Appeal No. UKEAT/0016/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 June 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR M COOPER APPELLANT

NATIONAL CRIME AGENCY RESPONDENT

Transcript of Proceedings

JUDGMENT

© Copyright 2017

APPEARANCES

For the Appellant	MR PHILIP COPPEL (One of Her Majesty's Counsel) and MS ESTELLE DEHON (of Counsel) Direct Public Access
For the Respondent	MR SIMON MURRAY (of Counsel) Instructed by: Government Legal Department Employment Group E3 One Kemble Street London WC2B 4TS

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

Unfair dismissal - reasonableness of dismissal - section 98(4) ***Employment Rights Act 1996***

The Claimant was dismissed for a reason relating to his conduct arising from an incident outside work, which had led to his arrest and in respect of which he then faced criminal charges. In pursuing his complaint of unfair dismissal, he raised concerns that information regarding his arrest had been passed to the Respondent by the police - part of a practice of information-sharing between law enforcement agencies - when this was (he contended) in breach of the **Data Protection Act 1998**. He also complained of the Respondent's refusal to defer the internal disciplinary process pending the determination of the criminal proceedings notwithstanding the Claimant's inability (on legal advice) to participate, given that information regarding the internal process would be forwarded to the police by the Respondent as part of the same information-sharing practice. The ET dismissed the claim, finding the Respondent had been entitled to conclude that no issue arose from the sharing of information with the police - the Respondent having investigated the point further to the extent reasonably required given how it had been raised by the Claimant and the evidence being that this was in accord with normal practice. It was also satisfied that the Respondent's decision not to defer the internal process had fallen within the range of reasonable responses in the circumstances of the case. The Claimant appealed.

Held: *allowing the appeal in part*

Given the way in which the point had been raised with the Respondent and the steps it had then taken to investigate the Claimant's concerns, the ET had permissibly concluded that the conduct of the investigation into the issues raised regarding the sharing of information with the police had fallen within the range of reasonable responses and was not unfair.

As for the decision to proceed with the internal disciplinary process, however, it was unclear whether the ET had regard to the point raised by the Claimant relating to the particular practice of information-sharing as between the Respondent and the police and as to how that might prejudice his ability to participate in the internal process when facing on-going criminal proceedings. This was a relevant factor and the ET's apparent failure to engage with it rendered its conclusion on this point unsafe; it would need to be remitted for reconsideration.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal concerns (1) the question of fairness in an unfair dismissal case, where questions were raised as to whether there had been a breach of data protection, and (2) as to the fairness of an employer proceeding with an internal disciplinary process where criminal proceedings were ongoing. In this Judgment I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal from a Judgment of the London (Central) Employment Tribunal (Employment Judge Snelson sitting alone on 13 and 14 January 2016; "the ET"), sent to the parties on 9 February 2016 and by which the ET dismissed the Claimant's complaint of unfair dismissal. Both parties were represented before the ET by counsel, albeit Mr Coppel QC did not then appear.

2. The Claimant's appeal was initially considered on the papers, by the Honourable Mrs Justice Simler DBE (President), not to disclose any reasonably arguable error of law. After a hearing on 9 December 2016, under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993** (at which I heard from the Claimant, as the Appellant, alone), I was, however, persuaded to permit this matter to proceed to a Full Hearing on limited grounds, as follows:

(1) whether the ET erred in dismissing as "not relevant" the Claimant's submission that the Respondent's decision was founded upon information obtained unlawfully in breach of the obligation owed to him under the **Data Protection Act 1998** ("DPA");

(2) whether the ET erred in failing to properly test the Respondent's response at the appeal stage to this point being raised by the Claimant's trade union representative, failing to ask whether this fell within the band of reasonable responses;

A

(3) whether the ET erred in its own approach to the question of the lawfulness or otherwise of the information-sharing between law enforcement agencies when one of those agencies was receiving the information in its capacity as an employer; and

B

(4) and (5) whether the ET failed to properly engage with the Claimant's case that he was impeded in the presentation of his case in the internal proceedings, when this went further than simply a complaint that those proceedings should have been postponed pending determination of the criminal proceedings.

C

The Relevant Background and the ET's Findings and Reasoning

3. The Respondent is a national law enforcement agency dedicated to combatting serious and organised crime. It was established in 2013 when it replaced the Serious Organised Crime Agency ("SOCA"). The Claimant, who has a long record of public service (including time served in the Armed Forces), joined the National Crime Squad in January 2004 and transferred to SOCA in 2006. He remained in that employment until he was dismissed with pay in lieu of notice on 17 October 2012 for a reason relating to an incident on 8 April 2012, which was held to have breached the Respondent's policies and code, and is described by the ET as follows:

D

E

> **"21. Shortly after midnight on Saturday 7/Sunday 8 April 2012 the Claimant was arrested in Hove for being drunk and disorderly. Not long afterwards, as a consequence of an incident in the police van he was also arrested for assaulting a police officer, the allegation being that he kicked her in the thigh.**
>
> **22. According to statements prepared by three police officers, they attended the Slug and Lettuce public house in George Street, Hove having been notified of a disturbance. They were told that someone involved had run off and that he had blood on his face, and found the Claimant shortly afterwards. He had a small cut near his right eye. The police officers described him as drunk, smelling strongly of alcohol and with glazed eyes and slurred speech. According to their statements he was asked several times to provide details of his name and address but failed to do so, responding with hostility, bad language and taunts. Among the remarks attributed to him (with my punctuation added) are:**
>
> > **I'm a Falklands War veteran. Don't fuck with me you cunt. I've served my country for 30 years. What have you done?**
>
> **And:**
>
> > **Fuck you, I'm a Falklands War hero, I'm out celebrating 30 years Falklands [sic] and you want to fucking know my name.**
>
> **And:**
>
> > **Fuck off … Who's the cunt? It's not me.**

F

G

H

A

The officers said that he was then arrested and struggled in resisting arrest. They further alleged that he kicked out at one of the officers in the police van, striking her thigh.

23. Further police evidence (not in the statements themselves) described the Claimant's conduct in the police station as "poor" resulting in him being taken to the cells. It seems that at that point he provided his details. A note of an interview conducted with him about 12 hours after his arrest records him as saying that he could not remember much about the incident of the night before although he could recall remonstrating and struggling with officers in the street. The note records him as expressing regret for his behaviour and a desire to apologise to the officer whom he was accused of assaulting.

B

24. The police officers reported being told that the Claimant's injury had been sustained when he was pushed away after "hassling women" and then fell. The Claimant's companion on the evening out, who was with him throughout but was not arrested and was not said to have been involved in any reprehensible conduct, was reported by the officers as saying that the injury had resulted from the Claimant being hit because of his "inappropriate behaviour". Two other witnesses described him "trying it on" with certain females and then being hit by a male."

C

4. The Claimant notified the Respondent of this incident when he was released from police custody at about 2.00pm on 8 April 2012, as he would have been contractually obliged to do.

D

He had already informed the police of the identity of his employer and, also on 8 April, a member of Sussex Police had contacted the Respondent by 'phone to let it know that the Claimant had been arrested for being drunk and disorderly and assaulting a police officer.

E

5. It was against that background that the Respondent embarked upon a disciplinary investigation, undertaken by Mr Kerr, an investigator within its conduct unit. During the investigation, the Claimant - on solicitors' advice - declined to make any comment on any

F

question relating to the criminal case and made apparent his concern to avoid prejudicing that case; although he was prepared to attend an investigatory interview, he was not prepared to put his case in writing. The investigation, however, considered material provided to the

G

Respondent by Sussex Police without the Claimant's consent, which included the custody sheet, the initial investigation report, all of the police witness statements made on the Claimant's arrest, information about the interview under caution and CCTV footage of the Claimant in the police custody-suite. Mr Kerr also attended the Claimant's Magistrates' Court hearing.

H

A

6. It was determined that the matter should proceed to a disciplinary hearing. That decision was communicated to the Claimant, and the various materials obtained in the investigation were sent to him in the disciplinary hearing pack. The ET records that the Claimant made no objection to this being considered by the disciplinary panel at that stage nor did he suggest anything relevant was missing. The Claimant did, however, ask for the disciplinary hearing to be deferred until after his criminal trial, which he considered necessary to ensure his full participation and to ensure that the hearing proceeded in accordance with fairness and natural justice. That request was refused.

B

C

7. The disciplinary hearing took place on 11 October 2012. The Claimant did not attend or make any written representations. After considering the evidence before it, the panel determined the Claimant should be dismissed; a decision notified by letter of 17 October 2012.

D

8. The Claimant appealed, in particular complaining that matters had been "*sub judice*", a breach of "*due process*" and there had been a failure to "*guard the integrity*" of the criminal justice system. The appeal panel met on 6 December 2012. Again, the Claimant did not attend or provide written representations. He did, however, authorise his trade union representative, Mr Tully, to attend on his behalf. Mr Tully again applied for a postponement of the hearing on the basis that the criminal proceedings should go first. Specifically, he communicated the Claimant's concern as to:

E

F

> **"… whether the information from the original panel [the disciplinary panel] has got through to the people involved in the … Sussex force …"**

G

9. The appeal panel disagreed. It did not consider it was constrained to await the determination of the criminal proceedings, and it continued with the hearing. Mr Tully also sought to explore further how evidence had been obtained. As the ET records:

H

A

> **"51. … Mr Tully explained that, in addition to the grounds of appeal, the Claimant had a concern about the "legal gateways" which had enabled the evidence against him to be collected and relied upon at the first-instance hearing …"**

B

10. The ET then sets out the exchange between Mr Tully ("PT") and the chair of the appeal panel, Mr Davies ("PD"), as follows:

> **"PT It's just to confirm that the evidence was gathered correctly and there was no coercion from the investigating officers to [elicit] information prior to a trial and that it was correctly gathered …**
>
> **PD OK. Is there an allegation that there was anything improper about it?**
>
> **PT He would just like [peace] of mind that it was gathered correctly, you know, obviously.**
>
> **PD OK, just to be clear … and please make sure that I sum this up properly, he's not alleging that the investigating officer did anything illegal or inappropriate, he is seeking reassurance that what he did was legal and appropriate.**
>
> **PT Yes, that's correct."**

C

D

11. The appeal panel acknowledged the need to investigate matters with Mr Kerr, who was then called as a witness at the appeal hearing. In giving his account Mr Kerr indicated his understanding that, "*There was no data protection issues [sic]*", confirming that the information had been voluntarily handed over by Sussex Police in a way that was within the normal course, given that it constituted an exchange of information between law enforcement bodies, something that had not been previously challenged. Having itself questioned Mr Kerr and given Mr Tully the opportunity to do so, the appeal panel reached the following determination on the point (as recorded by the ET):

E

F

> **"51. …**
>
> **The appeal panel explored this topic with Mr Kerr. Following a further adjournment Mr Davies announced the outcome. He reiterated that the objection to the disciplinary proceedings going ahead before the criminal case was unsound. He declared that there was no ground for complaint about the evidence having been supplied to the Respondents [sic] by Sussex Police, citing in that regard the contribution of Mr Kerr concerning the routine practice of sharing evidence of this sort, to which I have already referred. …"**

G

Ultimately, the panel concluded that the decision to dismiss should be upheld, and it set out its reasoned conclusion in that regard in a letter of 17 December 2012.

H

A

12. This then provides the background to the Claimant's ET claim lodged on 5 January 2013. Those proceedings were stayed pending the determination of criminal proceedings against the Claimant relating to the events on 8 April (initially, on 15 October 2013, he was convicted at the Magistrates' Court of being drunk and disorderly and assaulting a police officer; on 13 January 2015, however, that conviction was overturned by the Crown Court, on the Claimant's successful appeal).

B

C

13. In the meantime, the Claimant had submitted a complaint to the Information Commissioner and, on 21 February 2014, a case officer for the Commissioner expressed the view that it was unlikely that Sussex Police had complied with its obligations under the **DPA**. (I further understand the Claimant has brought County Court proceedings against both Sussex Police and the Respondent in respect of the data protection issues and, although there has been a settlement of his claim against the police in that regard, the case against the Respondent is due to be heard later this year. Plainly, no finding by the County Court was available to the ET at the time of the Full Merits Hearing, and that remains the position before me.)

D

E

14. It was against that background that the Full Merits Hearing took place before the ET in January 2016. The Claimant accepted that the reason for his dismissal was connected to his conduct - specifically his behaviour on 8 April 2012 - and that this had, in substance, constituted a fair reason for his dismissal. His case of unfair dismissal was put on three procedural bases, recorded by the ET as follows:

F

G

> **"10. … First, SOCA unfairly based the disciplinary case on material (in particular statements and CCTV footage) improperly passed to them by Sussex Police, which they (SOCA) had improperly received and used and thereby 'processed'. It was said that this material was protected under the [DPA] and that its delivery by Sussex Police and use by the Respondents [sic] were unlawful under that legislation. Secondly, it was submitted that SOCA acted unreasonably in failing or refusing to postpone the internal disciplinary and appeal hearings on account of the Claimant's ill health. Thirdly, Ms Dehon complained that SOCA acted unreasonably in failing or refusing to postpone the disciplinary appeal in light of the advice which the Claimant had been given by those representing him in the criminal proceedings that he should not participate in the internal disciplinary process for fear of prejudicing the criminal case."**

H

A

15. Only the first and third of those issues are now still live: it is said the ET erred in dismissing the breaches of the **DPA** as "not relevant" and in failing to properly engage with the Claimant's case as to the need for the postponement of the disciplinary appeal hearing.

B

16. Relevant to the **DPA** point, the ET made the following general observations:

> **"18. I was told in evidence, and accept, that it routinely happened that, when a SOCA employee was arrested by the police, the relevant force informed SOCA of that fact. This was (and is) seen as standard 'law enforcement to law enforcement' practice. It also operated (and operates) in reverse: if SOCA (or now the National Crime Agency) held a police officer in their custody they would notify that officer's local force. The sharing of information was said by the Respondents [sic throughout] to implement the Home Office circular number 6/2006, which contains guidance for police forces on the 'Notifiable Occupations Scheme'. That document includes the following:**
>
> > **6. The general position is that the police should maintain the confidentiality of personal information, but legal opinion supports the view that in cases invoking substantial public interest considerations a presumption to disclose convictions and other information to relevant parties, unless there are exceptional reasons not to do so, is considered lawful. Areas in which it is considered that there are likely to be substantial public interest considerations include:**
> >
> > - **Protection of the vulnerable, including children**
> > - **National security**
> > - **Probity in the administration of justice**
>
> **The document continues:**
>
> > **8. Forces are requested to notify the appropriate Government department, professional regulatory/disciplinary body and/or the employer of conviction and other information when it comes to notice that an individual is working in one of the professions or occupations listed in Category 1 …**
>
> **Category 1 is defined as applying to:**
>
> > **Professions or occupations bearing special trust and responsibility where substantial public interest situations arise specifically in relation to: …**
> >
> > - **Probity in the administration of justice**
>
> **It was not disputed by or on behalf of the Claimant that his role in SOCA placed him in Category 1.**
>
> **19. The practice of SOCA (and now the Respondents) of passing to the local police force information about any employee who has been charged with an offence by that force was explored before me. (The subject did not appear to be directly relevant since the Claimant's challenge, as explained above, was to the Respondents placing reliance on the police evidence, not the other way around, but I permitted questions on the point nonetheless.) Such information will include or comprise all material generated by internal disciplinary proceedings relevant to the charge. The local police force is responsible for its onward transmission to the Crown Prosecution Service ('CPS'). The practice of passing such material on to the relevant police force is not optional. It is dictated by the legal obligation on the prosecution to make all relevant material available to the defence. This is the effect of criminal procedure legislation referred to in evidence by Mr Davies (on which he was not challenged), designed to avoid notorious miscarriages of justice such as occurred in the case of the 'Guildford Four'. The local police force (specifically the 'Disclosure Officer') is required to produce for the scrutiny of the CPS a schedule of relevant material not forming part of the**

C

D

E

F

G

H

A

prosecution case. The prosecutor is responsible for taking a decision on whether the scheduled material must be disclosed to the defence.

20. The central purpose of the legislation just mentioned is to ensure that no evidence capable of *assisting* the defence is supressed. Mr Davies appeared to accept that, theoretically, material *adverse* to the Claimant *might* be included among the material passed to the local police force. He added, however, that it was not easy to see how the individual concerned might be prejudiced, given that (a) one would expect the defence to the disciplinary proceedings to correspond with that run in the criminal case and (b) in any event, any prosecution will be constructed on evidence collected in the criminal investigation, not on evidence generated by an internal disciplinary investigation carried out (often much later) for a quite different purpose, to answer a quite different question arising in a quite different legal context. No precedent was put before me of a prosecution based on evidence generated by an internal disciplinary exercise. And it was further pointed out that there are additional safeguards for defendants in the form of the wide powers of criminal courts to exclude any evidence on the ground that it would be unfair to allow it to be used." (Original emphasis)

B

C

17. The ET addressed the Claimant's arguments in respect of the **DPA** issue as follows:

"58. Ms Dehon's first point began with the startling assertion that the practice of police forces sharing information concerning arrests of SOCA (or NCA) staff with those organisations is necessarily and inherently a breach of the [DPA] and, on that account, any consequential dismissal is unfair. Reliance was also placed on a letter from a case officer in the Information Commissioner's Office dated 21 February 2014 expressing the view that it was "unlikely" that Sussex Police had complied with its obligations under the [DPA]. I will not attempt to summarise Ms Dehon's contentions (presented orally, not supported by a skeleton argument and without citation of any authority). It would not be appropriate for me to attempt to engage with them at all, because they are not relevant to the case before me. They were not relied on at either stage of the disciplinary process. At the disciplinary hearing the panel was not made aware of any possible challenge to the legality or propriety of relying on the police evidence. And at the appeal hearing Mr Tully put forward no positive case, but merely requested reassurance. The appeal panel reacted in a conscientious way. Mr Kerr's observations were sought. He referred to his considerable experience as an Investigator and to the long-standing practice of information-sharing, with which the steps taken in the instant case appeared to conform. The appeal panel had no reason to doubt what Mr Kerr, without challenge, told them. In the circumstances, the appeal panel was entitled to assume that the practice was lawful. (In fact, whether or not any member of the appeal panel was aware of it at the time, the practice was in accordance with the Home Office circular to which I have referred. That circular refers to 'legal opinion' and, given the importance of the subject-matter, it would be remarkable if the guidance which it contains it [sic] were not based on the detailed advice of a legal practitioner of seniority and repute.) We are satisfied that there was no tenable reason for upholding the appeal on the 'data protection' point. Indeed, to have done so would have been more than a little eccentric, given that (a) the Claimant's appeal did not rely upon it, and (b) the appeal panel was offered no arguable legal basis for finding any merit in it."

D

E

F

G

18. The Claimant had also objected to the fact that the internal disciplinary and appeal processes were not stayed pending the outcome of the criminal proceedings. Again, however, the ET rejected that point, holding it had plainly been open to the Respondent to refuse the request for the internal proceedings to be postponed. Specifically, applying the range of reasonable responses test, the ET reasoned as follows:

H

"65. In my view it was plainly open to the Respondents [sic throughout] to refuse the request for the internal proceedings to be postponed. Those proceedings and the criminal case posed

A

different questions and involved different burdens. The disciplinary charge did not depend on the Claimant being guilty of being drunk and disorderly or of assaulting a police officer; it was much wider, embracing his behaviour general on the relevant occasion. While conviction by a criminal court would have made his defence to the criminal charge all the more difficult to sustain, acquittal would not take the disciplinary case any further, one way or the other. Further, I am satisfied that the Respondents were eminently entitled to judge (as I find they did, in good faith) that the evidence of the Claimant's misconduct was compelling. In addition, the Respondents were entitled to have regard to the question of delay. By the time of the decision to refuse the postponement the Magistrates' Court trial had been put back to May, and there was the possibility (fulfilled in the event) of an appeal, which would be liable to extend the life of the criminal proceedings much further. (In the end, they lasted some 27 months.) The logic of the Claimant's case was that the Respondents were bound to suspend the Claimant on full pay for the entire period of the criminal proceedings. (In the course of the evidence Ms Dehon suggested at one point that it might have been proper for the Respondents to suspend without pay, but that was manifestly a hopeless argument and one which did not feature in her closing submissions.)"

B

C

<u>The Relevant Legal Principles</u>

19. The complaint before the ET was one of unfair dismissal. It was therefore concerned with the protection afforded by section 98 of the **Employment Rights Act 1996**; specifically - given the Claimant accepted he had been dismissed for a reason related to his conduct and that was a reason capable of being fair for the purposes of section 98(1) and (2) - the ET was bound to determine this case in accordance with section 98(4), which provides as follows:

D

E

> **"(4) 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."**

F

20. Where, as here, the ET is concerned with the question of fairness in a conduct dismissal case, the relevant questions are those identified in **<u>British Home Stores Ltd v Burchell</u>** [1980] ICR 303 EAT: if the Respondent has established an honest belief in the matter relied on as the reason for the dismissal, were there reasonable grounds for that belief, and did the Respondent carry out a reasonable investigation? In answering those questions, the test the ET is bound to apply is that of the range of reasonable responses of the reasonable employer in the relevant circumstances. In so doing the ET must be astute not to substitute the view it might have taken

G

H

A

for that of the reasonable employer. On the other hand, the range of reasonable responses is not "*infinitely wide*", and an ET is required to consider the employer's conduct against that range as a question of substance not simply as "*a matter of procedural box-ticking*" (**Newbound v**

B

Thames Water Utilities Ltd [2015] EWCA Civ 677 at paragraph 61).

21. In determining the fairness of a dismissal, a mistaken understanding of the law will not inevitably render a dismissal unfair, although it can be a relevant consideration. Equally,

C

however, an employer's ignorance or misunderstanding of the law will not necessarily mean that decisions taken on that basis would be fair. A relevant question is likely to be whether the employer's ignorance or misunderstanding was itself reasonable: did, for example, its failure to

D

take further steps to investigate the position mean that its reaction thereby fell outside the range of reasonable responses? This will be for the ET to assess - having regard to equity and the substantial merits of the case - asking whether it is reasonable that the employee should bear the

E

consequences of the employer's error on the particular facts of the case, see per Underhill J (as he then was) in **Eversheds Legal Services Ltd v De Belin** [2011] ICR 1137 EAT.

22. Where, as here, the internal disciplinary process takes place alongside ongoing criminal

F

proceedings, it is common ground that there is no rule that the internal process must be delayed or postponed pending the determination of the criminal proceedings: an employer has to be permitted a broad discretion, balancing the possible prejudice to the employee of proceeding in

G

those circumstances against the alternative unfairness that might arise from the lengthy delays that are likely to take place, see **Secretary of State for Justice v Mansfield** UKEAT/0539/09.

H

Submissions

The Claimant's Case

23. The Claimant's first objection is that the ET erroneously found his dismissal had been fair when the Respondent's decision was founded upon information that the Claimant contended had been obtained unlawfully in breach of the **DPA**; specifically, the ET wrongly dismissed the breaches of the **DPA** as not relevant to the case. The Claimant's case in this respect was identified in the ET1, to which the Respondent had responded without suggesting it was irrelevant. The ET had, further, wrongly proceeded on the basis that the Claimant had not challenged the legality or propriety of the Respondent relying on the police evidence, but that was not the case, as was made clear by Mr Tully's intervention (see above). Without dissenting from the importance of information-sharing between the police and the Respondent, it amounted to a breach of the **DPA** in this case: the only purpose being in relation to an employment matter, to which the Claimant had not consented; that was not a proper purpose and amounted to a breach of the **DPA**. The ET failed to understand the force of this point, hence its reference to it as "startling" (see paragraph 58).

24. Accepting that a mistaken understanding on the Respondent's part that the material it had received from Sussex Police was not obtained in breach of any legal obligation would not necessarily render its decisions unfair, the Claimant observed (1) the material clearly formed part of the basis for the Respondent's decision, and (2) in the circumstances of this case the ET was not entitled to take the view that the Respondent had taken all reasonable steps to investigate the legality of the position. This fed into the second question raised by the appeal: whether the ET erred in failing to properly test the Respondent's response at the appeal hearing stage to this point being raised by the Claimant's trade union representative - failing to ask whether the Respondent's response fell within the band of reasonable responses. (In his

A skeleton argument it was asserted more generally that the Claimant had consistently challenged the Respondent's ability to rely on information disclosed to it by Sussex Police. That is not, however, what the ET found, and Mr Coppel QC was unable to point to anything before the ET showing this was an issue raised before the appeal hearing.) The ET failed to appreciate the point being made at the appeal hearing by Mr Tully was one of a breach of the **DPA** - perhaps because it had itself taken the view that there was no breach - that was, however, Mr Tully's concern, and it was not answered by the Respondent giving its reassurance, which failed to address the underlying point and was based on the appeal panel simply having approached Mr Kerr rather than having obtained any proper advice on the question. The ET needed to ask whether that really fell within the range of reasonable responses. The ET had wrongly characterised Mr Tully as not putting forward a positive case (paragraph 58); the appeal panel plainly understood the issue but failed to carry out a reasonable investigation into the point by only pursuing the question with Mr Kerr (who was not legally qualified), who was put into an invidious position - effectively commenting upon the legality of what he himself had done.

25. Thirdly, the ET erred in its approach to the question of the lawfulness of information-sharing between law enforcement agencies when one of those agencies was receiving the information in its capacity as employer. It transposed (see in particular paragraphs 19 and 20 of the ET's Decision) the principles of disclosure of information held by the prosecution to an accused to the situation before it, where the disclosure was from the police to an employer.

26. Finally, the ET failed to properly engage with the Claimant's argument that he was impeded in the presentation of his case in the internal proceedings. That went further than a general complaint that the proceedings should have been postponed pending determination of the criminal process. Specifically, the Claimant was referring to the practice of information-

sharing between the Respondent and the police relevant to the criminal proceedings - it was that which had caused his solicitor to advise him not to participate in the disciplinary process.

The Respondent's Case

27. Making clear at the outset that the facts relied on by the Claimant in his skeleton argument were not accepted as consistent with the ET record, the Respondent also reminded me that it was not properly to be described - as the Claimant's argument might have suggested - as a normal employer: it was a national law enforcement agency, and the Claimant was employed in a position of responsibility, which involved him working on matters of considerable sensitivity and importance, in which capacity he held the designated powers of a Constable, Immigration Officer and Customs Officer, and had been vetted for security clearance purposes. Under the Respondent's disciplinary policy the Claimant had an obligation to self-report his misconduct even if it had occurred outside work. It was, further, the Respondent's case that the Claimant could be taken to have consented to the obtaining of information from other law enforcement agencies as part of the investigation into conduct issues of this nature. Further, there was no breach of the **DPA** in this case (see paragraphs 48 to 56 of **Laverty v Police Service for Northern Ireland** [2015] NICA 75). In any event, this was not the only material upon which the Respondent could base its decision: the Claimant had himself reported the incident in issue, and Mr Kerr - as part of the investigation - had attended the Magistrates' Court and relied on what he had seen there as part of the case before the disciplinary panel.

28. Turning to the first ground of appeal - the ET's approach to fairness in the light of the objection that the decision to dismiss was founded upon information obtained in breach of the **DPA** - the ET had engaged with this issue but found: (1) the Claimant's case in this regard startling given the information-sharing was between law enforcement agencies and related to an

officer's conduct, and, in any event, concluded (2) that the issue was irrelevant as, when the point was raised, the appeal panel had conscientiously investigated the matter with the investigating officer and, having received his evidence as to the practice of information-sharing, had reached a decision falling within the band of permissible responses. Furthermore, the Claimant had himself reported his conduct to the Respondent (as he was obliged to do) so it was unclear what weight was given to the information obtained from the police.

29. As for the second basis of challenge - whether the ET failed to properly test the Respondent's response at the appeal hearing stage - this complaint was founded upon a partial reading of the account of the hearing before the appeal panel. The ET plainly considered carefully what Mr Tully had said at the appeal hearing: he had not alleged that the sharing of information was in breach of the **DPA** or made any broader point as to this practice; he simply sought confirmation that there was no coercion from the investigating officer, that the data was correctly gathered and that the investigating officer had done nothing illegal. In these circumstances it would be perverse to suggest the appeal panel had done other than act within the band of reasonable responses in asking the investigating officer to confirm this fell within normal practice and was not unlawful. It made all the more sense to approach the investigating officer, as the panel needed reassurance there had been no coercion. There was nothing that could reasonably have required the appeal panel to take the additional step (for example) of approaching the Respondent's legal adviser. Considering how the point had been raised, the ET was entitled to find the Respondent had done sufficient.

30. The third point of challenge - whether the ET erred in its own approach to the question of the lawfulness or otherwise of the information-sharing between the agencies, when one of them was receiving information in its capacity as an employer - had to fail, given (1) the ET

had rightly found that the analogous information-sharing relied on by the Claimant (from the Respondent to Sussex Police) arose from a statutory duty owed towards the Claimant as a defendant in the criminal proceedings, and (2) had simply found the Claimant's argument in this regard to be irrelevant; there was no "transposing", as this ground suggested.

31. By the fourth and fifth points of challenge the Claimant was seeking to argue that, as a consequence of information-sharing between two law enforcement agencies, he had in some way been disadvantaged or impeded in the presentation of his case in the internal process. There was and had never been any evidence of such difficulty (see the ET's record of the argument below at paragraphs 19 and 20). In any event, even if there had been, the net effect of the point would simply be to return to the issue expressly considered by the ET, i.e. whether there should have been a postponement of the internal process.

Discussion and Conclusions

32. The issues raised by this appeal are limited in focus. The Claimant does not take issue with the fact that the Respondent had a genuine belief in his misconduct or that dismissal might have been a reasonable sanction given that conduct. The grounds of appeal can be seen as taking forward two main points of concern: (1) as to the fairness of the dismissal given the question of the lawfulness of the passing on to the Respondent of information by Sussex Police, in particular as to the reasonableness of the investigation taken into this point; and (2) as to the fairness of proceeding with the disciplinary process given the ongoing criminal proceedings and the information-sharing known to take place between the Respondent and the police.

33. The Claimant's first objection is that the ET erroneously found his dismissal had been fair when the Respondent's decision was founded upon information that he contended had been

A

obtained unlawfully, in breach of the obligation owed to him under the **DPA**; specifically, he complains that the ET wrongly dismissed the breaches of the **DPA** as "not relevant to the case".

B

34. That is, however, not a fair way of characterising the ET's approach: its comment on relevance was directed at counsel's very general submission as to the breach of the **DPA** arising from the practice of information-sharing between law enforcement agencies; a point not made in terms before either the disciplinary panel or appeal panel. The ET did not, in any event,

C

simply stop there; it then went on to consider how the point was made by Mr Tully - on the Claimant's behalf - at the appeal hearing stage. Can it be said that the ET thereby failed to properly engage with the Claimant's case? The Claimant was not seeking to question the

D

legitimate sharing of information between the Respondent and Sussex Police as law enforcement agencies. His issue was with Sussex Police's sharing of his personal data without his consent with the Respondent in its position as employer - his point being that the

E

Respondent (as an employer) was basing its disciplinary case against him on information that had been passed to it by Sussex Police in breach of the **DPA**. The ET had, however, addressed that point at paragraph 18 of its Judgment (see as cited above), when it found this was standard practice in accordance with Home Office circular 6/2006 (although it was unclear whether any

F

of the actual decision makers were specifically aware of that circular); the Respondent had considered it was entitled to receive information from the police about one of its employees because his role was such that there was a public interest arising from the need for probity in

G

the administration of justice. The Claimant was saying that this practice breached the **DPA** but the ET was not considering this as if it were an application for judicial review of the information-sharing practice; it was being raised as part of a claim for unfair dismissal. The

H

issue for the ET was whether the Respondent's decision to dismiss on the information available to it fell within the range of reasonable responses; more specifically: was it within that range for

A

the Respondent to make its decision based on information disclosed to it pursuant to what the ET had found to be its standard practice? In turn, the issue for me is whether the ET erred in concluding that the dismissal was fair when the decision was founded, on the Claimant's case, upon information said to have been obtained in breach of the **DPA**.

B

35. In determining the question it had to answer, the ET considered that the Respondent's conduct and decisions did indeed fall within the range of reasonable responses, given the information before it and given how the Claimant had put his case within the internal disciplinary and appeal processes. The ET thus applied the correct legal test and it was entitled to take the view that it would not be relevant if the Respondent had been wrong and, as a matter of law, the practice of information-sharing with Sussex Police gave rise to a breach of the **DPA**: although an employer might act outside the range of reasonable responses if it simply relies - without further investigation - on what may prove to be a mistaken assumption, here the ET was satisfied that what had taken place was standard practice; on its face and without more there was no reason for the Respondent to investigate the point further.

C

D

E

36. That was, however, not the end of the story in this case, and, at this stage, the second point of challenge comes into play, that is, whether the ET erred in failing properly to test the Respondent's response at the appeal hearing when this point was raised by the Claimant's trade union representative.

F

G

37. The starting point in determining this question is to consider what the ET found in this regard. That is set out at paragraph 58 of the ET's Judgment (cited above), which refers back to the ET's earlier findings of fact, in particular as set out at paragraph 51. The ET had earlier referred to the Claimant's grounds of appeal, which had not made express reference to evidence

H

A

having been obtained in breach of the **DPA**, albeit the Claimant had made a general complaint that "*policy and/or procedure was not followed*", stating that there had been "*procedural irregularities and breaches of his Article 6 rights and Natural Justice*". At the appeal hearing itself the ET equally did not find that Mr Tully had raised the specific issue of there having been a breach of the Claimant's rights under the **DPA**, although he had raised the Claimant's concern about the legal gateways that had enabled the evidence against him to be collected and relied on. The ET did not accept that Mr Tully had raised any positive case; it found he had put the Claimant's case on this point as requesting "reassurance". For the purposes of the hearing before me, I have been taken through the transcript of the appeal hearing in detail and have seen the various ways in which Mr Tully raised this concern. Having done so, I cannot say that this was other than an entirely permissible characterisation of Mr Tully's position before the appeal panel. He not only did not mention the **DPA** but expressly accepted that he was not saying that the investigating officer had obtained the information illegally or inappropriately; he was simply seeking reassurance that he had obtained it legally and appropriately.

B

C

D

E

38. In any event, as Mr Coppel QC accepts, the members of the appeal panel got the gist of Mr Tully's point: the Claimant was not only concerned about the possible prejudice he might suffer from information going out from the Respondent to Sussex Police (which might impact on the criminal proceedings - and, as to which, see further below), but was also seeking reassurance as to the appropriateness and legality of the information that had come in from Sussex Police, on which Mr Kerr had relied. His points sometimes confused the issue with the Claimant's other concern - about the Respondent's passing of information to Sussex Police from the internal process - and at times elided the question with a broader issue of procedural impropriety in the investigation. Nevertheless, it was in response to this concern that the appeal panel sought input from Mr Kerr, both questioning him themselves and giving Mr Tully the

F

G

H

opportunity to do so. As the ET found, Mr Kerr in turn reassured the panel that the evidence had been gathered in accordance with standard practice and there were no data protection issues. When questioned by Mr Tully, there was no suggestion that Mr Kerr was unqualified to provide these reassurances nor was his account challenged in any relevant manner on this point. And, for completeness, I note that, before the appeal panel adjourned to reach its decision, Mr Tully was given the opportunity to raise anything not already considered, but there was nothing more he wished to add and no suggestion that the panel needed to obtain legal advice as to the legality or appropriateness of relying on the material obtained from Sussex Police.

39. The ET found that the panel's response to the issue raised by Mr Tully was conscientious, noting there was no reason to doubt what Mr Kerr, without challenge, had said. It considered that to have upheld the Claimant's appeal on the data protection point in these circumstances would indeed have been "*more than a little eccentric*". Having regard to the evidence before the ET, can I say it failed to properly test the Respondent's response at the appeal hearing stage to this point being raised by Mr Tully, failing to ask whether the response fell within the band of reasonable responses? It seems to me clear that the ET found that the appeal panel's response did fall within that range, and I cannot see that it is open to me to interfere with that decision. Given how the issue had been raised - in particular as linked to a broader concern as to procedural impropriety in the investigation - the ET was entitled to find the Respondent had acted reasonably in seeking to investigate matters further with Mr Kerr. Given his reassurances and the lack of further challenge by Mr Tully, the ET was also entitled to find that no further obligation to investigate the point arose or, rather, that the way in which the appeal panel concluded the point fell within the range of reasonable responses.

A

40. Even if I assume in the Claimant's favour (and I make it clear I do not decide the point; that will be for others in the Claimant's civil proceedings) that there was a breach of the **DPA** in this case, the ET was entitled to find that the Respondent had reasonably concluded that no issue arose as to the adoption of a standard practice of information-sharing in this case and that, allowing for the wider merits and equity of the case, the Claimant - who had himself disclosed to the Respondent the fact of his arrest and whose account at the Magistrates' Court, witnessed by Mr Kerr as part of the investigation process, had not looked promising (see the ET at paragraph 55) - had not unreasonably suffered as a result of an error (if that is what it was) that had not been clearly articulated or pursued with particular force on his behalf. I am therefore satisfied that the appeal on these first two grounds must be dismissed.

B

C

D

41. By the third ground the Claimant contends that the ET erred in its own approach to the question of the lawfulness or otherwise of the information-sharing between law enforcement agencies, when one of those agencies was receiving the information in its capacity as an employer and that it transposed the principles of disclosure of information held by the prosecution to an accused to the situation before it. This is a specific reference to paragraphs 19 and 20 of the ET's Judgment, where - I am prepared to allow - it might be said that the ET lost some focus in this aspect of its reasoning. That may be reflective of the broader discussion before it, and I recognise that points can be crystallised on appeal in a way that was not necessarily the case below, but I can see the Claimant's objection that this appeared to evidence a confusion between the position regarding information-sharing between law enforcement agencies for the purposes of criminal proceedings and the position relating to the Respondent's role as employer. The question becomes, however, whether the ET allowed this apparently irrelevant matter to taint its decision making.

E

F

G

H

A

42. Having considered the ET's reasoning in full - in particular, as set out at paragraph 58 - I do not think that it did. Its focus was on the practice of information-sharing referenced at paragraph 18, which relates to the practice as between police and other law enforcement agencies acting as employer. Similarly, the reference to the Home Office circular 6/2006 is also so focused. There is no reference back to the matters alluded to at paragraphs 19 and 20. For the reasons I have already outlined, I consider that in expressing its conclusions at paragraph 58 the ET had correctly identified the approach it was bound to adopt and reached a decision that was open to it on the evidence before it and its earlier findings of fact. Again, I dismiss the appeal in this regard.

B

C

D

43. Finally, the Claimant complains that the ET failed to properly engage with his argument that he was impeded in the presentation of his case in the internal process, which went further than simply a complaint in general terms that the proceedings should have been postponed pending the determination of the criminal process. Specifically, the Claimant is referring to the practice of information-sharing as between the Respondent and the police relevant to the criminal proceedings; it was the fact of this information flow that had caused his solicitor to advise him not to participate in the disciplinary proceedings.

E

F

44. It is common ground that there is no general obligation upon an employer to postpone an internal disciplinary process pending criminal proceedings, notwithstanding the possible difficulty that might then arise for the employee, who may well be concerned about how comments made in an internal process might be used against them in criminal proceedings. The Claimant says, however, that the issue was more acute in this case given the practice of information-sharing between the Respondent and the police. He contends that the ET failed to pay proper regard to that fact in its determination of this question.

G

H

45. I initially had a concern as to whether the logical conclusion to the Claimant's argument in this regard must mean that the Respondent in these circumstances was obliged to postpone the internal process. It would be hard, for example, to see that it was obliged to give some kind of commitment not to share information with the police (1) because that request had not been made and (2) because if the Claimant said something that obliged the Respondent to report it to the police then it might have had to do so regardless of its normal practice. Properly understood, however, I think that the highest that the Claimant can put it is that the ET was required to consider the question of fairness with this issue in mind - that is, that the information was going to be passed over to Sussex Police without any coercive requirement being made of the Respondent - and to ask whether the course adopted by the Respondent then fell within the range of reasonable responses.

46. The ET considered the case law in this regard in some detail (see paragraphs 61 to 64). It - rightly, in my judgment - concluded that the test it had to apply was that of the range of reasonable responses. It then considered the balancing factors it identified at paragraph 65, coming down to the view that the Respondent had acted fairly. I am, however, troubled by the ET's failure at that stage in its reasoning to expressly reference the information-sharing practice between the Respondent and the police - the point which obviously concerned the Claimant and to which he and Mr Tully had made reference at various stages in the internal process. The ET had earlier referred to this aspect of the information-sharing between the two agencies (see paragraphs 19 and 20 of the ET's Judgment, albeit in a somewhat different context), but had apparently viewed it as something that would be potentially beneficial to the Claimant as a defendant rather than considering it as posing a possible risk to him given the lack of safeguards in internal proceedings as compared to criminal proceedings. Taking the reasoning as a whole, is the Claimant right to say that the ET failed to take into account this potentially relevant

factor? Allowing for the particular responsibility vested in an ET to assess the question of fairness in this regard - akin to making a finding of fact - is it open to me to interfere with this assessment because it had not referenced this particular point in its reasoning?

47. If ultimately I could conclude that it was simply a matter of failing to make express reference to the point in the reasoning at paragraph 65, I would dismiss this objection. After all, the ET applied the correct test, and I consider it was entitled to form the view it did on the considerations it had identified as relevant at paragraph 65. That said, the *particular* prejudice that the Claimant was complaining about arose from the atypical facts of this case. He was objecting to the refusal to delay the internal process until such time as he felt on legal advice able to participate (so, after the criminal proceedings had concluded) specifically because he was concerned that what he said would automatically be passed onto the police by the Respondent and the internal process provided him with no real safeguards; this was more than what might normally be expected in the general course. The ET might permissibly take the view that the Respondent's concern about delay was still sufficient to outweigh that issue and its decision thus still fell within the range of reasonable responses, but on the ET's reasoning at paragraph 65 I simply cannot be sure that there has been a consideration of this particular relevant factor, and therefore on that basis alone I conclude that the appeal should be allowed.

Disposal and Permission to Appeal

48. After I had given my oral Judgment in this matter, the Respondent sought permission to appeal to the Court of Appeal on the basis that there were potentially wider implications arising from my decision, suggesting that, in circumstances where there are information-sharing practices between law enforcement agencies, internal disciplinary processes should be delayed pending the conclusion of criminal proceedings. I refused the application. The point thus

A

identified is based on a misunderstanding of the Judgment I have given. My concern was simply that this ET had apparently not considered the specific practice of information-sharing when determining the fairness or otherwise of the Respondent's decision in this particular case. I have not suggested that there would be any automatic response in such cases; that would be dependent on the good judgment of the ET in each instance. On that basis, I cannot see that any properly arguable question of law has been identified or that there is any other compelling reason for this matter to trouble the Court of Appeal.

B

C

49. I then turn to the issue of remission and disposal of the appeal. Given my Judgment, it is common ground that more than one outcome is possible and therefore this matter should be remitted. The only question therefore is whether it goes back to the same or a differently constituted ET. Having borne in mind the factors identified in **Sinclair Roche & Temperley v Heard and Anor** [2004] IRLR 763 EAT, it seems to me that this is a matter that should properly be remitted to the same ET. This ET has made extensive findings of fact in this matter; there is no suggestion of bias on its part and its Judgment is not fatally flawed - the only matter of concern being as to whether the ET has taken into account a relevant factor in making a decision as to the fairness of the refusal to defer the internal process. I understand the concern identified on behalf of the Claimant that this might be seen as giving the ET a second bite of the cherry on this point. I have, however, no reason to doubt the professionalism of the experienced ET in question and am confident that it will approach this matter afresh, taking into account that relevant factor and as part of its reconsideration.

D

E

F

G

H