



EMPLOYMENT TRIBUNALS

Claimant: Y

Respondent: Z NHS Foundation Trust

Heard at: London South Employment Tribunal **On:** 17-19 June 2019

Before: Employment Judge Ferguson (sitting alone)

Representation

Claimant: In person

Respondent: Mr C Milsom (counsel)

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The Claimant's complaint of unfair dismissal fails and is dismissed.
2. The Claimant's holiday pay complaint succeeds by consent and the Claimant is awarded £4,335.40.

REASONS

INTRODUCTION

1. By a claim form presented on 12 February 2018, following a period of early conciliation from 12 January to 12 February 2018, the Claimant brought complaints against the Respondent of constructive unfair dismissal, failure to pay notice pay and failure to pay holiday pay. The Respondent defended the claim. The notice pay claim was dismissed upon withdrawal in a judgment sent to the parties on 4 September 2018. The holiday pay complaint had been resolved prior to the final hearing and the parties agreed to the terms of paragraph 2 of the judgment above.

2. In summary, the Claimant resigned after the Respondent conducted disciplinary proceedings against him relating to allegations of inappropriate conduct towards two 15-year-old boys, which had also been investigated by the police.
3. During discussion on the final day of the hearing about the mechanism of giving judgment and the online register, the Claimant applied for an anonymity order under Rule 50 of the Employment Tribunal Rules of Procedure. The Respondent did not object. I made an anonymity order as regards the identities of the Claimant and the Respondent for the following reasons. Although the hearing had taken place in public with no prior anonymity order, there had been no attendance at the hearing by any journalists or other third parties and I considered that the publication of the judgment on the online register would engage the Claimant's rights under Article 8 of the European Convention on Human Rights. This was because of the nature of the factual background to the claim and in particular the history of reprisals against the Claimant, with serious implications for his mental health, including a risk to his life. I took into account that the Claimant has been acquitted of the criminal charges that were brought against him. Notwithstanding the parties' agreement to the order being made, I gave full weight to the principle of open justice and to the Convention right to freedom of expression, but considered that those matters were outweighed by the potential impact on the Claimant if his identity is published or easily discovered by publication of the Respondent's full name. To preserve the anonymity of both parties, I refer in this judgment to employees of the Respondent by their initials.
4. Separately, I note that pursuant to the Sexual Offences (Amendment) Act 1992, there is a prohibition on publication of any matter relating to the alleged victim(s) if it is likely to lead members of the public to identify them as such.
5. It is agreed that the Claimant resigned on 16 October 2017. The only issue in dispute was whether the Claimant was constructively dismissed. The Respondent did not seek to argue that, in the event that the Claimant was dismissed, any such dismissal was fair. The Claimant asserts that he resigned by reason of the Respondent's conduct and relies on the following as the grounds on which he contends there was a breach of the implied term of mutual trust and confidence:
 - 5.1. AP pressurised the Claimant to remain at work although this was against medical advice. AP also failed to make occupational health appointments for the Claimant despite promising to do so on 12 May 2017.
 - 5.2. CB and DB placed pressure on the Claimant to continue working on 29 October 2016.
 - 5.3. The Respondent carried out a flawed and biased investigation and did not take into account the Claimant's defence.
 - 5.4. The Respondent rushed the investigation in order to publish the findings of the investigation before the police investigation and court case were concluded.
 - 5.5. The investigation report confirmed a series of unfounded and serious accusations which SA reported as fact.
 - 5.6. The investigation report made reference to the possibility of the Claimant committing future sexual abuse against a minor.

- 5.7. The investigation report was a calculated response to the poor publicity and was based on a lack of evidence.
- 5.8. The Respondent disclosed a copy of the investigation report to the family of Minor A.
- 5.9. The Respondent appointed SA to the role of investigating officer and to the role of liaison officer for the families of the minors involved in this matter. The Claimant contends that this was inappropriate and meant that SA was not impartial and so did not carry out a fair investigation.
- 5.10. SA relied on false information during the investigation process and was pressurised by the families of the minors involved in this matter.
- 5.11. SA shared confidential information with the family of minor A as well as third parties against the instructions of the police.
- 5.12. The Respondent's decision to publish the findings of the investigation report as fact and post it to other agencies in the knowledge that the allegations were false, was unjust and breached the Claimant's confidentiality and right to a fair trial.
- 5.13. Statements in the investigation report were manipulated and changed to enhance the allegations against the Claimant.
- 5.14. The Respondent shared confidential and personal information relating to the Claimant with the family of minor A who in turn shared that information with a 'self-appointed paedophile hunter'.
- 5.15. It was impossible for the Claimant to be able to defend himself during the disciplinary process due to the extent of the information relating to the Claimant disclosed to the police, the families of the minors involved in this matter and with third parties.
- 5.16. The Respondent used its knowledge of the defence evidence to enhance the prosecution statements and to delete evidence.
- 5.17. On 7 February 2017, AP informed the Claimant that the Claimant would be dismissed on health grounds or for gross misconduct, that the Claimant would not return to work, and that the Claimant should consider resigning as it would 'all go away'.
- 5.18. On 4 April 2017, AP visited the Claimant's house and interrogated the Claimant for two hours and forty minutes, during which time AP also removed the Claimant's funding for counselling and applied more pressure on the Claimant to resign.
- 5.19. On 15 December 2016 and 17 December 2016, AP informed the Claimant that the Claimant had committed the crimes that he had been accused of and that the Claimant should therefore resign.

6. The issues for me to determine are whether those matters, individually or cumulatively, amounted to a breach of the implied term, whether the Claimant resigned in response to any such breach and whether he delayed in resigning such that he affirmed the contract.
7. I heard evidence from the Claimant and, on behalf of the Respondent, from DB and CB (Operational Team Leaders), SA (former Clinical Operations Manager), AP (Clinical Operations Manager) and GA (Associate Director of Quality and Compliance). The Claimant also submitted two unsigned letters/statements, one from a former colleague and one from his sister, neither of whom attended the hearing. I therefore gave them very little weight.

THE FACTS

8. The Respondent is a regional Ambulance Service NHS Foundation Trust. The Claimant was employed by the Respondent from 6 January 2003 until his resignation on 16 October 2017. At all material times the Claimant was employed as a paramedic.
9. In around October 2016 a number of the Claimant's colleagues noticed that he was behaving differently. In a one-to-one meeting in late October 2016 the Claimant broke down in tears. He also spoke to both CB and DB, with whom he worked closely, and said that he was having trouble sleeping and might be suffering from Post-Traumatic Stress Disorder. The Claimant was referred to Occupational Health ("OH"). An OH report dated 26 October 2016 stated that the Claimant had been suffering from disturbed sleep and nightmares for approximately 12 months. He was assessed as suffering from symptoms of severe anxiety and low mood. The report noted that the Claimant was "very keen to remain at work". The OH practitioner advised that the Claimant was fit to work, subject to a number of recommendations including the Claimant contacting his GP, removal from lone working and regular meetings with a line manager to assess his progress. She also said that the Claimant would benefit from referral to the trauma support programme, and that he may need trauma focused CBT. The Claimant was removed from lone working after this, but remained on front line duties.
10. The Respondent had recently introduced a scheme called TRIM (Trauma Risk Management), providing support to frontline staff suffering from PTSD as a result of difficult experiences they might have had in the workplace. CB, who was a TRIM practitioner, conducted an assessment with the Claimant on 29 October 2016.
11. As a result of the OH report the Claimant was referred for specialist counselling, funded by the Respondent.
12. On 25 November 2016 the Claimant was arrested following allegations of inappropriate conduct towards a 15-year-old boy, A. The Respondent was made aware of the allegations and the Claimant's arrest on the same day by A's father. NS, Acting Operational Unit Manager, was informed that the allegations were based on a large number of text messages and Facebook messages that the Claimant had exchanged with A. There were also allegations concerning the Claimant's attendance at a fireworks event at a local school on 5 November 2016, where the Claimant was alleged to have supplied Entonox ("gas and air") to A. NS was told that a complaint had also been made by the family of another boy, B, who was also 15 years old.

13. On 27 November 2016 NS met the Claimant at his home and informed him that he was suspended pending an investigation into the allegations. The suspension was confirmed in a letter of the same day which noted that the allegations were of “inappropriate conduct towards children”.
14. NS asked a Clinical Operations Manager, AP, to act as the Claimant’s point of contact for welfare matters. AP kept in regular telephone contact with the Claimant during his suspension.
15. On or around 6 December 2016, SA, a former Clinical Operations Manager at the Respondent Trust, was appointed to conduct a disciplinary investigation into the allegations. SA worked in a different operational area to the Claimant and had by this time left his permanent position with the Trust. He continued to work for the Trust as a bank worker, carrying out clinical paramedic duties and conducting internal disciplinary investigations.
16. The police detective in charge of the investigation of the allegations against the Claimant asked for representatives of the Trust to attend the police station in order to identify certain items of medical equipment that had been found during a search of A’s house. SA attended with two other Trust employees. They identified two items, a Pulse Oximeter and a blood glucose monitor, as Trust property. The detective explained the background of the allegations against the Claimant. He also told SA not to interview the Claimant about the allegations at that time, and not to interview the two boys. SA was told that he could, however, contact the boys’ parents in order to get some background information. The detective said that the police had over 30,000 messages that had been exchanged between the Claimant and A.
17. At another meeting that SA attended with the police and A’s family in early December 2016 the police informed SA that the Claimant had been targeted by a so-called “paedophile hunter”, who had published a photograph of the Claimant in his paramedic uniform on a website and accused him of grooming underage boys. The website also included an audio recording of the “paedophile hunter” calling the Claimant on the telephone and warning him off the alleged victims. The police underlined the need for confidentiality and said that information about the Claimant had been removed from the website.
18. On 13 December 2016 the Claimant attempted to commit suicide by taking an overdose. His mental health had deteriorated following contact from the “paedophile hunter” and his details being published online. His partner had also decided to leave him. AP had been on the telephone to the Claimant on 13 December and the Claimant’s partner told AP the Claimant had shut himself in his bedroom. AP was afraid the Claimant was trying to commit suicide so he immediately drove to the Claimant’s house. AP managed to get into the Claimant’s bedroom and prevented him from taking a large amount of pills. AP called an ambulance. The Claimant was concerned about going to a hospital where he would be known, so AP arranged for him to be sent to another hospital further away and the Claimant agreed.
19. AP remained in almost daily contact with the Claimant for the next week or so, and visited the Claimant in hospital. AP formed the impression that the Claimant’s condition was improving as time went on.

20. SA met the parents of both boys in the latter part of December 2016. They explained the background to the allegations and provided copies of some social media messages between the Claimant and both boys. SA took statements from A's mother and B's mother. SA subsequently interviewed a number of other people including the Event Manager of the first aid company who had provided first aid cover at the fireworks display the Claimant had attended.
21. The evidence gathered by SA at this stage may be summarised as follows.
- 21.1. A's mother said that the Claimant had befriended A over a period of time, mainly because of A's ambition to become a paramedic. A was in a relationship with B. B had become distressed one evening in November 2016 and told his mother that the Claimant was trying to come between him and A. B's mother looked at B's Facebook page and was shocked to discover conversations between B and the Claimant that were of a sexual nature and highly inappropriate. She informed A's mother, who then checked A's phone and she also discovered messages of a sexual nature. There was also an implication in the messages that the Claimant had given A Entonox at a fireworks event.
- 21.2. Messages between the Claimant and A included:
- 21.2.1. The Claimant saying to A "You have a perfect figure... Keep it... Well proportioned" and referring to A as "my own pup".
- 21.2.2. In an exchange about watching TV, the Claimant saying to A, "Time for the porn then lol"
- 21.2.3. The Claimant saying to A, "Your as old as the man you feel... I feel 15", and A responding "I'm 52 then lol". The Claimant was 52 at the time.
- 21.2.4. The Claimant saying to A, "Sweet i love you. Mine was at the end and we stood side by side by the barrier it felt right so good".
- 21.2.5. The Claimant giving an explicit description to B of a sexual experience he had had in the past.
- 21.3. It appeared that A was a fundraiser for a Community First Responder ("CFR") scheme and had asked the Claimant to attend the fireworks event to help provide first aid. Another employee of the Respondent who attended the fireworks event said that A and the Claimant set up at the event without permission, and he queried why the Claimant had taken Entonox to the event.
22. On 18 January 2017 AP and SA attended the Claimant's house in order for SA to introduce himself to the Claimant. The Claimant had agreed to this meeting a few days beforehand. SA did not ask the Claimant any questions about the allegations.
23. Around this time SA decided to halt his investigation until the police allowed him to proceed further. The Claimant also attended an OH appointment on 7 February 2017. A report of the same date noted diagnoses of depression and PTSD, and that the Claimant

had started a programme of CBT. It was also noted that the Claimant was suicidal. The OH practitioner advised there was no realistic chance of the Claimant returning to work in any capacity for the foreseeable future (6-12 months), and suggested any formal management meetings be put on hold for the time being.

24. The Claimant's suspension was extended a number of times over the following months and AP kept in regular contact with him.
25. AP visited the Claimant at home on 4 or 5 April 2017. The Claimant covertly recorded the meeting. He produced a transcript for the purposes of these proceedings, which was included in the Tribunal bundle. During the meeting AP and the Claimant had a lengthy discussion about the Claimant's health and the police and internal investigations against him. AP informed the Claimant that the Respondent would not be able to continue paying for his CBT sessions because he had already had ten sessions and they normally only fund six. AP's evidence to the Tribunal was that he wanted the Claimant to start thinking about the future and the possible outcomes, best and worst case scenarios. The Claimant alleged that AP had told him at this meeting that it had already been decided the Claimant would be dismissed. AP denied saying this. The Claimant ultimately accepted that there was nothing in the transcript to support his account. On the contrary, at one stage the Claimant suggested that his dismissal had been pre-determined and AP strongly denied it.
26. The Claimant had a telephone consultation with OH on 24 April 2017. The OH practitioner reported that the Claimant's emotional resilience had improved and he was gradually feeling more confident about attending meetings with management. The Claimant had said a member of management (presumably AP) had visited him at home and he found the conversation distressing. The practitioner's opinion was that the Claimant would be fit to attend meetings with management in the next few weeks provided he continued to improve at the same rate. He asked the Trust to take into account the Claimant's fragile emotional state and adopt an understanding and compassionate attitude.
27. On 3 May 2017 an ambulance was called to the Claimant's home because of another suicide attempt. DB and two other paramedics attended. AP was notified and went straight to the Claimant's home. The Claimant had written a suicide note and said that he had received threatening notes through the door. DB sat with the Claimant for some time, cooked him a meal and spoke to his sister on the phone. The Claimant was reluctant to go to hospital, but AP and DB convinced him that he should do so for his own safety. After this incident AP contacted the Claimant almost every day for two weeks to check he was okay.
28. In late May 2017 due to pressures of other work AP handed over the role of primary contact for welfare issues to DB.
29. In or around June 2017 SA was informed by the police that they had completed their investigation, so he could reopen the internal investigation and speak to the key witnesses.
30. The Claimant was invited to a formal disciplinary investigation, which took place on 11 July 2017. The Claimant was accompanied by his union representative. The evidence SA had gathered (outlined above) was presented to the Claimant. During the interview the

Claimant accepted that he had a friendly relationship with A, that they were friends on Facebook and that they would exchange messages daily. He thought the messages were appropriate, and said that he was giving A and B relationship advice. He accepted that the tone of the conversation with B about his past sexual experience was inappropriate and said he regretted it. As to the fireworks event on 5 November 2016, the Claimant accepted he had not sought the Respondent's approval to attend and did not have authority to take the Entonox. He said had explained to A how the Entonox equipment worked. He later returned from a break to find A self-administering the Entonox. The Claimant said he had stopped A, but accepted he did not report the incident to the Respondent.

31. The Claimant asked to adjourn the meeting and SA agreed. A further meeting was arranged for 25 July 2017.
32. On 17 July 2017 the Claimant wrote to the Respondent complaining about the disciplinary process. He alleged that the process had been "fundamentally prejudiced", complaining in particular about the decision to proceed "prior to the police decision" and the "repeated parallel communications with the complainant". He alleged the evidence from the complainant had been at best taken out of context and at worst intentionally misrepresented by the complainant. He also alleged breaches of employee and medical confidentiality. He claimed that Trust "representatives" had put pressure on him to remain at work when his condition was unstable, against the advice of his counsellor and GP, and had this not happened he would not have felt obliged to attend the fireworks event. Finally he said he had been told by AP and his union representative that a decision had already been made to sack him. He warned that if he were to be dismissed he would proceed with a claim of unfair dismissal.
33. On 20 July 2017 the Claimant attended the police station where he was formally charged with supplying a psychoactive substance (Entonox). He was also issued with a "C5 notice", which is used by the police force in question to warn individuals about possible sexual behaviour towards children and give them an opportunity to change their behaviour.
34. The resumed disciplinary investigation took place on 25 July 2017 and the Claimant was accompanied again by his union representative. SA asked the Claimant about some further messages that had been given to him by A's family. The messages read as follows:

Claimant: Did you like the entonox

A: Was very good but somewhat scary

Claimant: Perhaps take u to the next stage next time

A: What's that ... Alcohol?

Claimant: No

A: What?

Claimant: Keep on it till you become unconscious. Unconsciousness lasts approx. 5 – 10 secs

A: That would be interesting... Does that always happen

Claimant: Yes

A: That would be weird. How long does it take

Claimant: Between 20 to 50 breaths

A: That's weird

Claimant: But you have to be lying down for obvious reasons. Belts and collars need to be loosened

A: Oh yes I bet

Claimant: Has to be monitored and o2 and bvm available

A: Yes I bet... That dangerous

Claimant: No its not but it's alway prudent to have safe guards in place

35. The Claimant's explanation for this exchange was that he was trying to scare A about the effects of Entonox, i.e. to warn him off taking it again.
36. The Claimant was asked about the pulse oximeter and blood glucose monitor found at A's house. He denied giving either of them to A. He admitted giving a black pulse oximeter to A, which he said was an old one he purchased on EBay. He "categorically" denied giving him the one the police had showed him, which was yellow. As for the blood glucose monitor, the Claimant said he had an old one he had purchased that he was going to give to A but A told him he already had one.
37. There was also discussion at the meeting of a valentine's card received by A. It was anonymous, but had a phone number on it which was for the Claimant's mobile phone. The Claimant had shortly before this changed his mobile phone number and only a small number of people knew the number that was on the card. The Claimant denied sending the card.
38. At the end of the interview the Claimant presented a written statement. The statement thanked SA for conducting the interviews in a "calm and compassionate" way, and apologised to the Trust for any embarrassment or inconvenience caused. He claimed that A's family had manipulated the entire investigation, and pointed out that the police were not pursuing any charge of grooming. He alleged that there had been breaches of confidentiality. He said the messages that had been produced had been selected and deliberately taken out of context. They were not a true representation of the relationship between the Claimant and A. The Claimant also said he had concerns that B had been grooming A. He said that in hindsight it was a bad decision to take the Entonox, for which

he apologised and said it was “the overwhelming desire to help the community that fogged my decision making”.

39. On 1 August 2017 AP was asked by an Acting Operational Manager if he could attend a court appearance with the Claimant as his welfare support. AP called the Claimant to offer to attend court with him, and did so on 3 August 2017 when the Claimant entered a plea of not guilty to the charge of supplying a psychoactive substance.
40. Around this time SA was given what he describes as “explicit authority” by the police to speak to A and B as part of the internal investigation. He took statements from both boys. B’s statement, dated 29 August 2017, may be summarised as follows. He said that he and A began a relationship, with their parents’ knowledge and approval, in June 2016. He became aware that A had a close friendship with the Claimant. He initially thought the relationship was normal and that the Claimant was simply acting as a mentor to A. The Claimant requested B as a friend on Facebook and they began communicating via Facebook Messenger from August 2016. The nature and frequency of the messages became troubling and inappropriate. They were often of a sexual nature and the Claimant would ask in-depth questions about sexual interactions between A and B. At one point the Claimant suggested to B that he was suffering from depression, which B found extremely upsetting. On one occasion the Claimant came to see A and B while they were walking home from school. He was on duty at the time. After the Claimant left A showed B a small, yellow, medical monitoring device that the Claimant had just given him. Towards the end of November 2016 the Claimant and B had an argument. A found out what had happened and had been convinced by the Claimant that it was B’s fault. B believed that the Claimant had attempted to come between him and A.
41. A’s statement, dated 6 September 2017, may be summarised as follows. He said he had had ambitions to be a paramedic since he was about 10 years old. He first met the Claimant in 2011, when he visited the ambulance station around Christmas time and the Claimant was dressed as Father Christmas. In around 2016 the Claimant became involved in nominating A for an award for his CFR fundraising work. Over the following few months the Claimant sent A a Facebook friend request and they began to chat on a regular basis. A said “I trusted him and looked up to him because of his position as a paramedic”. On five or six occasions the Claimant came to find A when he would be alone walking home after school. On one occasion he gave A a yellow pulse oximeter. The Claimant said A could have it as a present as it was an old one. In July 2016 A began dating B, and he came out as gay to his family and friends. He confided this in the Claimant and asked for his advice. They exchanged more than 38,000 messages on Facebook. The Claimant started sending messages which were sexually graphic. He would call A “his puppy” and tell him he loved him. On one occasion he sent A an image of a naked boy, which A deleted.
42. As for the incident on 5 November 2017, A said that they arrived at the venue early and the Claimant showed him the equipment he had brought, including how to administer Entonox. The Claimant put it all together and then got A to take more than 40 deep breaths of the drug. The next thing he could remember was coming round and the Claimant was standing in front of him, and appeared to be playing with himself. A went outside and tried to pretend it hadn’t happened. After the event the Claimant said he wanted to buy A a burger. While in the queue the Claimant put his hand on A’s genitals over his trousers. A was too scared and embarrassed to tell anyone.

43. A had received a valentine's card that was "obviously from [the Claimant]". The image on the front was a puppy and the wording told A to call the Claimant, along with his phone number.
44. A believed that the Claimant had tried to come between him and B.
45. Because of the new allegations of sexual assault SA notified the police immediately and provided them with a copy of the statement. They asked SA to halt his investigation while they looked into it further. SA's understanding was that the police re-interviewed A and the Claimant. They then gave SA approval to continue his investigation. SA wrote to the Claimant on 13 September 2017, inviting him to attend a third investigation meeting on 26 September 2017.
46. At the meeting on 25 September the Claimant denied the new allegation and alleged that A's father had coached A to say it. SA also asked the Claimant about further messages that had been provided by A, including one where the Claimant had said "perhaps I should get you a dildo and lube for Christmas". The Claimant said it was a joke. The Claimant again said that the messages had been taken out of context.
47. At the end of the meeting the Claimant gave SA a document he had prepared which was a timeline of events on 5 November 2016. Describing the incident when A took the Entonox, he said:

"When I returned to the classroom A had the mouth piece of the Entonox to his mouth and it was clear that he had sampled it. I asked him what the bloody hell are you doing. He said its ok I've done it before... then said go on let me try it. I regrettably said go on, I wasn't thinking at that moment and he took 2 or 3 more breaths as I walked the 5 meters or so from the door to where he was still sitting on the chair. I took the mouth piece off him and called him a 'LITTLE SHIT and said, 'this could cost me my job'. I was angry with him and he was most apologetic."

48. SA produced an investigation report on 26 September 2017. He summarised his investigation and concluded that the relationship between the Claimant and A was possibly innocent at first, but it appeared that over time the Claimant preyed on A's vulnerability. He abused his position as a paramedic by becoming involved in A's life. He also abused his position by attending the fireworks event and taking a controlled drug without permission. SA noted that the actual incident in which Entonox was taken was the Claimant's word against A's. It was for the disciplinary panel to decide whether the offences of sexual activity in the presence of a child or sexual assault occurred. As to the theft allegation, the evidence strongly suggested that the Claimant did supply the items to A as gifts. He concluded:

"In conclusion the evidence shows that the relationship between [the Claimant], A and B was totally inappropriate. The direction that [the Claimant] steered conversations was at times perverse. His alleged actions at the ... firework party are nothing less than gross misconduct as is the alleged sexual assault in MacDonald's.

Whilst the Police have to prove 'beyond reasonable doubt' that the offence occurred which given the new charges they appear able to prove through the CPS, [the Trust] only have to show a balance of probability and given all the evidence as a whole you have to conclude the offences of;

1. Engaging in sexual activity in the presence of a child.
2. Sexual assault on male
3. Theft

Occurred which again fall into gross misconduct."

49. By this time the criminal charge of supplying a psychoactive substance had been dropped, but following A and the Claimant being re-interviewed, the Claimant had been charged with further offences of engaging in sexual activity in the presence of a child, sexual assault and theft. This was noted in the investigation report. SA also mentioned the C5 notice.

50. SA concluded that the following allegations should proceed to a disciplinary hearing:

50.1. Allegation of sexual assault/ misconduct towards a minor;

50.2. Misuse of drugs;

50.3. Theft of [Trust] equipment;

50.4. Actions leading to loss of trust and confidence in the employee's suitability for employment.

51. On 10 October 2017 the Claimant was invited to a disciplinary hearing on 20 October 2017. He was given a copy of the investigation report. The allegations were as set out in the investigation report, plus an additional allegation of failing to inform the Trust that he had been arrested. GA, Associate Director of Quality and Compliance, was appointed to conduct the disciplinary hearing.

52. The Claimant's evidence to the Tribunal was that after receiving this letter his union representative told him that a decision had already been made to dismiss him, but that he (the union representative) had "brokered a deal" with the Trust whereby the Claimant would receive three months' pay, holiday pay and a good reference if he were to resign. The Claimant said he felt he had no choice but to resign. He did so by an email of 16 October 2017, which said:

"It is with a heavy heart that I submit this my resignation from [the Respondent], in light of recent events and ill health I feel my position is no longer tenderable (*sic*) within such an inspiring Ambulance service."

53. The Claimant said in cross-examination that he had chosen to resign, rather than await his dismissal, in order to protect his financial position.

54. GA's evidence to the Tribunal was that the Trust decided to proceed with the disciplinary hearing because of the seriousness of the allegations and the possibility of having to notify external bodies such as the HCPC. The hearing went ahead and GA concluded that all allegations were proven, except for the allegation that the Claimant failed to notify the

Trust of his arrest. GA concluded that, had the Claimant not resigned, he would have been summarily dismissed. The Claimant was informed of the outcome in a letter dated 20 October 2017. On the same date the Trust wrote to A's mother to inform her of the outcome.

55. The Claimant's resignation was accepted by letter dated 24 October 2017. It was noted that the Claimant's employment terminated on 16 October 2017. He was paid in lieu of 12 weeks' notice.

56. The Claimant's criminal trial took place in May 2018. He was acquitted of all charges.

THE LAW

57. Section 95(1)(c) of the Employment Rights Act 1996 provides:

95 Circumstances in which an employee is dismissed

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

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

58. Dismissals pursuant to section 95(1)(c) are known as constructive dismissals.

59. Four conditions must be met in order for an employee to establish that he or she has been constructively dismissed:

59.1. There must be a breach of contract by the employer. This may be either an actual or anticipatory breach.

59.2. The breach must be repudiatory, i.e. a fundamental breach of the contract which entitles the employee to treat the contract as terminated.

59.3. The employee must leave in response to the breach.

59.4. The employee must not delay too long before resigning, otherwise he or she may be deemed to have affirmed the contract.

(Western Excavating (ECC) Ltd v Sharp [1978] ICR 221; WE Cox Toner (International) Ltd v Crook [1981] ICR 823)

60. An employer owes an implied duty of trust and confidence to its employees. The terms of the duty were set out by the House of Lords in Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606 and clarified in subsequent case-law as follows:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

61. Any breach of this term is necessarily fundamental and entitles an employee to resign in response to it (Morrow v Safeway Stores Ltd [2002] IRLR 9).

RESPONDENT'S HALF-TIME SUBMISSION

62. On the second day of the hearing, after the conclusion of the Claimant's evidence, the Respondent applied to strike out the claim on the basis that it had no reasonable prospect of success. Mr Milsom argued that this was an exceptional case in which such a course was appropriate because the Claimant had admitted to conduct which amounted to serious misconduct (the incident in which A took Entonox) and against that background there was no prospect of him establishing a repudiatory breach on the Respondent's part. He relied on Brandeaux Advisers (UK) Ltd v Chadwick [2011] IRLR 224, in which Jack J endorsed the following comments he had made at first instance in Tullett Prebon pls v BGC Brokers LP [2010] IRLR 648:

“In my judgment the conduct of the employee may be relevant in this way. Whether the employer's conduct has sufficiently damaged the trust and confidence which the employee has in him objectively judged, is to be judged in all the circumstances. The circumstances will include the employee's own conduct to the extent that it is relevant to that question.” (para 85)

The judgment in Tullett Prebon was subsequently upheld by the Court of Appeal [2011] IRLR 420.

63. Mr Milsom also relied on the case of North West Anglia NHS Foundation Trust v Gregg [2019] IRLR 570 to support the proposition that an employer need not wait for the conclusion of any criminal proceedings before considering dismissal, unless there was evidence of the criminal investigation or proceedings being prejudiced by doing so.

64. Finally, Mr Milsom referred to the Claimant's evidence about the reason for his resignation and argued that he had resigned “for economic reasons”, not because of any alleged breach.

65. I refused the application. I did not consider it appropriate to make any comment on the merits of the claim in the course of the full merits hearing, save that I did not accept the matters relied upon by Mr Milsom made the Claimant's case unarguable. The circumstances were not sufficiently exceptional to warrant striking it out at this stage. I noted that in Atkinson v Community Gateway Association [2015] ICR 1 the Employment Appeal Tribunal rejected the notion that a prior fundamental breach by an employee precludes a claim of constructive unfair dismissal based on the employer's conduct of disciplinary proceedings. The dicta in Tullett Prebon at first instance does not add much to the analysis in a case of this kind, where the Respondent's conduct can only be understood by reference to the Claimant's conduct that prompted the police investigation.

66. Further, the Claimant's case had not changed significantly as a result of his oral evidence, there had been no prior application to strike out, the Claimant was not legally represented and the Respondent had come prepared to defend the claim. Even if the threshold of “no reasonable prospect of success” under Rule 37 were met, the power to strike out is discretionary and I considered it was in the interests of justice to determine the case based on all of the available evidence.

CONCLUSIONS

67. I will address in turn each of the Claimant's allegations of conduct that he says breached the implied term.

AP pressurised the Claimant to remain at work although this was against medical advice. AP also failed to make occupational health appointments for the Claimant despite promising to do so on 12 May 2017.

68. It is not clear what "medical advice" the Claimant is referring to. He has not produced any evidence of medical advice that he was unfit to work. On the contrary, the OH report of 26 October 2016 advised that he was fit for work with adjustments (which were made) and noted that he was very keen to remain at work. Nor is there any evidence of AP pressurising the Claimant to remain at work. As to the conversation in May 2017, AP accepted that there was discussion of a possible further OH appointment, but denied promising to arrange one. His evidence, which is supported by a contemporaneous note of the conversation, was that the Claimant was worried his suspension had expired and that he was going to be required to return to work at short notice. AP advised him that the Trust would not allow him to return without a report from either OH or his GP. The Claimant's suspension was extended shortly thereafter. That evidence was not challenged by the Claimant and he did not put forward any evidence to the contrary. This allegation is therefore not made out on the facts.

CB and DB placed pressure on the Claimant to continue working on 29 October 2016.

69. Both CB and DB denied putting such pressure on the Claimant. Their evidence that the Claimant had told them he was keen to remain at work was not challenged and is consistent with the OH report. They both saw the OH report of 26 October 2016 and were not aware of any medical advice suggesting the Claimant was not fit for work. The highest it could be put is that either or both of them might have said to the Claimant that it can be beneficial for someone with PTSD to remain at work. In the circumstances that is certainly not conduct capable of contributing to a breach of the implied term.

The Respondent carried out a flawed and biased investigation and did not take into account the Claimant's defence.

70. There is some overlap between this very broad allegation and the specific complaints addressed below. I do not accept that the allegation is made out on the facts. There is certainly nothing to suggest any bias on the part of SA. He was entirely independent of the Claimant and the area where he was based. The conclusions in his investigation report were supported by the evidence (see below). It is not clear what is meant by "the Claimant's defence". SA's evidence to the Tribunal was that the Claimant had alleged the text messages had been taken out of context, but the Claimant did not suggest any context other than that he had been joking. SA said he "could not think of any context that would make the content of the messages appropriate, given the sexual nature of the content and the age of the individual [the Claimant] was messaging." SA also noted in the investigation report the Claimant's account of the fireworks event, and the fact that the Claimant denied giving A the medical equipment found at A's house. I find that SA did

take into account these aspects of the Claimant's "defence" and concluded on reasonable grounds that there was a disciplinary case to answer.

The Respondent rushed the investigation in order to publish the findings of the investigation before the police investigation and court case were concluded.

71. Again, this allegation is not made out on the facts. The Claimant has not challenged the content of SA's interactions with the police. SA paused his investigation twice when requested to do so, and only proceeded with the express permission of the police officer in charge of the criminal investigation. No steps were taken towards disciplinary action that required the Claimant to respond to the allegations until after the police investigation had concluded. When new matters arose in September 2017, the internal investigation was paused pending further police interviews.
72. It is well established that an employer need not necessarily wait until the conclusion of criminal proceedings before commencing parallel disciplinary proceedings (Harris (Ipswich) Ltd v Harrison [1978] IRLR 382). It will often be impractical for the employer to wait until the trial takes place. In the Claimant's case, at the point at which the police gave SA the authority to proceed, there was no fixed date for the Claimant's trial. It ultimately did not take place until May 2018. The Claimant had been suspended on full pay since November 2016 and it was not unreasonable for the Respondent to conclude that it was appropriate to proceed without waiting for the outcome of the criminal trial. SA's evidence was that when he was preparing his investigation report he was aware that the Claimant would be attending a plea hearing in October 2017, but did not know how long the criminal proceedings would go on. He wanted to interview the witnesses before their memories of key incidents faded. The standard of proof is of course higher in criminal matters, so the outcome would not have been determinative. Further, there were issues, such as the Claimant taking the Entonox without authority and failing to report the incident, which were relevant only to the disciplinary proceedings. There is certainly no evidence of SA or anyone else being motivated by a desire to publish the findings of the internal investigation before the criminal proceedings concluded; it was simply impractical to wait and there was no reason not to proceed.

The investigation report confirmed a series of unfounded and serious accusations which SA reported as fact.

73. The Claimant did not properly explain this allegation, but I have assumed that he takes issue with SA's comment in the report that "given all the evidence as a whole you have to conclude the offences ... occurred". It is true that this goes further than concluding there is a case to answer, but reading the report as a whole it is clear that the final decision would be that of the disciplinary panel. SA had said earlier in the report, "You must at this time draw your own conclusions as to whether the offence occurred". He also referred to the Claimant's "alleged actions" at the fireworks event and the "alleged sexual assault". Overall, and bearing in mind the purpose of the report, it was clear that SA was setting out the evidence and even if his view was that the allegations were made out on the balance of probability, that was ultimately a matter for the disciplinary panel. There is certainly nothing in the wording of the report that is capable of contributing to a breach of the implied term.

The investigation report made reference to the possibility of the Claimant committing future sexual abuse against a minor.

74. The Claimant was unable to point to such a reference in the investigation report and I have not found any such reference. This allegation is not made out.

The investigation report was a calculated response to the poor publicity and was based on a lack of evidence.

75. There is no evidence to support the allegation that the investigation report was a calculated response to poor publicity. SA's unchallenged evidence was that other than the "paedophile hunter" website, he was not aware of any bad publicity relating to the Claimant's actions. The information on the "paedophile hunter" website was taken down very shortly after it was discovered, in December 2016. There is nothing to suggest that SA or anyone else was influenced to any extent by any poor publicity.

76. As to the "lack of evidence" allegation, this is completely unfounded. Mr Milsom in his closing submission pointed to the following aspects of the evidence, all of which I accept are pertinent and justified the decision to proceed to a disciplinary hearing:

76.1. The relationship between the Claimant and A emanated from the workplace. That was the basis of the trust that A and his parents had for the Claimant.

76.2. The Claimant has never suggested that any of the messages were fabricated. He accepted sending them. There was no context that could justify them and the relationship was on any view unhealthy.

76.3. No alternative explanation was given for how A came to have the two items of medical equipment belonging to the Trust.

76.4. The Claimant admitted much of the conduct alleged to have taken place on 5 November 2016. He admitted taking the Entonox, an addictive drug, to the event without the knowledge or authority of the Trust. He was at least reckless as to whether it was sampled by a minor. In his own account he said "go on" to A, and A continued to take further breaths. He admitted failing to report it. The messages after the evidence about going "to the next level" speak for themselves.

76.5. As for the allegations of sexual assault, even if the Respondent could not be satisfied they were well-founded, the Claimant had put himself in an obvious scenario where allegations were liable to be made.

76.6. The Claimant had shown no insight, failing for example to acknowledge the gravity of the Entonox incident.

77. I find that SA conducted an investigation that was fair, reasonable and proportionate, and that the conclusions of his investigation report were amply supported by the evidence. There were aspects of the Claimant's account that were simply not credible, including his claim that the messages about the Entonox were an attempt to discourage A from taking it again. The only reasonable interpretation of those messages is that the Claimant was doing precisely the opposite; encouraging A to take Entonox again.

78. This allegation is not made out on the facts.

The Respondent disclosed a copy of the investigation report to the family of Minor A.

79. The Respondent denies this and the Claimant has not put forward any evidence to suggest that the investigation report was disclosed, or even that A's family had a copy. SA's evidence was that he retained a copy and he gave one to Respondent's HR department to pass to the disciplinary panel. He did not give a copy of the families of A or B and he could not believe that anyone else in the Trust would have done so either. That evidence was not challenged. The allegation is not made out.

The Respondent appointed SA to the role of investigating officer and to the role of liaison officer for the families of the minors involved in this matter. The Claimant contends that this was inappropriate and meant that SA was not impartial and so did not carry out a fair investigation.

80. SA's evidence was that there was no such role as "liaison officer" for the families, and the Claimant did not put forward any evidence that such a role was created or that anyone was appointed to it. SA accepted that he was the point of contact for the families. There is no evidence that this led to any unfairness, or that it was otherwise inappropriate for him to act as the point of contact. As noted above, there is also nothing to suggest that SA was not impartial. I have found that he carried out a fair investigation.

SA relied on false information during the investigation process and was pressurised by the families of the minors involved in this matter.

81. The point about "false information" is dealt with above. The Claimant did not point to any specific information in respect of this allegation. As to pressure from the families, there were emails from both families expressing disappointment with the police investigation and saying, on at least one occasion, that they hoped there was no possibility of the Claimant returning to work. There is nothing, however, to suggest that SA was swayed by such comments. He responded to one such email on 9 July 2017, saying "I can confirm he is and will remain suspended until we conclude our investigation and he appears and any subsequent disciplinary hearing". That was entirely proper and did not suggest any promise as to the outcome.

82. This allegation is not made out on the facts.

SA shared confidential information with the family of minor A as well as third parties against the instructions of the police.

83. SA's response to this allegation was follows:

"I absolutely deny that I provided the families of the victims with any confidential information or evidence, as [the Claimant] has alleged. I am not sure what 'confidential information' [the Claimant] is suggesting I divulged, but there was very little information that I could have shared with the family in any event. During my investigation, I received two tranches of social media messages exchanged between Minor A, Minor B and the Claimant; but all of these messages were

provided to me by the family of Minor A. I prepared witness statements from all of the witnesses, but I did not provide copies of these to the families, other than to let each individual check their own statement. I made sure to keep the statements very secure and very few people within the Trust saw them: I even typed the statements myself so they would not need to be sent out for typing. [The Claimant] did not provide me with any documentary evidence; he did produce a number of letters for me and a timeline, but I did not provide these to the family either.”

84. This account was not challenged and the Claimant did not put forward any evidence of confidential information having been disclosed to the families. SA accepted that he had disclosed the new allegations made by A in September 2017 to the police, but the Claimant makes no complaint about that and indeed it was obviously the right thing to do.

85. This allegation is not made out on the facts.

The Respondent’s decision to publish the findings of the investigation report as fact and post it to other agencies in the knowledge that the allegations were false, was unjust and breached the Claimant’s confidentiality and right to a fair trial.

86. The findings of the investigation report were not “published”, other than for the internal disciplinary proceedings. The Claimant does not allege, and there is no evidence, that it formed any part of the criminal proceedings so it cannot have affected his right to a fair trial. SA accepts that the Trust sent the report to HCPC and DBS (para 75), but there was no evidence as to when this happened. SA said his understanding was that the Respondent was obliged to provide it. The Claimant did not dispute that. For the reasons given above I do not accept that the Respondent “knew the allegations were false”. This allegation is not made out on the facts.

Statements in the investigation report were manipulated and changed to enhance the allegations against the Claimant.

87. This allegation was not explained. There was no evidence of any statements being manipulated or changed. The allegation is not made out.

The Respondent shared confidential and personal information relating to the Claimant with the family of minor A who in turn shared that information with a ‘self-appointed paedophile hunter’.

88. This is largely dealt with above. AP also specifically denied having passed on any information to third parties. There is no evidence of any confidential or personal information being shared with A’s family. The Claimant did not explain what information he believed had been shared. The allegation is not made out.

It was impossible for the Claimant to be able to defend himself during the disciplinary process due to the extent of the information relating to the Claimant disclosed to the police, the families of the minors involved in this matter and with third parties.

89. Again, there is no evidence of any information having been inappropriately shared as alleged. Further, it is not clear what the Claimant means by saying it was impossible for

him to defend himself. There is nothing to suggest any difficulties in responding to the allegations raised with him in the disciplinary investigation meetings.

The Respondent used its knowledge of the defence evidence to enhance the prosecution statements and to delete evidence.

90. This is effectively the same allegation as the “manipulating evidence” allegation above. It has not been explained and there is no basis for it.

On 7 February 2017, AP informed the Claimant that the Claimant would be dismissed on health grounds or for gross misconduct, that the Claimant would not return to work, and that the Claimant should consider resigning as it would ‘all go away’.

91. There is no evidence of any meeting between the Claimant and AP on 7 February 2017. AP’s evidence that there was no such meeting was not challenged. AP also denied saying at any point that the Claimant was going to be dismissed or putting pressure on him to resign. That is consistent with his contemporaneous notes of the welfare meetings and I accept it is correct.

On 4 April 2017, AP visited the Claimant’s house and interrogated the Claimant for two hours and forty minutes, during which time AP also removed the Claimant’s funding for counselling and applied more pressure on the Claimant to resign.

92. The Claimant covertly recorded this meeting and produced a transcript running to 110 pages. The transcript suggests that, at least at the start of the meeting, AP did most of the talking and the Claimant was not very engaged. The Claimant was unable to point to anything in the transcript, however, showing that AP applied pressure on him to resign. AP’s evidence was that he wanted to get the Claimant thinking about the potential outcomes of the criminal and disciplinary proceedings and to think about his future. They discussed both positive and negative outcomes. That is supported by the transcript and I accept it is a fair summary of the conversation.

93. It is not in dispute that AP told the Claimant at this meeting that the Trust could not fund any additional counselling sessions, but AP’s unchallenged evidence was that this was because he had a limited budget and the Claimant was by this stage receiving treatment through the community mental health team. It is not conduct capable of contributing to a breach of the implied term.

On 15 December 2016 and 17 December 2016, AP informed the Claimant that the Claimant had committed the crimes that he had been accused of and that the Claimant should therefore resign.

94. There is no evidence of the Claimant having meetings with AP on either date. AP accepts he was in contact with the Claimant on 15 December 2016, but according to AP’s contemporaneous records this was a text exchange that was only about whether the Claimant’s partner should be treated as his next of kin. The allegation is not made out on the facts.

95. In summary, the Claimant’s allegations are either not made out or are not capable of contributing to a breach of the implied term. He has not therefore established that he was

dismissed and the complaint of unfair dismissal fails. It is unnecessary to address the reason for his resignation or the issue of delay.

96. For completeness, however, I will address two other arguments that were not pleaded, but were made by the Claimant during the hearing, including in his closing submissions.
97. First, the Claimant argued that the Respondent knew he was mentally ill but “disregarded my health condition and continued invading my private home as they pleased to harass me with sexual investigations”. He claimed this amounted to torture or degrading treatment, contrary to Article 3 of the European Convention on Human Rights. He also claimed the Respondent should have conducted a mental capacity assessment before proceeding with the disciplinary investigation and should have paid for someone to represent him in the Tribunal proceedings. He also suggested that his behaviour was a consequence of his mental health illness and “If I sent those messages, it was because I was mentally ill”.
98. There was no medical evidence presented to the Tribunal other than the OH reports. Clearly the Claimant was suffering from significant mental health issues during his suspension. It appears from the OH reports and AP’s notes of his communications with the Claimant that the Claimant was very up and down. It is certainly not right to say that the Respondent “disregarded” his mental health condition. They appointed AP as a welfare officer and he kept in regular contact with the Claimant during his suspension. The Claimant acknowledged that AP had saved his life on the occasion of the first suicide attempt. AP and DB had also gone above and beyond the call of duty on the occasion of the second suicide attempt, making the Claimant a meal and spending a long time with him to check he was going to be safe. The Respondent also sought OH advice on whether he was well enough to attend meetings for the purposes of the disciplinary investigation, and followed that advice. SA adopted a compassionate approach to the meetings, as acknowledged by the Claimant. AP accompanied the Claimant to his plea hearing. It is difficult to see what more the Respondent could have done.
99. Contrary to the Claimant’s suggestion that he could not have a fair hearing in the Tribunal representing himself, I am satisfied that he was able to make all of the arguments he wished to make and to participate fully in the proceedings. I asked the Claimant at the start of the hearing what his mental health issues were and whether he needed any adjustments to the Tribunal procedure. He said he suffers from depression and anxiety and that he may need additional breaks. The Claimant was allowed a break whenever requested and on the second day the Tribunal adjourned early because the Claimant said he needed more time to prepare his cross-examination for the remaining witnesses. On the last day the Claimant attended with a pupil barrister who acted as a McKenzie friend.
100. As for the suggestion that any misconduct was caused by mental illness, the Claimant did not raise this at any stage during the disciplinary proceedings and there was no reason why the Respondent should have approached the matter any differently. If the Claimant had attended the disciplinary hearing he could have raised the mental health issues then.
101. Secondly, the Claimant argued that the disciplinary investigation related to matters that had nothing to do with his job as a paramedic. This argument is wholly misconceived. The allegations of inappropriate conduct towards minors amounted to allegations of

serious breach of his position of trust in the community as a paramedic. The Entonox incident was obviously related to his job, not least because the Entonox itself and the equipment were Trust property. The Claimant's assertion in his written closing submissions that the Respondent "decided to make a mountain out of a mole with an issue that does not legally concern them" illustrates the extent of his lack of insight.

102. For the reasons given above, the complaint of unfair dismissal fails and is dismissed.

Employment Judge **Ferguson**

Date: 11 July 2019