Appeal No. UKEATS/0014/18/JW

EMPLOYMENT APPEAL TRIBUNAL
52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On Friday 24th April 2020

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

K	APPELLANT
-v-	
L	RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

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APPEARANCES

For the Appellant
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For the Respondent
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SUMMARY

UNFAIR DISMISSAL

The Claimant was charged by the Police with possession of indecent images of children under s 52A of the Civic Government (Scotland) Act 1982. The Procurator Fiscal reviewed the evidence and decided not to prosecute. The Claimant was a schoolteacher. His employers convened a disciplinary meeting and dismissed him. The Crown had provided the employer with a summary of the evidence but would not permit it to be released to anyone else. It was withheld from the decision maker. The Claimant began proceedings for unfair dismissal. His claim was rejected by the Employment Judge. He argued on appeal that the complaint issued by the school did not mention the risk of reputational damage and as a result it was not open to dismiss him on that ground. He also argued that since the complaint was based on misconduct and not the risk of reputational damage. In that situation it was necessary to decide whether or not he was guilty of downloading the images and on the state of the evidence they were not in a position to decide he had. He further argued that it was not open to the employer to dismiss him based on the possibility he had downloaded the images.

Held (1) that the complaint in the dismissal letter was based on misconduct and gave no notice that reputational damage was a potential ground of dismissal; and in such a circumstance the employer was bound to make a decision on whether the misconduct had been established and had it done so it was bound to conclude that misconduct had not been established; (2) that an employer was not entitled to dismiss an employee on the basis that misconduct was a possibility that could not be excluded or where there was no guarantee of his good conduct (s 98(2) and (4) Employment Relations Act 1994); and (3) that the reasonable approach to the standard of proof was to apply the balance of probabilities; where the employer was not in a position to make a judgement about conduct collateral to reputational damage as the ground of dismissal, the employer required to be satisfied that there was substantial evidence that was open to scrutiny and challenge in support of the underlying conduct and this test was not satisfied in the present case; and appeal allowed.

THE HONOURABLE LORD SUMMERS

1. This case comes before me on appeal from the Employment Tribunal. An anonymity order is in place.

2. The Employment Judge sets out her Findings in Fact between paragraphs 11 and 153. Hereunder I summarise those Findings that have a bearing on the issues argued before me on appeal.

Facts and Circumstances

3. The Claimant was a teacher. He had been employed by the respondents for 20 years. He had an unblemished record. On 30th December 2016 the Police entered his property having been granted a warrant to do so by a Sheriff. The warrant authorised them to search for and seize computers in the possession of the Claimant. The warrant was based on intelligence that indecent images of a child or children had been downloaded to an IP address associated with the Claimant. The Claimant lived at the address with his son. Both he and his son were taken to the Police station for questioning.

4. The Police examined three computers in the Claimant's home. One was found to have data that was of interest to the Police. The Police seized the computer.

5. Shortly after the raid the Claimant was due to return to his teaching duties. He did not appear as expected at school and enquiries were made. He met with the Head Teacher and advised that he was involved in a Police enquiry into potential indecent pseudo images (Finding in Fact 28). The Claimant was suspended while matters were investigated. Although it is not stated as a finding in fact, it is clear that the Claimant denied from the outset that he was responsible for the images being on the computer (see e.g. Finding in Fact 93).

6. The Claimant was charged with an offence under s 52A of the Civic Government (Scotland) Act 1982. I was not able to locate a copy of the charge in the Core Bundle. I

note however from p 119 that the Respondents proceeded on the basis that the offence in question was under s. 52A. It provides so far as material –

52 A (1) It is an offence for a person to have any indecent photograph [or pseudo-photograph of a child] in his possession.
(2) Where a person is charged with an offence under subsection (1), it shall be a defence for him to prove—
(a) that he had a legitimate reason for having the photograph [or pseudo-photograph] in his possession; or
(b) that he had not himself seen the photograph [or pseudo-photograph] and did not know, nor had any cause to suspect, it to be indecent; or
(c) that the photograph [or pseudo-photograph] was sent to him without any prior request made by him or on his behalf and that he did not keep it for an unreasonable time.

7. In the chronology it is stated that he was charged after interview at the Police station (Finding in Fact 35; cf. Finding of Fact 86).

8. The Police referred the matter to the Procurator Fiscal. The Procurator Fiscal after having reviewed the information supplied by the Police decided not to prosecute. The Claimant was informed of this decision and communicated it to the school on 25 February 2016 (Finding in Fact 45). The Letter confirming the Procurator Fiscal's decision (hereafter the "Procurator Fiscal's Letter") was not issued until 8 April 2016. The Procurator Fiscal's Letter reads –

"I have now reviewed the case and have decided on the basis of current information available to me to take no further action in the case against you at this time.

You should be aware that there is an obligation on the prosecutor to keep cases under review. This includes cases where the prosecutor has decided to take no further action. I therefore reserve the right to prosecute this case against you at a future date.
If you have a solicitor you should show him or her this letter.

If not and you have any questions about this letter, you may wish to speak to someone at Citizens Advice or consult a solicitor…"

9. The HR Advisor had anticipated that the Procurator Fiscal's Letter would say he had no case to answer (Finding in Fact 51). She recognised that this was not what the letter said. The HR Advisor "did not understand what the letter meant" (Finding in Fact 51).

10. The Respondents made enquiries with the Crown. They explained their predicament. They explained that the Claimant was a teacher and that in order to make informed decisions about whether it was appropriate for him to continue to work with children they wished to establish what evidence the Crown had against the Claimant. They wrote on 13 July 2016 "I am writing to ask that you share… the information which you hold concerning the alleged incident for the purpose of these investigations, to enable us to properly understand the context of the decisions" (Finding in Fact 52). They wrote again at greater length on 19 August 2016. The Respondents acknowledged that if they dismissed the Claimant without sufficient evidence that might generate a claim of unfair dismissal (Finding in Fact 59). They explained the various legal difficulties that would arise if the Claimant posed a risk to children. They reiterated their request for sight of the evidence against the Claimant.

11. The Crown wrote a letter (the "Crown Office Letter") on 28 September 2016 to the Respondents. It stated –

"I enclose a redacted copy of the summary of evidence provided by COPFS in this case and advise that the information is provided only for the purposes of allowing you to carry out your investigation and should not be used or disclosed for any other purpose."

12. The Crown Office Letter was produced in evidence to the Employment Judge. The whole of the paragraph containing the summary of evidence is blanked out. The COPFS went on to state that COPFS could give no view on whether the Claimant was a risk to children. It stated that he had not been reported to COPFS on any analogous

matter. It acknowledged the Respondent's concern given the nature of the offence alleged (Finding in Fact 75).

13. The Respondent's HR Advisor did not share the redacted summary of evidence with the Head Teacher, the other investigating officer. The Head of Service who chaired the disciplinary hearing had no knowledge of the Crown Office Letter.

14. At a reconvened investigatory meeting the Claimant confirmed that the computer taken by the Police was his. He stated that it was not in use at the time of the Police search and that it was used as a backup computer. He stated that he was told by the Police that there was illegal material on the computer.

15. He indicated that his solicitor had advised him that the Procurator Fiscal's Letter was "bog standard" and was issued to anyone against whom it had been decided not to take proceedings. He advised that his son had received the same letter. He had been advised that the reason the Procurator Fiscal made no promise that the offence would not be prosecuted in the future was so that (and I paraphrase here) if there was evidence of further offending behaviour the Procurator Fiscal would be at liberty to prosecute both offences as they could potentially corroborate one another (Finding in Fact 89).

16. He was asked if he had in his possession within his household a computer with indecent child images. He answered, "Obviously yes" (Finding in Fact 91).

17. An Investigatory Report was drawn up. Its terms are set out by the Employment Judge (Findings in Fact 95-100). The Conclusions at paragraphs 5.5 and 5.6 state –

"The charges by Police Scotland of being in possession of a computer with indecent child images are of a serious nature and if it became publicly known, this may have brought the respondents into disrepute.

The claimant holds a position of trust within the organisation and may be considered in breach of GTC Code of Professionalism and Conduct which states "you should avoid situations both within and outwith the professional

context which could be in breach of the criminal law, or may call into question your fitness to teach."

18. The recommendation reads –

"Due to the seriousness of this matter i.e. the claimant admitting to illegal material of indecent child images on a computer within his home, and the relevant (sic) to the computer's employment as a Teacher, it is recommended that a disciplinary hearing be arranged. "

19. The Claimant was invited to attend a disciplinary hearing by letter dated 7 December 2016 (hereafter the "Invitation Letter"). It described the complaint (hereafter "the Complaint") against the Claimant as follows –

"The reason for the hearing was due to you being involved in a police investigation into illegal material of indecent child images on a computer found within your home and the relevance of this to your employment as a teacher. "

20. The Invitation Letter does not refer to the charge. It places matters on a more general footing and refers to him "being involved in a Police investigation". It makes no reference to the possibility raised at paragraph 5.5 of the Report that if it became known that he had child images on a computer in his home this might lead to the Respondents suffering reputational damage (Finding of Fact 106).

21. At the hearing he accepted that the Police had found indecent images on the computer. He stated however that he did not know how they got there. He denied having downloaded the images. He pointed out that he was not the only person with access to the computer. He shared the house with his son and his son and his son's friends had access to the computer. He said that it could have been his son's friends that downloaded the images (Finding in Fact 116).

22. His solicitor gave evidence about the Procurator Fiscal's Letter. She explained that the Crown would not tell her why they were not proceeding. She gave some examples of why a "no pro" letter might be issued. The Procurator Fiscal might have concluded

there was insufficient evidence that a crime had been committed, or that it was not possible to say who had committed the offence or, where "the charges were downgraded", that a prosecution was not justified. I infer that means that a Procurator Fiscal might decide not to prosecute in the public interest if as a result of being downgraded the offence is too minor to merit prosecution (Findings in Fact 117). This expands on the single explanation given at Finding in Fact 89.

23. The Employment Judge found that although the subject of reputational loss was referred to by the Senior HR Advisor during the hearing "there was not… a great deal of discussion about reputational risk". The Head of Service had mentioned however that reputational damage might occur if in the future a prosecution occurred (Finding in Fact 118).

24. The Head of Service concluded that there was insufficient material upon which to conclude that the Claimant was responsible for downloading the images (Finding in Fact 120).

25. She decided however that the Claimant should be dismissed. Her reasons for doing so are set out in her Decision Letter. Its terms appear in Finding of Fact 126. It says –

- **"You have been charged by the Police with an offence (sic) in respect of indecent images of children having been found on a computer within your home. I believe that you have been charged under section 52A of the Civic Government (Scotland) Act 1982.**
- **You have received a letter from the Crown Office and Procurator Fiscal Service in which you were advised that having reviewed the case they decided on the basis of current information available to them that no further action would be taken against you at that time. You were further advised that there was an obligation on the prosecutor to keep cases under review. This included cases in which the prosecutor had decided to take no further action, and that they reserved the right to prosecute the case against you at a future date.**
- **You have admitted that a computer was located in your household which contained indecent images of children.**

- **I am unable from the evidence before me to exclude the possibility of you having been responsible for the indecent images of children which you have admitted to have been found on a computer within your home.**
- **As a consequence of the set of circumstances which have arisen, risk assessments have concluded that it would present an unacceptable risk to children for you to return to your current teaching post or any current vacancy within the Council.**
- **The Council is a high profile public authority. The Council has statutory responsibility for child protection and is trusted with the custody of thousands of children on a daily basis to their care (sic) at school and other locations. Council staff are also in contact with children and vulnerable adults in the community on a daily basis. The Council has access to information in relation to members of the public. If in the future, either by criminal prosecution or otherwise it was shown that you had committed an offence involving indecent images of children it would cause the Council serious reputational damage if we continued to employ you in any post in circumstances whereby it became public knowledge that we were aware of the allegations against you yet continued to employ you.**
- **This set of circumstances have resulted in an irretrievable breakdown of trust and confidence between yourself and the Council and an unacceptable level of risk to the Council of serious reputational damage. "**

26. In due course the Claimant lodged a claim for unfair dismissal. The Employment Judge rejected his claim. The Claimant appeals that decision.

The Statutory Background

27. The background to the grounds of appeal is s. 98 of the Employment Rights Act 1996. The Respondents submitted that the decision to dismiss was based on s. 98(1)(b) of the Employment Rights Act 1996. This permits dismissal apart from the two specified grounds viz. capability (s. 98(2)(a)) and conduct (s. 98(2)(b)) if it can be established by the employer that there is "some other substantial reason of a kind such as to justify the dismissal of an employee". The Respondents' position was that the grounds set out in the Decision Letter constituted "some other substantial reason" for dismissal.

"98 (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) …

(b) relates to the conduct of the employee,

(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

First Ground of Appeal

28. The Claimant's first Ground of Appeal is that the Letter of Invitation did not give notice that he was at risk of being dismissed on the grounds of reputational damage.

"The reason for the hearing was due to you being involved in a police investigation into illegal material of indecent child images on a computer found within your home and the relevance of this to your employment as a teacher. "

One of the grounds for dismissal was reputational damage.

"If in the future, either by criminal prosecution or otherwise it was shown that you had committed an offence involving indecent images of children it would cause the Council serious reputational damage."

29. The Employment Judge accepted that this reason for dismissal was "different in nature to the allegations which the claimant faced" (paragraph 193 Judgement). The Employment Judge went on however to conclude that the Investigatory Report and Letter of Invitation "did reflect the matters" that were the basis of dismissal. The Employment Judge was persuaded that the "approach on the part of the respondents could not be said to be unreasonable".

30. **Boyd v Renfrewshire Council** 2008 SCLR 578 at pp. 586-587 and **Strouthos v London Underground Ltd** [2005] IRLR 636 at p. 637 are authority for the proposition that an employer must give notice to an employee of the ground upon which dismissal may be sought. The notice must be expressed clearly. The employee should be able to understand the allegation the employer makes. This requirement is consistent with the basic requirements of natural justice that an employee should know the ground of complaint he or she faces. It is also consistent with the idea that the complaint should enable the employee to know what issues he or she should be ready to address by way of suitable evidence and supporting submissions.

31. The first question is whether the Invitation Letter gives notice to the Claimant that he may be dismissed because of potential reputational damage. The Employment Judge's initial conclusion was that the reason for dismissal was "different in nature" from the allegation in the complaint. The Employment Judge however went on to refer to the reputational loss mentioned at paragraph 5.5 in the Investigatory Report. The Employment Judge took the view that this "reflected" the ground for dismissal.

32. I am unwilling to accept however that an employee can be dismissed on the basis of a matter that is absent from the complaint but is referred to in an Investigatory Report. While the Investigatory report may be used to interpret the Letter of Complaint, it cannot be used to supply a wholly separate basis for dismissal. As the case of **Leach v The Office of Communications** [2012] ICR 1269; [2012] I.R.L.R. 839 **(**discussed in detail below) shows, reputational damage secondary to misconduct is regarded as a separate ground of dismissal and raises a set of considerations that are connected to but distinct from dismissal based on misconduct. I consider that the complaint must set out any potential ground of dismissal upon which reliance may be placed.

33. I note that the Employment Judge found that reputational loss was mentioned in passing at the disciplinary meeting. This supports the proposition that it was not under active consideration at the disciplinary meeting. It would be entirely unjust if this ground furnished a basis for dismissal. The ground was not addressed by the Claimant. There would have been substantial benefit in detailed submissions and suitable evidence designed to address the spectre of reputational damage.

34. I consider that the Invitation Letter discloses a Complaint based on alleged misconduct. The Invitation Letter refers to the Claimant "being involved in a Police investigation into illegal material of indecent child images on a computer found within your home". The Letter of Invitation then indicates that the Respondents would have to consider "the relevance of this to your employment as a teacher". Although the Respondents did not specify what they meant by "relevance" nothing turns on that. If he had a sexual interest in children manifested by possession of illegal images he might be pose a risk of harm to the children he taught. The lack of any reference to the charge was no doubt because it had been dropped. It does however set out the facts upon which the charge had been based.

35. The Claimant thought the complaint was about his conduct (paragraph 188). The Head of Service's Decision Letter deals at length with conduct issues and whether she could rely on his conduct as a basis for dismissal (Core Bundle p 121). In these circumstances I am persuaded that the dismissal was unfair in that it relied on a ground of dismissal that was absent from the Complaint and for which there was insufficient notice.

36. Mr Allison also argued that the Letter of Invitation did not warn the Claimant that the Respondents were concerned that he might be a risk to children and that dismissal was a possible outcome. There is no merit in this argument. While the Letter of Invitation does not spell the matter out, the Claimant would have appreciated that the reason indecent images of children are prohibited is because those that make and use them represent a risk to children. This was so obvious it did not need to be stated. The Letter of Invitation stated that "dismissal may be considered" so the Claimant would have been aware that this was a possible outcome.

Second Ground of Appeal

37. The Claimant argues that the Employment Judge erred in her assessment of the adequacy of the investigation (paragraph 196 – 203). In particular the Claimant took exception to the following sentence -

"In considering the reasonableness of the investigation, the Tribunal has to consider what the employer did, not what it might have done" (paragraph 197).

38. I accept that this sentence interpreted in isolation from the remainder of the judgement is an inaccurate statement of the law. In order to assess reasonableness, it is of course necessary to consider look at what an employer did and contrast it with what might have been done (**British Home Stores Ltd v Burchell** 1980 ICR p 303 at p 304 D-F; **Sainsbury Supermarkets Ltd v Hitt** [2003] IRLR 23). I am unable however to conclude that is what the Employment Judge meant. Read in the context of her subsequent comments I take it that what she meant was that while other steps might have been undertaken she was satisfied that the steps actually taken were reasonable. The Employment Judge was no doubt drawing a distinction between what should have been done and what "might have been done".

39. The criticisms made in the second Ground of Appeal are based on the hypothesis that the Employment Judge did not consider whether another approach ought reasonably to have been adopted by the Respondents. The criticisms rest on a false premise.

40. The Employment Judge notes that the Respondents took legal advice (paragraph 202 line 11), that the reasonableness of the Respondents actions had to be considered objectively as required by **Burchell** (line 13) and that she accepted that the Respondents' interpretation of the Crown Office Letter was reasonable (line 15). I accept that the approach of the Employment Judge does not contain detailed reasoning. But I do not consider detailed reasoning was necessary. I consider the Employment Judge's interpretation of the Crown Office Letter was both reasonable and correct. The relevant part reads -

"… the information is provided only for the purposes of allowing you to carry out your investigation and should not be used or disclosed for any other purpose."

41. In my view it is plain that the Respondents held the information on the condition that it was not to be used or disclosed for any purpose other than to enable them to investigate further. Its terms plainly prevent disclosure to the Claimant. That is all that requires to be said in this connection. Equally I am not persuaded that there was any obligation to advise the Claimant that they had written to Crown Office. The Employment Judge addressed the argument that the Respondents should have disclosed that a request for information had been sent to Crown Office. The Employment Judge's conclusion was that "applying an objective test, the Tribunal could not conclude that such an approach was unreasonable" (paragraph 202). I do not consider that they should have advised the Claimant that they had written to Crown Office. That aspect of matters had no impact on the reasonableness of the investigation one way or the other. It was an option the Claimant could have pursued on his own initiative. A difficult situation might have arisen if Crown Office had released information that was apt to exonerate the Claimant. But there is no indication that this is what occurred. That being so there is no basis upon which to criticise the Respondents.

42. I am satisfied that no error of law has been demonstrated in the Employment Judge's reasoning.

Third Ground of Appeal

43. The Claimant in this ground of appeal raises the issue of standard of proof that is consistent with the requirements of reasonableness found in s. 98(4)(a) of the Employment Rights Act 1996. He argues that he could not be dismissed on the basis that he might have committed the offence. He argues that the employer must be satisfied on the balance of probabilities that he had committed the offence.

44. At paragraph 120 the Employment Judge records the Head of Service's view **"there was insufficient material upon which to conclude that the clamant was responsible**". At paragraph 121 she found that the Head of Service **"could not conclude the claimant was guilty of gross misconduct".**

45. The Head of Service went on however (Core Bundle p 121) –

"I am unable from the evidence before me to exclude the possibility of you having been responsible for the indecent images of children which you have admitted to have been found on a computer within your home."

46. She did not consider that there was an absolute guarantee that the Claimant had not downloaded the images (Judgement paragraph 121 lines 26-28; paragraph 126 lines 4-5). The approach she took to the issue was that unless she could exclude the possibility that the Claimant was guilty of the conduct in question she was entitled to take the misconduct alleged into account (paragraph 121). The latter wording appears in her Decision Letter (paragraph 126, page 31 of Judgement line 4).

47. The Employment Judge endorsed the Head of Service's approach. The Employment Judge points out that the Head of Service concluded **"that there was a risk the claimant had been responsible"** (paragraph 229). The Employment Judge sets out the factors that entitled the Head of Service to be satisfied that there was a risk. The Employment Judges observes **"it could not be said to be unreasonable for the Head of Service to conclude that she could not exclude the possibility of the claimant having been responsible for the images"** (paragraph 229 line 31).

48. The Claimant submitted that there is only one standard of civil proof namely the balance of probabilities and that the Head of Service had not been entitled to ask herself whether she could "exclude" the possibility that the misconduct occurred or "guarantee" that he had not been guilty of misconduct. That was to utilise a different standard of proof. In this connection the Claimant relied on Lord Hoffman in **In Re B (Children) (**2009 1 A.C. 11 at p 17; [2008] 3 W.L.R. 1; [2008] 4 All E.R. 1) at paragraph 2

"2. If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries

the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."

49. Although **in Re B** was not concerned with the interpretation of s. 98(4) of the Employment Rights Act 1996 Lord Hoffman's dictum is of general application. He adverts to cases where "a legal rule requires a fact to be proved". I am not aware of any principle of the law of evidence in Scotland that would be adverse to Lord Hoffman's dictum. If it is necessary to find facts established then those facts require to be proved to the civil standard. The fact that the matters in hand are extraordinarily serious for both the Claimant and Respondents does not alter the standard of proof.

50. The Employment Judge did not consider that the observations by Lord Hoffman in **in Re B (Children)** were relevant to decisions made by an employer in an employment context. She considered that they were of relevance only to decisions made by a judge or jury.

51. The Head of Service however was in my opinion fulfilling a quasi-judicial role. She heard witnesses and considered evidence. Submissions were made to her and she had to resolve issues of fact law and apply the law. Although I accept that in an employment context the requirement of reasonableness may often require a degree of latitude that would not be appropriate to a court or tribunal, I am unable to accept that Lord Hoffman's words have no application to a case of this sort. I consider that the obligation to act reasonably (s. 98(4)(a)) and in accordance with equity (s. 98(4)(b)) required the Respondents to apply the balance of probability. Plainly she was not permitted to guess. Some objective standard had to be applied. As Harvey indicates it will only be in exceptional circumstances that a doubt is a sufficient ground for dismissal (Harvey on Industrial Relations and Employment Law para. 1466). If it was in order to take account of doubts about his "innocence" the alternative test formulated by the Head of Service and endorsed by the Employment Judge was not an appropriate one. It was unreasonable to apply a test that in effect entitled the employer dismiss unless all doubt as to the Claimant's guilt had been excluded. It may be that if the employer had

dismissed on the basis of a substantial doubt short of probability the Respondent's argument based on s. 98(2) and (4) of the 1996 Act would have had more force.

52. The **Burchell** guidelines indicate that the employer must have a "reasonable suspicion amounting to a belief" that the employee is guilty of the conduct in question. It appears to me that in concluding that there was insufficient evidence to show that the Claimant was guilty of misconduct the Head of Service could not have the requisite belief. It is evident that in arriving at the conclusion at paragraph 120 she used some standard of proof. She did not guess. The Head of Service had to choose between two competing explanations of how the images had got on to the computer with no means of holding one more likely than the other. I consider that she must have asked herself whether it was likely he had downloaded the images. That is the standard by which matters are habitually assessed in the realm of employment law and indeed civil law generally. **Burchell** supports the use of the balance of probabilities. Arnold J states (p. 304F-G) -

"The test… is reasonableness, and certainly… a conclusion on the balance of probabilities will in any surmisable circumstances be a reasonable conclusion. "

53. In my opinion the Head of Service reached the correct conclusion at paragraphs 120 and 121 (Core Bundle p 119). The Employment Judge should have treated that finding as the end of the matter.

Reputational Damage

54. Since it may be that my conclusion about the proper interpretation of the Letter of Invitation and complaint may be challenged and since it may be that my conclusion that misconduct must be proved on the balance of probabilities may also be challenged, I require to address the position that would arise had the complaint been based in whole or in part on a complaint that the Claimant's conduct had led to the prospect of reputational damage.

55. I note that in the Respondents' submissions to the Employment Judge reliance was placed on **A v B.** The Employment Judge gives the citation as [2010] UK/EAT 0206/09 281. The case that carries that reference is in fact a later judgement concerning anonymisation of the EAT's judgement. The EAT judgement on the issues that arise in

this case is reported; see [2010] ICR 849; [2010] IRLR 844. In the ICR version both the merits judgement and the judgement on anonymisation are reported together.

56. By the time the case got to the Court of Appeal the appellant had been convicted of a number of child sex offences and the anonymity order no longer served any purpose. The Court of Appeal's judgement is reported as **Leach v Office of Communications** [2012] ICR 1269; [2012] I.R.L.R. 839. This is the same case described as **Leach v Ofcom** (see paragraph 24 of the Employment Judge's Judgement). The citation ([2002] IRLR 893) is erroneous; see above. Given the significance of **Leach** and the extensive and illuminating dicta from the EAT and the Court of Appeal it is surprising that the Employment Judge did not rely more heavily on Underhill, J's reasoning. The Employment Judge does not refer to the EAT's discussion of dismissal for reputational damage and its interrelationship with misconduct allegations. It is referred to only connection with the obligation of trust and confidence.

57. I should note that the parties did not refer me to the decision of Choudhury, J the current President of the E.A.T, in **Lafferty v Nuffield Health** UKEATS/0006/19/SS, an appeal based on reputational damage in the context of a charge of assault to injury with intention to rape where the prosecution had commenced but not concluded. Nothing however in the decision requires me to put the appeal out for further submissions or disturbs the approach I have taken.

58. **Leach** is the leading case in this area. The judgement in the E.A.T. was written by Underhill, J (a former President of the EAT). His reasoning is adopted by the Court of Appeal (pp. 1280H- 1281A). There the leading judgement was written by Mummery, LJ, (also a former President of the EAT). The page references below are from the ICR report.

59. The employer in **Leach** was the independent regulator and competition authority for the communications industry in the UK. It had a statutory role to have regard to the vulnerability of children. The employee in question had a senior position in the organisation. He was arrested in Cambodia on charges that he had sexually abused children. This occurred during a recruitment process and before he took up employment with the employer. At that time he was volunteering at the Light House Orphanage

Centre in Cambodia. His passport was confiscated and he was not able to return to the UK. The case generated press interest. He gave false information to the press about his employer's identity. A municipal court in Cambodia decided that no further legal action should be taken and he was allowed to leave the country although his case was under appeal. The dismissal of the case against him was confirmed by the Cambodian Supreme Court about two years after proceedings commenced. He did not advise his employer of these matters. The employee used his work email address to protest about his treatment. The employer investigated and warned him about his use of his work email address. His employer investigated the allegations and was satisfied of his innocence.

60. Thereafter a body called the Metropolitan Police Child Abuse Investigation Command (hereafter "CAIC") got in touch with the employer and warned that they had intelligence that indicated he had engaged in paedophile activity in Cambodia. They warned the employer that they considered he was a risk to children. CAIC representatives met with the employer and agreed to make a limited disclosure pursuant to multi-agency public protection arrangements created under the Criminal Justice and Court Services Act 2000. They disclosed to the employer that the employee had pretended to be a doctor in order to gain access to children in Cambodia and that he had frequented brothels in Cambodia known to supply children. This led to a disciplinary hearing where the CAIC disclosures were discussed. The employer expressed a concern that if these allegations turned out to be true and became public knowledge they would suffer reputational loss if they continued to employ him. The employer was also concerned that the employee had not disclosed potentially damaging information to them before the hearing. It decided that the relationship of trust and confidence had broken down and dismissed him summarily. The EAT dismissed the claim of unfair dismissal and also the case of wrongful dismissal holding that his failure to inform them of certain matters and his continued contact with external organisations by work email constituted a fundamental breach of contract justifying summary dismissal. The Court of Appeal upheld the EAT, holding that the dismissal was fair and that there was no wrongful dismissal.

61. The facts of **Leach** are different from the present case in a variety of respects.

62. In **Leach** the Police had furnished the employer with detailed information about the conduct in Cambodia which tended to support misconduct. In the present case the Respondents had very little to go on. The Claimant admitted that indecent images had been found on a computer in his home, but he denied being responsible for the download. There were other credible explanations for how the images could have got on to the computer. There was no information about the nature of the images before the Head of Service apart from an indication that they were "pseudo images" (Finding in Fact 28). There is no indication as to how they were assessed or graded.

63. In **Leach** the information was analysed critically by the employer with the Police and the employee. The employer sought to establish the reliability of the Police disclosures as far as possible. The Court accepted that this was information the employer was entitled to rely on. In the present case there was no comparable disclosure. As a result there could be no critical analysis of the evidence.

64. In **Leach** there was press interest in the case because of the proceedings in Cambodia. The Sun had been about to publish a story in 2007 after the Cambodian Supreme Court upheld the dismissal (p. 1274C). The employer's press advisor had evaluated the risk of adverse coverage (p 1274G) and considered it to be a real one. In the present case there was no existing press interest. There was no prosecution and no indication that this would change.

65. In **Leach** the employee did not have direct contact with children through his employment. In this case the Claimant was a teacher with access to children at his place of work.

66. The employee in **Leach** had conducted himself in a way that had broken the trust and confidence of his employer. He had concealed the court case from his employer. He had misled the press as to who his employer was. He had used his employer's email to conduct a campaign of protest against the Cambodian authorities. Despite his brush with the law in Cambodia he returned in 2007 for a diving holiday in a part of Cambodia not known for diving (p 1274F). There was no equivalent evidence in the present case.

<u>Proof of matters collateral to Reputational Damage</u>

67. **Leach** demonstrates that dismissals based on reputational damage may be fair even though the conduct giving rise to the reputational damage is disputed by the parties. In **Leach** the evidence available to the employer was in the form of sources indicating that the employee had committed sexual offences against children in Cambodia. The information was disclosed to the employer and the employee and was the subject of discussion. In these cases, given the nature of the allegation, there is an understandable reluctance to require the employer to make a finding as to the truth or falsity of the allegations.

68. The Court of Appeal observes that the employer did not decide that the employee **"was in fact guilty of the matters disclosed by CAIC**" (p 1275C-D) but nevertheless -

> **" .. was entitled to treat the information received from CAIC under an official disclosure regime as reliable… It was entitled to conclude that the responses (of the employee) were not… wholly convincing and not as convincing as they had been in the past.**
>
> **31. The employment tribunal held that it was reasonable for the employer to conclude that there was no significantly legitimate reason to discount or abandon the CAIC view.** "(p 1276E-G)

The Court of Appeal repeat the E.A.T. (p. 1279D-E) observation that –

> **"In a case of this kind … it (is) not established that the employee is in fact a danger to children…"**

69. I note that the employee was in fact later convicted of sexual offences against children and hence the need to anonymise the case had ceased by the time the case was decided by the Court of Appeal.

70. The Claimant in this case rested his argument on the basis that this was a case based on misconduct. I did not understand him to argue that it was necessary to make a finding based on the balance of probability where the conduct relied was collateral to a

dismissal based on reputational damage. That being so I do not require to go farther than the limits set by the decision in **Leach**.

71. The Court of Appeal quoting Underhill, J's (p. 1278A-C) at paragraph 27 put the matter as follows –

"It sticks in the throat that an employee may lose his job, or perhaps in practice any chance of obtaining further employment, on the basis of allegations which he has had no opportunity to challenge in any court of law – or may indeed have successfully challenged. On the other hand, it has to be recognised that there are cases where it is necessary for employers to be warned of facts which indicate that an employee (or potential employee) is a risk to children, even in the absence of any conviction. The courts have had to grapple in a number of cases with how the balance should be struck . . ."

72. The Court of Appeal continued its summary of the E.A.T. judgement –

"The appeal tribunal added that an employer would not be acting reasonably for the purpose of section 98(4) of the 1996 Act if he took an uncritical view of the information disclosed to him: see para 29. The employer was entitled to insist on a sufficient degree of formality and specificity about disclosure before contemplating any action against the employee on the basis of it, to raise questions about its reliability and to seek credible reassurance that all relevant information has been taken into account: see para 29. "

73. The Court of Appeal came to the conclusion that the employer was entitled to dismiss based on the Police intelligence.

74. This case has a far narrower base than **Leach.** Unlike **Leach** there was some primary evidence. The Claimant accepted before the Disciplinary Tribunal that indecent images were on his computer. But beyond that there was no evidence that he was responsible for downloading them. In **Leach** by contrast there was substantial evidence from the Police about the employee's activities with young children in Cambodia. Although a letter containing a summary of evidence was produced, the Crown was not in a position

to share the information with anyone other than the Respondents. As a result I do not know what the summary said. Nor did the Head of Service. The Crown Office Letter is in the Core Bundle. The relevant paragraph is redacted. All that can be discerned from the size of the redacted section is that the summary was brief. As a result the Claimant was dismissed in ignorance of what kind of images were downloaded, what level of gravity they were assessed to have, how many images were downloaded, when they were downloaded, whether the images may have been accessed remotely (Finding in Fact 36) etc. It was possible to infer from the charge that evidence had existed but any inference that might be drawn as to its nature was left in doubt in light of the Procurator Fiscal's unwillingness to prosecute. The reasons for this decision were not divulged. In my opinion in light of the strictures in **Leach** the evidence in this case was insufficient to support a dismissal based on reputational damage. It was not disclosed to the parties or subjected to any form of analysis.

75. There is no indication that the Employment Judge applied the guidance in **Leach** to the question of dismissal on the ground of reputational damage. If she had she would have been bound to conclude that the ground of dismissal could not stand.

76. The only indication that the Employment Judge considered **Leach** in the context of reputational damage is in the summary of the Respondents' submission (paragraph 156). There the Employment Judge quotes Underhill, J's judgement in the E.A.T. –

"In a case where the employee's job involves working with children dismissal on the basis that he posed a risk to children would generally be justified (though it might be necessary to consider whether suitable alternative employment was available, at least in a case where the allegations are unproved)."

77. This comment is found at paragraph 31 of Underhill, J's judgement ([2010] ICR 849 at p. 864). It draws a distinction between an employee such as the employee in **Leach** who was not employed to work with children and employees such as teachers who work with children. It expresses the view that they should be treated differently.

It may be that the Employment judge relied on Underhill, J's dictum in holding that dismissal was open to an employer if there was a risk the employee had been guilty of misconduct.

78. I am unable to read Underhill, J's judgement as authority for this proposition whether in general or in cases involving risk to children. The legal regime for those dismissed because of suspected of child sex offences is the same for employees who face other grounds of dismissal. There are not two regimes. The protections afforded by s 98 of the 1996 Act are applicable to all employees although of course what is reasonable will vary according to the nature of the case.

79. I consider that Underhill, J was addressing the position where the risk to children was established. This follows from his observation in brackets where he contrasts the situation that would arise "where the allegations are unproved". In that situation "it might be necessary to consider suitable… alternative employment". This dictum of Underhill, J does not support the proposition that an employee can be dismissed because of mere risk though it does raise the question of whether some response short of dismissal is appropriate where there is doubt but no proof that the relevant conduct occurred. I note that Underhill, J's view is expressed in cautious terms.

80. I have considered **Z v. A** [2014] IRLR 244 another decision of Underhill, J in the E.A.T. in some respects similar to the present case. It follows the approach set out in **Leach**.

Proof of Reputational Damage

81. Another criticism of the approach of the Employment Judge in relation to reputational damage is that it endorses as reasonable the hypothesis that there would be reputational damage in the event of future prosecution and subsequent conviction. The Claimant's position was that the Employment Judge's reasoning was that although the risk of damage related to the future it required to be proved in the same way as events in the past.

82. The factual predicate is as follows (Core Bundle p. 121).

"If in the future, either by criminal prosecution or otherwise it was shown that you had committed an offence involving indecent images of children it would cause the Council serious reputational damage if we continued to employ you in any post in circumstances whereby it became public knowledge that we were aware of the allegations against you yet continued to employ you."

83. Here the Head of Service's decision is predicated on the possibility of criminal prosecution. The words "or otherwise" indicate that it was thought that his behaviour might be scrutinised in some other unspecified way. The Head of Service postulates that the prosecution would show that the Claimant had committed an offence.

84. The only evidence about the possibility of future prosecution was the Procurator Fiscal's Letter. The evidence given by the Claimant's solicitor about the interpretation of the Procurator Fiscal's Letter was designed to explain its meaning. Although the Procurator Fiscal's Letter is written in guarded terms and is certainly not an unequivocal renunciation of the right to prosecute, it communicates a decision taken on the basis of the evidence available. The Letter could not have been understood to mean that the Crown intended to prosecute at some later stage. The proper inference was that unless there was a change of circumstances the Claimant was not going to be prosecuted. The Head of Service had no evidence that entitled her to be satisfied that this would happen. It would appear however that the fact that the possibility of conviction existed was enough to persuade the Employment Judge that it was reasonable to take account of the risk.

85. Although I accept that reputational damage was an important concern for the Respondents given the nature of the charge and their responsibility towards children, the spectre of reputational damage abated when the Crown Office and Procurator Fiscal Service indicated that they had no plan to prosecute the Claimant. These hearings have taken place (to my knowledge) without any disclosure of the identity of the parties. The anonymity order that was in place at the Employment Tribunal and before the Employment Appeal Tribunal has achieved its purpose and enabled the issues to be examined beyond the glare of publicity.

86. The hypothesis of a future conviction only arose as a concomitant of an approach to risk that was unlawful. The Head of Service was not entitled to assess matters on the basis of unknown risks but on the basis of the evidence known to her. In my opinion the Employment Judge erred in law in accepting that this approach was reasonable and in conformity with the requirements of s. 98(4) of the Employment Rights Act 1996.

Fourth Ground of Appeal

87. The Claimant submits that the Employment Judge did not explain why she did not apply **In Re B.** As I narrate in connection with the Third ground of Appeal the Employment Judge did give a reason for rejecting **In Re B**. I therefore reject this Ground of Appeal.

Fifth Ground of Appeal

88. This ground can be taken shortly. The Claimant did not press it. The Claimant submitted that the Employment Judge had at points substituted her own view for that of the employer. The Claimant referred to the following passage at paragraph 229.

> **"The Tribunal considered that in reaching the conclusion that the Head of Service was not able to exclude the possibility of the Claimant having been responsible, what she was effectively concluding was that there was a risk that the Claimant was responsible."**

89. I do not agree. This is a paraphrase of the Head of Service's reasoning. I consider it is an accurate paraphrase. I do not consider that this is an error of law.

90. The Claimant further submitted that the Employment Judge substituted her views for that of the Head of Service in the following passage at paragraph 229.

> **"In the course of the disciplinary hearing, he said that he did not know how they [the images] came to be there, only that his son's friends could have been responsible. At the investigatory stage, he said that the Police had told him that his computer could have been remotely accessed. These are possible different explanations, but they could not reasonably be construed as the explanation of how the images got there…"**

91. The Claimant points out that the Dismissal Letter states "you were not able to provide any alternative explanation as to how the images came to be on your computer within your home" (Core Bundle p 119). This is erroneous. The Claimant did provide explanations for how the images might have got on to his computer. In light however of the conclusion in the same paragraph that "there is insufficient evidence that you were responsible for the indecent images" the error is no significance. I do not consider in any event that the Employment judge is substituting her view for that of the Head of Service. I accept however that the Employment Judge appears to have thought that the Claimant had to supply the Head of Service with "the explanation" of how the images came to be there. That however does not involve any question of substitution. I refer back to the Third Ground of Appeal and my observations there about the standard of proof. The Employment Judge here (paragraph 229 line 30) appears to place the onus on the Claimant. The Claimant was not obliged to provide the explanation.

The Obligation of Trust and Confidence

92. There was no ground of appeal focussed on the obligation of trust and confidence. Strictly speaking I do not require to deal with this issue. It falls away of necessity because the basis for breach of the obligation has not been upheld. I note that there were discrete grounds supporting breach of the term in **Leach** which the Court of Appeal accepted were a justification for dismissal. There is no separate justification for the alleged breach in this case. I echo the concerns of Mummery, LJ (p. 1281C-D).

> **"The mutual duty of trust and confidence, as developed in the case law of recent years, is an obligation at the heart of the employment relationship. I would not wish to say anything to diminish its significance. It should, however, be said that it is not a convenient label to stick on any situation, in which the employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever a conduct reason is not available or appropriate."**

The Risk Assessment

93. The Respondent carried out a risk assessment. It is mentioned in the Dismissal Letter (Core Bundle p 121). It did not figure in argument before me. It was not in evidence before the Head of Service and the Claimant had no input into it. It seems to have been

a “desktop” risk assessment instructed by the Respondents after the disciplinary hearing was over. It was accepted that it did not affect the issues argued before me.

Human Rights

94. During the hearing I raised with parties a concern as to whether the disciplinary hearing was subject to the article 6 E.C.H.R. fair trial guarantees and whether the knowledge of the HR Advisor should be treated as imputed to the Head of Service. I am grateful to the parties for their detailed written submissions in this connection and am satisfied that it was a “red herring” (**Mattu v University Hospitals of Coventry and Warwickshire NHS Trust** [2012] IRLR 661 at paras. 75 and 107; **Carltona Ltd v Commissioners of Works** [1943] 560).

Disposal

95. In these circumstances I will uphold the first and third grounds of appeal; dismiss the second, fourth and fifth grounds of appeal, substitute a finding of unfair dismissal and remit the case back to the Employment Tribunal for further procedure in connection with remedies. I do not see any need to remit to a differently constituted tribunal.