period”. In such cases, the time limit begins to run from the end of the period (s.123(3)(a) EqA).

## CONCLUSIONS

### Comparators

61. The Claimant relied on Officer B as a comparator.
62. Both the Claimant and Officer B were accused of serious and unwelcome physical and verbal conduct of a sexual nature by a colleague. The allegations faced by each of them were sufficiently similar that we conclude there was no material difference between them at the point at which the allegations were presented. Both the Claimant and Officer B were at the same rank and in the same team. These circumstances were comparable. We do not regard it as relevant that Officer C had not expressly stated that his allegations against Officer B were of sexual harassment. The nature of the allegations plainly met that description. Furthermore we do not regard it as a material distinguishing factor that Officer B accepted a degree of blame. The Claimant accepted a similar degree of blame, in that he agreed that he had touched Officer A’s thigh.
63. In relation to the decision to suspend the Claimant we are not persuaded that Officer B’s case is distinguishable because she was new to the team. That (as well as the fact that she had accepted some blame) was a factor which CM Bonner took into account after meeting with Officer B, rather than at the stage at which a decision was made about whether to suspend her pending investigation. Therefore these aspects of Officer B’s case are not relevant to the comparison exercise when considering the decision to suspend the Claimant. We find that Officer B is an appropriate comparator for the Claimant in relation to this part of his case.
64. However we do not find that Officer B is an appropriate comparator for any of the Claimant’s complaints which postdate the decision to suspend him. Officer B was never placed under suspension, investigated or subjected to a disciplinary hearing, so her circumstances were not comparable to the Claimant’s circumstances from the point at which he was suspended.
65. We also considered the Claimant’s argument that Officer A was in some sense an appropriate comparator because Officer Martin had suggested during the investigation stage that she might have taken part in the culture of inappropriate sexual banter and that there could be a basis for suspending and investigating her. In this context we took account of the “character references” produced by the Claimant, in some of which allegations of sexual impropriety were made against Officer A. We conclude that Officer A was not

an appropriate comparator because no allegations of sexual harassment were made against her by any purported victim, so she was not in a similar situation to the Claimant.

66. Therefore, in relation to the complaints other than the complaint about the decision to suspend the Claimant we have considered only whether the Claimant was treated less favourably than a hypothetical female comparator would have been treated in like circumstances.
67. In relation to the allegations during the Claimant's suspension, the characteristics of the hypothetical comparator are that she is a female officer at the same rank and in the same team as the Claimant who was accused of serious sexual misconduct against a fellow officer, placed under suspension and subjected to a formal investigation.
68. In relation to the allegations during and after the Claimant's disciplinary hearing, the hypothetical comparator is a person with those characteristics who was subjected to a formal investigation and a disciplinary hearing in which the evidence was similar to that given in the Claimant's investigation and disciplinary hearing.

### **The decision to suspend the Claimant**

69. We find that the Claimant's suspension was an act of direct sex discrimination, but that it was presented out of time and there are no grounds for us to exercise our discretion to extend time for the presentation of the complaint.
70. The suspension was plainly a detriment.
71. Officer B was not suspended when Officer C made allegations against her; rather, on 11 May 2021 she was called to an informal meeting with CM Bonner who put to her what appears to have been a partial and significantly watered down version of the allegations and decided not to take matters further. He reported to Governor Donoghue on 13 May 2021 that Officer B had accepted responsibility for her actions, when in fact she had not because the full extent of the allegations was never put to her. We think that he swept the matter under the carpet.
72. By contrast the Claimant was not called into an informal meeting to discuss the allegations made against him (still less a watered down and incomplete version of them); instead, he was suspended and a formal disciplinary investigation was launched.
73. We therefore find that the Claimant was treated less favourably than Officer B in comparable circumstances.
74. In our view the Claimant has shown facts from which we could conclude that the reason why Officer B was not suspended was because she was a woman. We infer this from the statement made by CM Bonner in his meeting with her



that she should consider “what could have happened if the roles were reversed”. We have found that what he meant by this was that he would have treated the matter more seriously if she had been a man and Officer C had been a woman.

75. We therefore conclude that the Claimant has shifted the burden of proof in relation to this allegation.
76. We were not satisfied with the Respondent’s explanation about what happened in Officer B’s case. CM Bonner was not called to give evidence, so the Respondent gave no account of why Officer B had not been suspended. The Respondent did not produce Officer C’s Intelligence Report of 10 May 2021 (the Tribunal only saw this because it was partially replicated in the Claimant’s appeal documents) or any other substantive documentary evidence about the matter. Furthermore the Respondent pursued a misguided defence that Officer C’s allegations against Officer B were not sexual harassment allegations because Officer C had not expressly described them as such, despite the fact that, substantively, they amply fitted that description.
77. We therefore find that the Respondent has not provided an explanation which is sufficient to show that it did not discriminate against the Claimant because of sex. Accordingly this part of the Claimant’s complaint succeeds in principle.
78. However we also find that the complaint was brought out of time and that there is no basis for an extension of time. Our reasons are as follows:
  - 78.1. The complaint made is specifically about the decision to suspend the Claimant and not the maintenance of the suspension thereafter. Thus this is a complaint about a single decision taken on or about 16 July 2020 and there is no question of it being about an act extending over a period (note that although the List of Issues says that the Claimant was under suspension from 9 June 2020, in fact his suspension began on 16 July 2020).
  - 78.2. The ET1 was lodged on 29 July 2022 following ACAS Early Conciliation between 7 and 9 June 2022. Therefore the ET1 was lodged 21 months and 8 days out of time.
  - 78.3. No application was made by the Claimant for an extension of time, and no reasons were advanced by him as to why the claim was not lodged in time or why the Tribunal should exercise its discretion to extend time on the just and equitable basis. The Claimant was aware that the time point would be considered at this hearing, since it was contained in the List of Issues and had specifically been held over following the Preliminary Hearing at which his unfair dismissal complaint was dismissed.

78.4. Accordingly the Tribunal does not exercise its discretion to extend time for the presentation of this complaint, which is dismissed on the basis that the Tribunal does not have jurisdiction to determine it.

79. In any event, the Tribunal would have concluded that it is not just and equitable to make an award of compensation in relation to this complaint, since the Claimant's conduct was such as to merit his suspension and the Respondent acted entirely properly in placing him under suspension.

### **Other complaints**

80. The remainder of the Claimant's claims fail.

81. We were troubled by the evidence we heard that revealed a culture of inappropriate and sexualised behaviour amongst the workforce in Feltham. We were particularly concerned about this in light of the fact that the staff at Feltham are *in loco parentis* of vulnerable young people. We were not satisfied by the evidence we heard from Governor Martin about efforts made to change the culture after the Claimant's dismissal.

82. That having been said, we find no evidence on the basis of which we could conclude that the hypothetical comparator would have been treated differently by the Respondent than the way in which the Claimant was treated, or that the reason for any of the treatment to which the Claimant was subjected was his sex. We reach this conclusion notwithstanding our findings above to the effect that Officer B was treated leniently by CM Bonner because she was a woman. We did not see evidence to suggest that CM Bonner's undue leniency towards Officer B could form the basis of an inference that there was a wider or more systemic bias towards women in the Respondent organisation. We are not persuaded that there was any basis upon which we could properly conclude that CM Bonner's attitude towards Officer B would be replicated in the case of the hypothetical comparator identified above.

83. We therefore find that the Claimant has not shifted the burden of proof in relation to these parts of the claim. If we are wrong about that, we are satisfied that the Respondent has shown that there was no discrimination whatsoever in the decisions and actions that it took.

### *Timescales for reviews and updates during the Claimant's suspension*

84. The Respondent did not dispute that the Claimant remained under suspension from July 2020 until his dismissal on 20 September 2021.

85. The Claimant did not give positive evidence about any failure to give him reviews or updates or to support him during the suspension. He addressed these issues only in closing submissions.

86. The Tribunal is satisfied that the Respondent kept in touch with the Claimant on a weekly basis through Governors Dixon and Barney, and that Deputy Governor Donoghue reviewed the suspension as appropriate (in particular on

or about 22 December 2020). Whilst the Tribunal appreciates that the Claimant's state of mind was seriously affected by his long suspension, we did not see any evidence that the Respondent subjected him to any detriment in relation to updates, reviews or support during this period. Even if it did, we were not shown any evidence to the effect that the hypothetical comparator would have been treated any differently or that the treatment was because of the Claimant's sex.

87. Although the delay in completing the disciplinary process does not appear as a separate complaint in the List of Issues the Claimant referred to it during the hearing at some length. Therefore for completeness the Tribunal considered the issue.
88. The Respondent stated that the reasons for the delay in completing the investigation report were the police investigation and the impact of Covid (including staff absence). Thereafter the delay was said to have been caused by problems in getting the Claimant's paperwork and summer leave commitments. We accept that the reason why the investigation did not commence until 22 December 2020 was because the Respondent was awaiting the outcome of the police investigation. Thereafter the investigation took a considerable time, and a further long delay occurred before the disciplinary hearing in September 2021. Although these were substantial delays, we accept that the reasons given by the Respondent were genuine and we find that there was no evidence on the basis of which we could have concluded that the hypothetical comparator would not have been subjected to a similar delay or that the delay was because of the Claimant's sex.

#### *Support during the Claimant's suspension*

89. We did not see any evidence of a failure to support the Claimant during his suspension. The Claimant did not give any evidence about this allegation. We find that he did not suffer a detriment in this regard. Even if he did, there was no evidence that the hypothetical comparator would have been treated differently or that the Claimant's sex was any part of the reason for any less favourable treatment.

#### *Decision to proceed to a disciplinary hearing*

90. The decision to proceed to a disciplinary hearing was a detriment. However, the evidence gathered during the investigation pointed strongly towards the Claimant's guilt. In particular, the Tribunal found that it was quite clear from the CCTV evidence that the Claimant had been aiming his hand at Officer A's crotch in the 29 June 2020 incident. Furthermore there was corroborating evidence from Officer Mandizvidza that the Claimant had slapped Officer A on the bottom and had engaged in inappropriate sexualised behaviour towards Officer A in particular. In those circumstances we conclude that the hypothetical comparator would also have been taken to a disciplinary hearing, and the decision to do so was not taken because of the Claimant's sex.

*Character statements*

91. The Tribunal was not clear about which of the Claimant's "character statements" were shown to the Governor Martin during the disciplinary hearing, although it was accepted that some were. We find that Governor Martin took into account those that were shown to her before she made her decision, insofar as it was appropriate for her to do so. In large part these were pure character references from friends or allies of the Claimant, and as such it would have been inappropriate to attach much if any weight to them. Governor Martin approached them principally as mitigation evidence but also took them into account as part of the overall picture. We do not find that the Claimant suffered a detriment in this regard. Even if he did, the hypothetical comparator would have been treated the same and the Claimant's sex was no part of the reason for any less favourable treatment.

*Assessment of evidence during the disciplinary hearing*

92. We find that Governor Martin did favour Officer A's evidence over the Claimant's evidence and that this was a detriment to him. However the Claimant did not persuade us that there was any basis on which we could conclude that the hypothetical comparator would have been treated in a different way. Furthermore Governor Martin preferred Officer A's evidence because it was corroborated, and not for any reason connected to the Claimant's sex.
93. In respect of the 29 June 2020 incident Governor Martin placed particular weight on the CCTV evidence, which was consistent with Officer A's account. Officer Mandizvidza's eye witness evidence corroborated the allegation that the Claimant had slapped Officer A's bottom and had behaved in an inappropriately sexualised manner towards her.
94. Governor Martin gave the Claimant the benefit of the doubt as to the WhatsApp message, and made no findings on this allegation on the basis that she had not seen the message on the mobile phone and so was not able to be sure that it had not been faked. The Tribunal considered this to have been a generous finding by Governor Martin, since Governor Laws had inspected the mobile phone and had seen the WhatsApp message. Governor Martin properly considered whether the possibility that the WhatsApp message had been faked undermined Officer A's credibility, but concluded that it did not.
95. The Tribunal noted that Governor Martin made a finding that the Claimant engaged in sexualised banter towards Officer A on occasion. We were not clear which of the allegations in the investigation report this fell under (if any), and there were no particulars of the banter in the dismissal letter. However we saw no basis for concluding that Governor Martin would have made a different finding in respect of the hypothetical comparator and we were satisfied that she did not make this finding because of the Claimant's sex. Rather, she made the finding on the basis of ample evidence – including that

given by the Claimant himself – that there was a “banter culture” in the team, in the context of which the Claimant had blurred boundaries about what was acceptable and had lost inhibition in the workplace, particularly in relation to Officer A.

*The Claimant’s dismissal*

96. For the reasons given in the section above the Tribunal was not persuaded that there was any basis on which we could conclude that the hypothetical comparator would not have been dismissed in similar circumstances or that the Claimant’s sex was any part of the reason for his dismissal. We find that the Claimant was dismissed because the allegations against him were extremely serious and the evidence of his guilt was compelling.

*The Claimant’s appeal against dismissal*

97. Ms Whitehead’s decision to dismiss the Claimant’s appeal on 25 April 2022 was a detriment to him. However we did not see any basis upon which we could conclude that the hypothetical comparator would have been treated differently in a similar situation or that the decision was taken because of the Claimant’s sex. We are not convinced that Ms Whitehead was right to disregard the evidence about Officer C and Officer B on the basis that Governor Martin had not been aware of that complaint. However, we saw no basis on which to conclude that she would have reached a different conclusion in the case of the hypothetical comparator or that she reached the conclusion because of the Claimant’s sex.

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**Employment Judge Reindorf KC**

Date 3 June 2024

**Sent to the parties on:**

4 June 2024

**For the Tribunal:**

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