Appeal No. UKEAT/0203/13/SM
& UKEAT/0380/13/SM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
on 12th November 2013
Judgment handed down on 9th December 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MR I EZEKIEL

MR H SINGH

UKEAT/0203/13/SM

Z APPELLANT

A RESPONDENT

UKEAT/0380/13/SM

A APPELLANT

Z

RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant (in UKEAT/0203/13/SM and the Respondent in UKEAT/0380/13/SM)	MR ANDREW WATSON (Representative) Instructed by: Free Representation Unit Ground Floor 60 Gray's Inn Road London WC1X 8LU
For the Respondent (in UKEAT/0203/13/SM and the Appellant in UKEAT/0380/13/SM)	MR BRUCE GARDINER (of Counsel) Instructed by: Legal Services of the school in question

SUMMARY

UNFAIR DISMISSAL/REASON FOR DISMISSAL INCLUDING SUBSTANTIAL OTHER REASON

The Police reported to a school that an allegation had been made of historical sex abuse by the Claimant school caretaker (outside, and before, his employment). Though disbelieving, the Head suspended the Claimant whilst investigations continued. After about a year, the Head decided to recommend dismissal to the Governors, though nothing further had happened to support the allegation, the accuser's mental state was being assessed, those witnesses whom the accuser had identified as supporting his claims in fact did not do so, and it was said that a decision as to whether to charge the Claimant or not would be made within the immediate future. The Governors dismissed, and on appeal that was upheld, on the basis that even if the Claimant were exonerated the fact of the allegation alone should have that result. Their principal concerns were the risk to children, and to the school reputation. An ET held that the dismissal was unfair, both substantively (the reason did not amount to some other substantial reason of a kind justifying dismissal) and procedurally, and awarded compensation. In assessing the award, it did not regard the Claimant as entitled to damages to the extent that post-dismissal depression had prevented him from obtaining work.

An appeal against the liability decision was rejected, since this was a factual assessment and was not perverse; none of the other grounds of appeal was made out.

The Claimant cross-appealed as to remedy, arguing that the Judge should have linked the depression to the dismissal. This too was rejected, since the Judge had been entitled to hold

that the burden of proof (of showing that the dismissal caused or contributed to the depression) had not been satisfied.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. For reasons given on 15th October 2012 Employment Judge Pettigrew at East London Employment Tribunal held that the Claimant had been unfairly dismissed. In a separate decision, reasons for which were delivered on 16th January 2013, the same Judge awarded £5,155.52 in compensation for this unfair dismissal. The employer appeals the first decision; the Claimant the second. Because of the nature of the allegations, Rule 49 of the Employment Tribunal's Rules of Procedure applied, so that the judgment was anonymised. In accordance with the practice adopted in **A v B** [2010] ICR 849, we have continued that anonymisation.

2. Neither party was represented by the same advocate who appeared below, though as before, the Claimant was represented with the assistance of the Free Representation Unit, this time by Andrew Watson, whereas the employer was represented by Counsel: before us Mr Bruce Gardiner.

The Facts

3. A was employed as a school caretaker and site manager at a primary school which had over 200 pupils. He was forty-nine years old at the date of his dismissal in July 2011.

4. In March 2010 an allegation was made to the police that A had, some time ago, sexually abused a child. On 23rd April 2010 that allegation was reported by the police to the school: the accuser had said he felt compelled to make his allegation after hearing that A was now working with children.

5. Although initially concerned that the allegation was malicious, the Head Teacher, X, suspended A from duty towards the end of April, despite recognising that this very seriously affected A. Her reasoning was that protection of the children was paramount. That decision was taken following a strategy meeting. A further such meeting was held a week later on 5th May 2010. It appeared then that the accuser did not wish there to be a criminal charge, and although A was to be interviewed there would be no criminal conviction.

6. A further strategy meeting was envisaged, though none was held. However, by 20th May the accuser had made a formal statement confirming the allegations. The police were then investigating.

7. After nearly a year, as to which the Tribunal was given no detail of what if anything was occurring, X decided to bring matters to a head. She invited A to a meeting with herself and an HR Advisor on 6th May 2011. She heard from A that he resisted the allegations, had not been charged with any offence, and was seeking to question the accuser. He told X that the police had wanted to drop the case. X, however, decided to call A to a hearing before the Governors, scheduled for 8th June, at which the Governors would consider her recommendation that he be dismissed on the ground that the trust and confidence which she had in him as an employee had broken down to the point where it was irreparable. This was "due to the very serious nature of the allegations" (paragraph 4.19).

8. Two days before the hearing on 8th June X spoke to the police officer then responsible for the investigation. He told her that an analysis of the accuser was under way and should be completed within 2 weeks. That would then be passed to an expert witness who would make a judgment on the validity of his allegation – whether the accuser imagined the events or whether

it was possible it had happened. Whereas the accuser had earlier identified a number of people whom it was said would support the accusation, none of the witness statements taken by the police in response in fact supported the claim. Whereas a view had previously been expressed to the Head Teacher at the very outset by a social work practitioner to the effect that making an allegation of abuse is traumatic, not a decision which a victim takes lightly, that malicious allegations are rare, and that the details of this complaint were said to be "very believable", the PC responsible for the investigation in June 2011 said the police were taking no view about the credibility of the accuser: they were making no judgments, but engaged in fact finding (paragraph 4.20; Cf 4.10).

9. At the hearing on the 8th. June, the members of the panel decided that A should be dismissed as the school's trust and confidence in him had broken down. The record of the decision noted that the allegation "created a serious safeguarding issue for the school and even if the employee were to be completely exonerated the trust and confidence in him had been eroded and there would always be an element of doubt." The Tribunal set out extracts from the records at 4.24 and 4.25 giving the reasons of the panel as being that, given the allegation, there was always going to be a doubt, and that the matter could seriously damage the confidence that parents and public had in the school. Due to the length of time the police investigation was taking the school could not reasonably allow the situation to continue for an unlimited period. It was not suggested that the Claimant had done anything to forfeit trust and confidence in him beyond being the subject of the allegation.

10. An appeal before a panel of different Governors took place in late July, in which the Claimant indicated that he had a specific date (which was only eight days later) for the outcome of the investigation.

The Tribunal Decision

11. The Tribunal gave a self-direction on the law on unfair dismissal at paragraph 5 of its reasons in a manner which has not been criticised before us, and we regard as impeccable. In particular, it centred itself on the relevant statute, at section 98 of the **Employment Rights Act 1996**. The Judge recognised the difficulty for the employer in seeking to deal fairly with the Claimant. Where an accusation of child abuse, albeit historic, is made, a school cannot reasonably ignore it, but is in no position to assess the allegations for itself; whilst on the other hand the employee is at risk of serious injustice if he is to lose his job on the basis of an unproven and untested allegation made ***to*** his employer (not ***by*** him).

12. At paragraph 6 the Tribunal noted from **A v B** that the question for the Employment Tribunal was not whether the Claimant had suffered an injustice, but whether the conduct of the Respondent employer towards him was fair. If the unfairness lay in the behaviour of the accuser and the police, the Claimant's remedy lay against them. When **A v B** came before the Court of Appeal as **Leach v Office of Communications** [2012] ICR 1269, C.A. it determined that the question for the Tribunal was whether the reason for dismissal following an allegation that the employee had been engaged in abuse outside his occupation was one for "some other substantial reason" ("SOSR"), which was a question for assessment by the Employment Tribunal on the facts as found. In order to determine that, an Employment Tribunal had to examine all the relevant circumstances. SOSR was not to be used as a convenient label to stick on any situation where the Respondent feels let down or feels it can be used as a valid reason whenever a conduct reason is not available or appropriate.

13. The Tribunal held: (1) each case must be determined on its own facts; (2) the question was whether what had happened was fair, not what might have happened; (3) the first task was to decide what the reason was for dismissal; (4) the Judge had to focus on the statutory words. For ease of reference we interpose here that in **A v B** at paragraph 31, Underhill P said:

> **"Even if the employer was entitled to treat the disclosed information as reliable and thus to treat the Claimant as posing a risk to children, it remains to consider whether that was a sufficient reason for dismissal: see section 98 (4) (a). This is not straight forward. … in a case where the employee's job involves him 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 were available at least in a case where the allegations were unproven)".**

14. Apart from delivering a ringing endorsement of the judgment of the Appeal Tribunal, in the Court of Appeal (sub nom. **Leach v Ofcom**) Mummery LJ said, at paragraph 53 in relation to whether there was a "substantial reason":

> **"The circumstances of dismissal differ from case to case. In order to decide the reason for dismissal and whether it is substantial and sufficient to justify dismissal the Employment Tribunal has to examine all the relevant circumstances."**

15. The Tribunal concluded at paragraphs 6.5 and 6.6 that the reason for dismissal was that there had been an accusation of historic child abuse against the Claimant. It asked whether the accusation was a substantial reason justifying the dismissal of a person holding the position that A held (thereby echoing the requirements of section 98 (1) (b) of the **1996 Act**). The matter was not a trivial one, but whether it was a sufficient reason depended on the circumstances. At paragraph 6.9 the Tribunal said:

> **"A bare accusation by itself, even of something so serious, cannot, in my finding, amount by itself to a substantial reason justifying a dismissal. If it were otherwise the consequences would be that there would be no reason to investigate any allegation by a pupil against a teacher or by a parent against a teacher: the mere fact of an allegation, however wild or frivolous, would be enough to dismiss, and I do not believe that can be right.**
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> **6.10 X was very clear. Only if there were a prompt retraction by the accuser would she regard the matter as cleared, so as to consider the Claimant as having established trust and confidence. The Governing Body were equally clear. One member did not believe that the Claimant could be exonerated… the others candidly admitted that the evidence was immaterial. The allegation had been made and that was enough…**

> **… 6.12 It is clear that the school regarded the matter as substantial because if the allegation were true, and even if it were not, the fact that it had been made, meant that they could not run the risk of having the Claimant as caretaker.**
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> **6.13 In this I accept that the school had in mind that its reputation, in the eyes of parents and the public, might have been at risk. I find it more likely than not that the school would be aware that parents might take the view that there was "no smoke without fire".**
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> **6.14 In deciding whether the reason – that an accusation has been made – was such as to justify the dismissal of the Claimant, is necessary to strike a balance. It was necessary to weigh the recommendations that the school had and the welfare of children against the interests of the Claimant, but to condemn on the basis of accusation alone is a standard that a reasonable employer would not have adopted. It is more appropriate to bodies of a more totalitarian disposition.**
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> **6.15 I observe that the Respondent has policies and practices for dealing with child protection issues. That code includes provision for dealing with accusations against school staff and in my interpretation it fairly balances the rights of the individual against unfounded accusations. It is predicated on the assumption that there will be a process leading to a conclusion, usually that process being run by the Police. There may be a conviction, or some other finding of guilt, or there may be an equital or a decision not to prosecute."**

16. The Judge considered the particular formal and general Procedure which the Respondent had adopted, which included steps protective of the position of both the school and the affected employee, including looking to support an affected person in a process which permitted proper investigation of the allegations and findings. Z had not followed that procedure: but he noted at paragraph 6.19 that that fact was not of itself determinative of whether there was a substantial reason justifying dismissal, or whether the Respondent acted reasonably or not. The conclusion at paragraph 6.20 was as follows:

> **"…it makes little difference whether I characterise this as a failure to show a substantial reason of a kind sufficient to justify the dismissal of a caretaker, or whether this is a lack of reasonable grounds of dismissal for that reason. Fundamentally, the Claimant was dismissed on an accusation leading to no more [than] an unsupported suspicion that he was a risk to children, but without any authoritative evidence or opinion to support it. That, in my finding, was not a substantial reason such as justified the dismissal of an employee holding the position that the Claimant held."**

17. The Respondent having failed to show a potentially fair reason for his dismissal, the claim had to fail. The Judge found in addition (paragraph 6.21) that no reasonable employer would have treated the reason as a sufficient reason to dismiss. Observing that the interests of

children might be paramount but were not conclusive (he said "exclusive") a reasonable employer would not have "proceeded down the disciplinary route" (This description was challenged as inappropriate by Mr. Gardiner in opening, though in response Mr Watson showed us a letter from the school to the Claimant of 26th April 2011, which referred to the anticipated proceedings as being part of the school's "formal disciplinary procedure". Therefore, whereas we understand the criticism, it is unjustified here since the judge was merely echoing what the Respondent itself was saying, not exhibiting a confusion in approach as between discipline for misconduct in work and dismissal for behaviour outside it).

18. At paragraph 6.23 and following the Tribunal said this:

> **"Further, I found that the Respondents did not act within the band of reasonableness in relation to procedure. Again, whilst the Respondent's child protection procedures are not determinative, they are a relevant consideration, and they reflect in many ways the interests of ensuring fairness. The Respondents in my view failed the test of the reasonable employer when they failed to brief the Claimant in the implications of what they were being told by the Police. No reasonable employer in my finding could have relied on the strategy meeting notes without disclosing them to the Claimant in advance."** [that was a reference to the fact that at the dismissal meeting the notes were read out: the Claimant had not seen them, or heard them before.] **The latest information the school had about the progress of investigation was from the Claimant himself at the appeal. He told the panel the matter would be concluded on 28th July. Six weeks had elapsed since the latest update by PC S. Nobody made any further enquiries to check whether the Claimant's assertion was correct.**
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> **6.24 I would also have remarked on the affect (sic) of the delay. If it is the case that the Respondent decided to dismiss the Claimant irrespective of the outcome of police investigations, and that was the case in my finding, no reasonable employer would have waited 14 months to do it. By then the inference had arisen that the Respondent was seeking to determine the Claimant's employment future on a rational basis having regard for the evidence against him and the merits of his case, not on the mere fact of accusation.**
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> **6.25 To summarise for the reasons set out, I found that the Respondent had failed to show a substantial reason such as to justify the dismissal of a person holding the position that the Claimant held and, if I am wrong about that, then they did not act reasonably in all the circumstances in treating that as a sufficient reason for dismissing the Claimant and therefore I found that the dismissal was unfair"**

Grounds of Appeal

19. The employer raised 8 grounds of appeal. In a skilful argument Mr Gardiner submitted that the Tribunal had looked impermissibly to the employer to make a decision as to guilt or

innocence; it had instinctively adopted a categorisation of three types of accusation – one which had been investigated, showing guilt, a second which was where an authoritative opinion had been expressed (as in **A v B**) and a third where there was a bare allegation - and had concluded that a bare allegation could not be grounds for fair dismissal; that the Judge had extrapolated the factual position from **Leach v Ofcom** to suggest that was the minimum needed to be fair; had been over-influenced by the school's own procedure; had confused having a disciplinary procedure with dismissal or some other substantial reason ("SOSR") (a point we reject for reasons given at paragraph 17 above); had failed to consider that this was not a bare allegation ("bare" was used in the sense of unsupported by any other evidence than that of the accuser) because here the police had brought it to the attention of the school, and it was clear that the police had not dismissed the accusation out of hand, such that it could not be equated with a wild or frivolous obligation. In saying what he did the Judge put the bar too high. In drawing the principles from **Leach v Ofcom** at paragraph 6.3.7 he adopted too high a level of generality. The true import of **A v B** was "where there is an authoritative disclosure or opinion that an employee poses a risk to children, or is liable to commit offences, it is open to an employer having tested that disclosure to dismiss fairly". The wider principle to be drawn is that in a case where there is a reason to think that there is a potential risk to children which is potentially supported by the police, dismissal on the basis that the person is a risk to children will "generally be justified".

20. Ground 1, set against the background of the general points, argued that it was an error of law to find the Respondent did not have a substantial reason for dismissal in the circumstances of the case on the basis that there was an unsupported suspicion that he was a risk to children; or alternatively, Ground 2 that the finding that the Respondent was dismissed on the basis of an unsupported suspicion was perverse; Ground 3 argued that the finding in paragraph 6.21 that no

reasonable employer would have treated an allegation of this nature as a sufficient reason to dismiss, when they could not investigate it themselves, was an error of law; Ground 4 that the balance struck by the Tribunal in paragraph 6.14 was incorrect – the interests of children do not balance equally the interests of the employee. The Tribunal mis-directed itself in so holding. Ground 5 attacked paragraph 6.22 (that no reasonable employer would dismiss without obtaining an authoritative opinion from a person in a position to investigate) as an error of law. Ground 6 was that the view expressed in paragraph 6.24 as to delay was in error; Ground 7 that it was an error of law to hold that the employer's failure to brief the employee on the implications of what they were being told by police rendered the dismissal procedurally unfair; and Ground 8, to the same effect, attacked the decision on reasonableness of procedure in paragraph 6.23 - what the Tribunal said about the strategy meeting notes was an error of law, since the Claimant already knew the details of the allegations, having been interviewed under caution, and there was no prejudice to him.

21. Both parties were invited to consider whether the case of **Gogay v Hertfordshire County Council** [2000] IRLR 703 had anything of principle to offer. It is not necessary to say more than that both parties submitted in writing after the close of oral argument that it did not, since although it concerned allegations of sexual abuse it was clearly to be distinguished on its facts. We therefore disregard that case.

Discussion and Conclusions

22. We accept that the approach described in **Leach v Ofcom**, endorsing the judgment in **A v B** from which it was an appeal, is to be adopted. Moreover, though binding upon us without the need for further support, it chimes in unison with the earlier decision of Lady Smith

(in a different case despite the similar lettering) in **B v A** (UKEATS/0029/06, 3 April 2007) in which the Tribunal said at paragraph 55:

> **"We would wish to add that although the outcome of this appeal is that we are satisfied that this Claimant was fairly dismissed in circumstances whether the trigger for his dismissal was a 'soft disclosure' letter, we are not to be taken as holding that every time that an employee is dismissed on the grounds of the existence of such a letter, such a dismissal will be held to have been fair. We concede that it is likely that it will not be difficult for an employer to show that the dismissal was "for some other substantial reason" if it was on the grounds of such a letter. The test for fairness, however, remains as set out in Section 98 (4) of the 1996 Act and we do not see that a dismissal is to be presumed to have been fair because it is on the grounds of such a letter. Rather, each case is bound to turn on its own facts and circumstances. It so happens that in this case, the whole facts show that the dismissal was a fair one. Matters might well be different in another case notwithstanding that one of the relevant facts is the existence of such a letter."**

What is significant about the expression of principle in those three decisions by Lady Smith, Underhill P and subsequently Mummery LJ is that each was careful not to hold that as a matter of law the mere fact of an allegation of sexual abuse precluded a finding that a dismissal because of it was unfair. The first noted that different cases might be determined differently. The second (paragraph 27 of his judgment) thought that it stuck in the throat that an employee might lose his job, and perhaps in practice any chance of obtaining further employment, on the basis of allegations which he had had no opportunity to challenge in any court of law or indeed might have challenged successfully. The focus of the enquiry by the Employment Tribunal had however to be on how the employer should reasonably have acted when such a disclosure was made to him. He held that an employer was entitled to rely upon the view that an employee was a risk to children when expressed by an authoritative body under an official disclosure regime, but even then only "in principle and subject to certain safeguards" (paragraphs 28 and 29). An employer would not be acting reasonably for the purpose of Section 98 (4) (paragraph 29): -

> **"…if he takes an uncritical view of the information disclosed to him… the employer ought therefore always to insist on a sufficient degree of formality and specificity about the disclosure before contemplating taking any action against the employee on the basis of it. He will sometimes be in a position, either from his own knowledge or information obtained from the employee, to raise questions about the liability of the disclosed information…"**

At paragraph 31, Underhill P added this:

> **"That, however, is only the first stage. Even if the employer was entitled to treat the disclosed information as reliable, and thus to treat the Claimant as posing a risk to children, it remains to consider whether that was sufficient reason for dismissal: see Section 98 (4) (a). This is not straight forward. …"**

23. Thus, in a case in which the Metropolitan Police Child Abuse Investigation Command (CAIC) had not simply reported allegations made by others but actually delivered a warning that they considered the Claimant posed a continuing threat to children, an employer was obliged not to accept that view uncritically, and even then dismissal would not automatically be justified. The use of the word "generally" in paragraph 31 of **A v B** means that the question is one for determination by the Tribunal: it is not conclusively determined by the fact of an allegation, even where that allegation is authoritatively supported.

24. Thirdly, Mummery LJ, with whom Hooper and Pitchford LJJ agreed, said in **Leach**:-

> **"52. First, the question for the Employment Tribunal was whether the employer's reason for dismissal of the Claimant was "some other substantial reason" within the meaning of section 98 (1) (b) of the 1996 Act. Was it a reason which a reasonable employer could rely on to justify a decision as fair for the purposes of Section 98 (4)? That is essentially a question for the Employment Tribunal's assessment on the facts found in the particular case. Its decision can only be appealed if a question of law arises from it. The Claimant is not entitled to re-argue the facts of the case in the hope that he can persuade this court to make a different assessment more favourable to him. ….**
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> **53 …. in order to decide the reason for dismissal and whether it is substantial and sufficient to justify dismissal the Employment Tribunal has to examine all the relevant circumstances. …."**

Hence the Court of Appeal plainly contemplated that the assessment by a Tribunal of whether a disclosure of potential risk merited dismissal was one for its judgment. Its conclusion on that matter would be one of fact and as such unassailable on appeal unless it could be properly described as perverse – or perhaps if it could be demonstrated that the Tribunal did not examine all of the relevant circumstances and had left a material one out of consideration.

25. **Leach**, and **A v B**, considered factual circumstances which in at least two major respects are different from the facts before us. They pull in different directions. First, the employee there did not work directly with children as did the Claimant here. But, second, the CAIC gave its own view that the Claimant was a continuing threat to children, whereas the police here declined to give a view, at least by the time of dismissal. It is precisely because the facts of one case will inevitably differ from those of another that the search in this area above all must be for statements of general principle. Although **Leach**, and **A v B** arise from a factual background distinguishable in at least the two respects we have mentioned from those of the current appeal, in the citations set out above they do express general principles, consistent with those stated earlier at EAT level by Lady Smith. It follows from those principles that a Tribunal is not bound to hold that because the police have reported an allegation made by a third party without, at least at the point of dismissal, endorsing it as their own view, a dismissal for being the subject of the allegation is necessarily fair within Section 98 of the **1996 Act**. We accept Mr Watson's riposte to this ground that the Appellant has to show the decision was perverse. The principle here is no different to that applicable to any conclusion of fact and assessment based on fact.

26. We do not accept Mr Gardiner's argument that the Tribunal adopted a taxonomy splitting permissible decisions into three exclusive classes. Rather, its decision was careful to recognise the particular facts of the case before it: that the evidence showed that it did not matter to the employer how credible, or otherwise, the allegations might be - it was sufficient to dismiss that they had been made at all. It was in that context that the Tribunal spoke of delay: if, truly, it was the fact of the allegation as opposed to its substance that was to be determinative, it was potentially unfair to encourage the Claimant by delay to think that

evidence exonerating him would preserve his job, whereas on the basis of what was said to the Tribunal it would not (paragraphs 6.10; 6.12; 6.24). This evidence, too, would not have satisfied the principle expressed by Underhill P in **A v B** to the effect that even where an authoritative body said that an employee was a danger to children the employer should nonetheless look critically at the allegation.

27. We do not accept Mr Gardiner's argument that the extensive description from paragraph 6.3.1 to 6.3.7 of the circumstances of the case of **A v B** suggested that the Tribunal had been wrongly over-influenced by that decision. It took care at paragraph 6.4 to say (in the third sentence) that what it drew from **A v B** and **Leach v Ofcom** were the principles which emerged. The Judge was careful to make it clear that he was not adopting the factual scenario from that litigation as a form of factual template for unprincipled comparison.

28. Nor do we accept that the Tribunal was impermissibly over-influenced by the fact that the school had a procedure for dealing with child protection issues. It was, we think wise (at paragraph 6.19) to say it did not regard the procedure as of itself determinative of the legal issues which arose, for the employer's Child Protection Procedure perhaps concentrated more on allegations about employees raised internally within the school rather than externally to it: but in any event the fact that there was a procedure, which was at the very least of some relevance, was material to the assessment which the Tribunal made. To talk of 'over influence' is to raise an issue of weight. If, as we hold, the decision is essentially one of fact and factual assessment an argument as to weight or emphasis simply does not go far enough to become an error of law.

29. Ground 1 asks us to treat the Tribunal's hands as tied, despite consistent authority suggesting that though an employer's decision to dismiss where there has been an allegation (but no conviction) of child abuse may well, and indeed generally, be fair it is not inevitably so. Moreover, there is no presumption that such a dismissal will be fair unless there is some exceptional reason to decide otherwise: so to hold would be to introduce an inadmissible gloss on the wording of Section 98 of the **Employment Rights Act 1996**. That section calls for the employer first to establish a qualifying reason for the dismissal (therefore, in the present case it was for Z to establish that there was some other substantial reason of a kind justifying dismissal – and those last five words should not be overlooked), after which, once achieved, fairness falls to be determined without a burden being placed upon either party either to prove or disprove it.

30. Ground 2 falls on the facts. The suspicion was unsupported: the evidence was clear that was the reason for the dismissal.

31. Turning to Ground 3, the finding in paragraph 6.21 was part of a conclusion as to reasonableness, as to which the conclusion was simply not perverse.

32. Ground 4 is without force, for the passage of which it complains cannot be taken on its own. As with any Tribunal judgment, this one must be read as a whole. The balance between the interests of children on the one hand, and the interests of the Claimant on the other was not struck between interests which were regarded by the Tribunal as of equal weight – for in paragraph 6.21 the Judge makes it clear that "the interests of children might be paramount but they are not exclusive", thereby recognising the greater weight they had.

33. Ground 5 approaches paragraph 6.22 as if it were a general proposition about all cases whereas the wording makes it clear that it was confined to the particular facts of this case itself.

34. Ground 6 we have dealt with in our general comments above.

35. Grounds 7 and 8 seek to isolate two aspects of procedure which were judged as part of an overall assessment of all the aspects of the procedures adopted. Whereas forensically we understand the technique of concentrating on particular factors whilst leaving others unconsidered, in the hope of showing that the decision was flawed, it is the whole picture and not mere component parts of it which must be viewed. The Tribunal heard the evidence. It considered the detail and the submissions of both parties. It was best placed to judge whether in the current circumstances what the employer did amounted to adopting an unreasonable procedure, taking into account all the other procedural aspects which the Tribunal identified (including the fact that the school had not observed its own Child Protection Procedures, a finding which is not the subject of any adverse criticism before us). As to Ground 8, it is almost axiomatic that a fair procedure requires a person to be given a reasonable opportunity of answering those matters which are to be held against him. Here, the employer in seeking to dismiss the Claimant relied upon notes of a strategy meeting held almost a year previously. Yet what those notes contained were matters of which the Claimant only had proper knowledge when he was in the course of the disciplinary hearing itself. The fact that much of the ground covered by those notes may also have been dealt with by the Claimant elsewhere does not diminish the point of its force, for these were matters which the Claimant was being required to answer there and then, which he may not previously have appreciated were significant to his employer and which, if he had, he might have been in a better position to answer. That was the vice to which we think the Employment Judge was making reference in paragraph 6.23. The

paragraph as a whole deals comprehensively with the question of fairness of procedure highlighting some aspects of it. There is nothing perverse about the overall conclusion which was reached.

36. Standing back from the detail of the appeal, unsubstantiated allegations of sex abuse, which are given no additional force by the endorsement of police CAIC or other authoritative body, give rise to one of the most difficult issues of balance which an Employment Tribunal has to perform. The employer is always likely to be in a cleft stick, unless it already has some reason of its own to suspect the employee, or some good reason to think that the allegations are out of character to an extent that diminishes their reliability. The duty of such an employer concerned with serving children is first and foremost to those children, but that does not remove its responsibility to its employees. Every case will turn upon its own facts. The principles to be applied have been clearly set out in **Leach v Ofcom** and it would be unwise of us to add any contribution of our own. We would, however, emphasise that those principles leave room for a Tribunal to draw its own conclusions both as to whether there was a reason of a kind justifying dismissal (emphasising those last words, which may too often be forgotten in examining a supposed SOSR), and whether having regard to equity and the substantial merits of the case, in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating that reason as sufficient. HHJ Clark, on the Sift, thought that the views of Lay Members would be of particular value as to the approach to be taken by an employer to a delicate and difficult issue such as this. Thus although the Judge sat alone below, HHJ Clark ordered an appeal panel of three and we have sat as such. All three of us had sympathy for the employer's position: but had the Lay Members been occupying their industrial roles each would from their respective positions have endorsed the views of the Employment Tribunal.

37. It follows that despite the skill with which Mr Gardiner advanced his submissions, the appeal in respect of liability must be and is dismissed.

Cross-Appeal

38. The Claimant had sought a substantial award of damages. His case was that he had suffered from depression in consequence of the way in which his employer had treated him. The depression effectively prevented him working. That was accepted by the Tribunal in its remedy findings at paragraph 31, in which it said "…the loss which A has suffered from the date of dismissal is not attributable to the Respondents but to his ill-health." The Claimant argued before the Judge that he should recognise that the ill-health had been caused by the dismissal itself. He argues before us that had the Judge done so, he could, and should, have held the Claimant entitled to an award: in **Devine v Designer Flowers Wholesale Florists Sundries Ltd** [1993] IRLR 517, an Employment Appeal Tribunal chaired by Lord Coulsfield held that there was no reason why the personal circumstances of the employee, including the effect of dismissal on her health, should not be taken into account in ascertaining the appropriate amount of compensation.

39. The central reasoning of the Judge is to be found at paragraph 29:

> **"I found that the Claimant has suffered from depression from early or mid May 2011 and that that has prevented him from working since. Essentially A is seeking damages for the manner of his treatment as separate from the fact of dismissal. To succeed in that he would need to show first, that the Respondents acted unreasonably, second that that behaviour caused his ill-health, and third, that such ill-health prevented him working. He has no evidence really for point number two. In any event the loss for the manner in which he was dealt with (and he particularly refers to conversations that took place in May 2011) are well on the wrong side of the line to be susceptible for an award of compensation for unfair dismissal as explained in the case of *Johnson v Unisys* [2002] [ICR480]. If there is to be a claim for loss of earnings deriving from ill-health caused by the Respondent's behaviour it has to be either in**

> **tort or in contract under a claim for breach of the implied trust and confidence. Neither of those jurisdictions were before me."**

40. Mr Watson argued that this paragraph betrayed three errors: the reference to **Johnson v Unisys** was erroneous; it was perverse to hold that the Claimant had "no evidence really" since there was some; and the Claimant was not placing reliance on the manner of his dismissal alone, but on both that and the fact of dismissal - at the very least, the Judge should have considered whether if the Claimant were suffering from depression at the time of his dismissal, the dismissal aggravated that depression so that the period of illness from which he suffered extended for longer than it otherwise would have done: see **Dignity Funerals Ltd v Bruce** [2005] IRLR 189, C.S., to which the Tribunal had been referred in argument.

Discussion

41. The starting point has to be the statute, as is ever the case in employment matters. Section 123 of the **Employment Rights Act 1996** provides so far as material that:-

> **"(1) … the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the Complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer"**

42. This calls for a causative link between the dismissal and the loss sustained. The loss is purely economic: there is no room for non-economic loss (**Dunnachie v Kingston upon Hull City Council** [2004] ICR 1052, HL). In principle, if it is a consequence of a dismissal that mental illness ensues, which in turn prevents the sufferer from working, the necessary causal link can be established (**Devine**; **Dignity Funerals Ltd**). However, to show that that consequence has resulted requires sufficient evidence. Next, it is worth noting the limits to this principle. The Tribunal must have regard under section 123 to a loss sustained "in consequence of the dismissal". It does not have to pay regard to that which is not part of the dismissal – such

as those matters which precede a dismissal, but which on the facts, as established by the evidence, are not part of it.

43. The jurisprudence sparked by **Johnson v Unisys**, which can be traced through **Eastwood v Magnox Electric plc**; **McCabe v Cornwall County Council and another** [2004] ICR 1064, HL to **Edwards v Chesterfield Royal Hospital NHS Foundation Trust** [2012] ICR 201, SC; [2011] UKSC 58 concerned the question whether a Claimant could sustain a claim for mental illness or psychiatric injury and consequent inability to work which had been caused or contributed to by the way in which an employer had treated him whilst in the process of dismissal. The House held that a claim for common law damages for such injury should be struck out, since by providing the employee with a limited remedy for dismissal under what is now part X of the Employment Rights Act 1996 Parliament had stepped in, and by doing so excluded any common law claim for the same event – the dismissal. The boundary of the area from which common law claims were excluded, upon the basis that Parliament had provided an exclusive statutory remedy within that area, was discussed by Lord Nicholls at paragraphs 27 to 33 in **Eastwood**. At paragraph 29 he noted that if a person claiming to have suffered financial loss from psychiatric or other illness caused by pre-dismissal unfair treatment brought proceedings both in court and before a Tribunal he could not recover any overlapping heads of loss twice over; and (paragraph 31) the existence of the boundary line meant "that in some cases the continuing course of conduct, typically a disciplinary process followed by dismissal, may have to be chopped artificially into separate pieces."

44. In **Edwards**, at paragraph 51, Lord Dyson JSC said:

> **"The question… is, therefore, whether or not the loss founding the course of action flows directly from the employer's "failure to act fairly when taking steps leading to dismissal" and "precedes and is independent of" the dismissal process (Lord Nicholls, at para. 29 of *Eastwood*). In other words, the Court must decide whether "earlier**

events do or do not form part of the dismissal process" (Lord Steyn at para. 39). This is a fact-specific question."

45. The first question for us is to consider what the Tribunal actually found, and why, in paragraph 29 of its Reasons (quoted above). In saying in the second sentence that A was seeking damages for the manner of his treatment (as separate from the fact of dismissal) the Judge was not saying in our view that he was seeking damages for non-pecuniary loss. Rather, the distinction which the Judge was emphasising was that between losses caused by the way in which A had been treated up to dismissal, on the one hand, and those losses caused by the dismissal itself on the other. He was, in our view, recognising that the statute requires regard to be paid only to losses arising in consequence of *the dismissal*. This inevitably leads to a consideration whether the "dismissal" was a process or event which included acts taken by the employer shortly before the date upon which the employee left service or at least the decision that he was to do so was finally reached. The third sentence of paragraph 29 looks for evidence that the Respondent's unreasonable behaviour caused the ill-health which in turn led to loss. In saying that the Claimant had "no evidence really" for the causative link, the Judge was not in our view ignoring the fact that there was some material before it about the depression from which the Claimant suffered. The Judge was, albeit inelegantly, making the point that there was insufficient evidence to satisfy the burden of proof, an onus which lies on the Claimant. An expert psychiatrist report had not been obtained. The Claimant had put three letters from his G.P. dated 23rd September 2011, 13th January 2012 and October 25th 2012 before the Tribunal, the first two of which did not attribute the depression to the dismissal. In summary they said, rather, that "these alleged allegations made against A have completely destroyed the man's life and left him in a state of severe anxiety and depression". That is blaming the allegations for causing his condition, not the employer's actions. The third letter repeated the same words, but added that the work that the Claimant had done at the school was a stabilising influence and "prevented him from relapsing into depression that he had sporadically suffered

from prior to his current employment". Since he had been suspended since the allegations came to light, this has to be a reference to bouts of depression which had affected the Claimant before there was any question of the accusation of sexual abuse. In short, the letters gave a cause of his depression other than the employer's conduct, and added reason to think that depression was well established prior to any hint of the allegation.

46. The Claimant also produced a hand-written letter of August 2011 from a Community Specialist Practitioner, who by 19th October 2012 described herself as a Primary Care Therapist in a second, typed, letter. The first of those described the hurt and rage that "someone he trusted could so mis-judge his character" – but does not identify whether that was X or the accuser, and does not attribute the onset of depression to the way in which the employer behaved. The second is no better at serving that purpose. In the first paragraph the PCT suggests that the Claimant's life was totally "affected (sic) by him being suspended from the work he loved at a local junior school." This gives suspension, not dismissal, as the cause. The second paragraph comes closer - "..the fact that this crazy allegation was believed and acted upon by the school has left him totally shattered.." but we accept Mr Gardiner's point that it does not identify the action or actions referred to, nor the point at which they were taken, and certainly does not go so far as to link dismissal with depression.

47. As to evidence from the Claimant himself, the weight of which would have to be carefully evaluated by the Judge since the Claimant did not pretend to have clinical expertise in the attribution of cause to mental illnesses, his statement (paragraphs 15, 16, 19) makes reference to some of the matters that were spoken of during May 2011. In 19 he says that "since I was informed that I would be dismissed because of the allegations I have felt hopeless."

48. This was the totality of the evidence to which Mr Watson has referred us. It fully justifies the conclusion by the Judge, as we think it to be, that it did not satisfy the burden of proof that the dismissal caused the ill-health.

49. That is sufficient to answer the appeal. However, the main focus of Mr Watson's submissions was in respect of "the **Johnson** point" which was a further ground for making the same decision. Here, in dealing with the manner in which the employer treated the Claimant, by particular reference to conversations in May, and saying that they were "well on the wrong side of the line", the Judge was encompassing a factual finding that the events in May were not part and parcel of the actual dismissal. As Lord Dyson said in **Edwards** such a conclusion is fact specific. Given that it is a finding of fact, we would have to conclude it was perverse before we could upset it. We cannot do so: the hearing to decide whether to dismiss the Claimant occurred in early June, not in May, such that it was at least open to the Judge to conclude that events during that month were not part of the dismissal.

50. As Mr Gardiner points out, the Claimant retains a theoretical right to sue for such damage as he can prove that the events in May caused him, assuming he can show that the Respondent was in respect of those events in breach of a relevant duty owed to him at that time. The Judge was thus entitled to express the penultimate and last sentence of paragraph 29 as he did.

51. It followed that we do not accept that the reference to **Johnson v Unisys** was erroneous; hold that the decision was not perverse; and that the Judge did properly consider the link between dismissal and ill-health. The cross-appeal fails.