Case Number: 2200215/2013

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr M Cooper		**National Crime Agency**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 17 August 2020**

BEFORE: Employment Judge A M Snelson

The Claimant's claim for unfair dismissal having been remitted by the Employment Appeal Tribunal for fresh consideration;
And that remission having been affirmed by the Court of Appeal;
And upon hearing the Claimant in person, supported by Mr R Gibb, lay representative, and Mr S Murray, counsel, on behalf of the Respondents;

It is adjudged that the original judgment of the Tribunal sent to the parties on 9 February 2016 is, following fresh consideration, affirmed and the proceedings accordingly stand dismissed.

REASONS

Introduction

1. This case has a long history, which is mainly attributable to a lengthy stay pending determination of criminal charges against the Claimant and activity at the appellate level following the Employment Tribunal's first determination in favour of the Respondents in early 2016. In my judgment and reasons issued on 9 February 2016, I introduced the dispute in these terms.

> **1 The Respondents are a national law enforcement agency dedicated to combating serious and organised crime. They were established in 2013, replacing the Serious Organised Crime Agency ('SOCA'). At all relevant times SOCA employed over 4,000 people in Great Britain.**

2 The Claimant, who was born on 6 February 1960, is proud of his record of public service over many years. Among other things, he has served in the armed forces and took part in the Falklands campaign in 1982. He joined the National Crime Squad in January 2004 and transferred to SOCA in 2006. That employment ended with summary dismissal (with payment in lieu of notice) effected by means of a letter dated 17 October 2012, on the ground that, on 8 April 2012, whilst off duty, he had behaved in a manner which breached SOCA policies and the SOCA Code. At the time of his dismissal he was employed as a Principal Officer, on an annual salary of just under £49,000. It is not in question that his position carried significant responsibilities and involved working on matters of considerable sensitivity and importance. …

3 By a claim form presented on 5 January 2013 the Claimant complained of unfair dismissal. The claim was resisted by SOCA on the ground that he had been fairly dismissed following a fair procedure. In due course, the Respondents, as successors to SOCA, inherited the claim and adopted SOCA's defence to it.

4 At a case management discussion held on 10 April 2013 at which the Claimant appeared in person and SOCA was represented by a solicitor, Regional Employment Judge Potter listed the case for a three-day hearing to commence on 4 September 2013 and gave directions in unremarkable form. She also noted the issues in an annex to her order, which included the following:

> **Did the Respondent follow a fair procedure – in particular the Claimant alleges the following aspects were unfair: (release of and) reliance on police evidence and failure to postpone Disciplinary Hearing until the Claimant [was] fit to participate?**

The Claimant's case at that stage also featured allegations of bias and a human rights point, but these were subsequently abandoned.

5 On the Claimant's application the final hearing of his case before the Employment Tribunal fixed for September 2013 was postponed pending determination of criminal proceedings against him arising out of the events of 8 April 2012.

6 Those proceedings resulted in convictions on 15 October 2013 before Brighton Magistrates' Court of being drunk and disorderly and assaulting a police officer. The Claimant appealed and the Tribunal proceedings were further stayed.

7 On 13 January 2015 the Claimant's appeal against his convictions was upheld by the Crown Court.

8 The unfair dismissal claim came before me for final hearing on liability only on 13 January 2016, with three days allocated. The Claimant was represented by Ms E Dehon and the Respondents by Mr S Murray, both counsel …

The Statutory Framework

9 The Claimant invokes the protection against unfair dismissal enacted in what is now Part X of the Employment Rights Act 1996 ('the 1996 Act'). The key provision is s98. It is convenient to set out the following subsections:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
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> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
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> **(b) that it is either a reason falling within subsection (2) or some other**

substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

(b) relates to the employee's conduct …

(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."

Although my central function is simply to apply the clear language of the legislation, I am mindful of the assistance available, both legislative and judicial. By the Trade Union and Labour Relations (Consolidation) Act 1992, s207(2), any ACAS Code of Practice which appears to be relevant to any question in the proceedings is admissible in evidence and "shall be taken into account in determining that question". I bear in mind the guidance applicable to misconduct cases contained in *British Home Stores Ltd-v-Burchell* [1978] IRLR 379 EAT (although that authority must be read subject to the caveat that it reflects the law as it stood when the burden was on the employer to prove not only the reason for dismissal but also its reasonableness). The criterion of 'equity' (in s98(4)(b)) dictates that, the more serious the allegation and/or the potential consequences of the disciplinary action, the greater the need for the employer to conduct a careful and thorough investigation (*A-v-B* [2003] IRLR 405 EAT and *Salford Royal NHS Foundation Trust-v-Roldan* [2010] IRLR 721 CA). From *Iceland Frozen Foods Ltd-v-Jones* [1982] IRLR 439 EAT and *Post Office-v-Foley; HSBC Bank-v-Madden* [2000] IRLR 827 CA, I derive the cardinal principle that, when considering reasonableness under s98(4), the Tribunal's task is not to substitute its view for that of the employer but rather to determine whether the employer's decision to dismiss fell within a band of reasonable responses open to him in the circumstances. That rule applies as much to the procedural management of the disciplinary exercise as to the substance of the decision to dismiss (*Sainsbury's Supermarkets Ltd-v-Hitt* [2003] IRLR 23 CA).

The Rival Cases

10 The Claimant did not challenge the conduct ground put forward on behalf of SOCA, or that that constituted, in its substance, a fair reason for dismissal. Ms Dehon helpfully explained that his complaint rested on three procedural points only. 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 Data Protection Act 1998 and that its delivery by Sussex Police and use by the Respondents 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.

11 For the Respondents, Mr Murray submitted that there was nothing in any of the three points raised on the Claimant's behalf and that, on any view, the substance

of the decision to dismiss and the procedure applied fell within a permissible range of action in all the circumstances.

Oral Evidence and Documents

12 I heard evidence from the Claimant and, on behalf of the Respondents, Mrs Carolyn Woolley, at all relevant times Head of HR Operations, Mr Stephen Coates, at all relevant times Deputy Director, Intelligence Collection, Mr Peter Davies, at all relevant times Chief Executive of the Child Exploitation and Online Protection Centre, a body affiliated to SOCA, and Mr Mark Kerr, an Investigator in the Respondents' HR Conduct Unit. All gave evidence by means of witness statements.

13 I read the documents to which I was referred in the principal (one-volume) bundle. A supplemental bundle was also handed up.

14 In addition, I had the benefit of a chronology prepared on behalf of the Respondents and Mr Murray's opening skeleton.

2. I went on to recite the facts which I thought it necessary to record (a briefer narrative will be set out below below). I then stated my conclusions in (so far as now material) the following terms.

Reason and reasonableness

54 The reason for the dismissal was the judgment of the disciplinary and appeal panels that the Claimant's behaviour on 8 April 2012 was unacceptable and placed him in serious breach of the SOCA Code. That was a reason relating to conduct and, as such, a potentially fair reason for dismissal.

55 There was, and could be, no challenge to the proposition that the Respondents had reasonable grounds for that belief. There was ample plausible evidence on which to base it. And the Claimant's answer to the allegations, so far as it could be understood from the defence foreshadowed in bare outline at the Magistrates' Court on 25 May 2012, did not look promising.

56 Given the facts found, was dismissal within the band of reasonable responses? Again, Ms Dehon sensibly did not attempt to argue that, on the basis of the findings made at the disciplinary and appeal stages, dismissal was an impermissible option.

57 The case on reasonableness was accordingly fought on the three points identified above, all of which relate to process. I will take them in turn.

The Data Protection Act point

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 Data Protection Act 1998 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 1995 Act. 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 were not based on the detailed advice of a legal practitioner of seniority and repute.) [I am] 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.

Postponement on sickness grounds

59 … I conclude that this complaint is unfounded since neither panel was faced with an application to postpone on health grounds. …

60 I have a further reason for rejecting this part of the Claimant's case. He had made it abundantly clear that he would not participate in the disciplinary proceedings because, apparently, he believed or was advised that to do so might prejudice his interests in the criminal case (this is discussed under the third point, to which I will very shortly turn). In those circumstances, putting the disciplinary or appeal phase back could have served no purpose.

Postponement pending the outcome of the criminal proceedings

61 The third procedural point was whether or not it was unfair to decline the Claimant's application for the disciplinary proceedings to be stayed pending the outcome of the criminal trial in circumstances where he maintained that he had received legal advice that he must not participate in the disciplinary proceedings for fear of prejudicing his defence in the criminal case. …

[There followed a discussion of legal principles derived from *Harris v Courage (Eastern) Ltd* [1982] ICR 530 CA, *Ali v Sovreign Buses (London) Ltd* UKEAT/0274/*06* and *Secretary of State for Justice v Mansfield* UKEAT/0539/09.]

64 Mr Murray submitted that *Harris* was binding authority which required me to hold that the dismissal in the instant case was fair. I disagree. *Harris*, and the other cases cited, are, to my mind, simply illustrations of the 'band of reasonable responses' test as applied to the particular issue of whether to postpone a disciplinary process pending determination of a parallel criminal case. A broad discretionary judgment is called for and only where the employer wanders outside the band can his or her decision be stigmatised as unfair.

65 In my view it was plainly open to the Respondents to refuse the request for the internal proceedings to be postponed. Those proceedings and the criminal case posed 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 generally on the relevant occasion. While conviction by a criminal court would have made his defence to the [disciplinary] 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.)**
>
> **Outcome**
>
> **66 For the reasons stated, the complaint of unfair dismissal is not well-founded. The process followed, and the substance of the decision to dismiss, fell comfortably within a range of permissible action open to the Respondents ...**

The Appellate Proceedings and Remission

3. The Claimant's appeal against the Tribunal's decision proceeded to a full hearing before HHJ Eady QC (as she then was) sitting in the Employment Appeal Tribunal ('EAT') on 16 June 2017. By that stage the appeal was confined to the first and third prongs of the claim before me, which I will call the Data Protection Act point and the prejudice to criminal proceedings point. The learned judge dismissed the appeal on the former issue but upheld it on the latter.

4. On the Data Protection Act point, the EAT held that, given in particular the way in which the case for the Claimant had been put in the disciplinary proceedings (specifically, the appeal), I had permissibly concluded that the fairness of the dismissal was not vitiated by the fact that information relevant to the disciplinary charges had been supplied to the Respondents by Sussex Police in a manner which the Claimant later alleged to have infringed his rights under the Data Protection Act.

5. On the ground which succeeded, Judge Eady QC said this:

> **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.**
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> **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.**
>
> **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?**
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> **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.**

6. At para 48 the learned judge referred to the application on behalf of the Respondents for permission to appeal, which appeared to her to assume that her judgment laid down a general rule or principle that where there were information-sharing practices between law enforcement agencies, internal disciplinary proceedings should be delayed pending the conclusion of criminal proceedings. She went on:

> **The point thus 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.**

7. At paragraph 49, Judge Eady QC turned to the question of remission, as to which she made, among others, these remarks:

> **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. … 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.**

8. The case eventually reached the Court of Appeal in October 2018 in the form of conjoined appeals by the Claimant against the EAT's ruling on the Data Protection Act point and a judgment of the County Court (HHJ Dight) dismissing his claim for damages under the Data Protection Act based on the Respondents' use ('processing') of his personal data (the subject-matter of the Data Protection Act point before the ET). There was also a cross-appeal by the Respondents against so much of the EAT's Order as had upheld the Claimant's appeal.

9. By a judgment handed down on 22 January 2019, the Court of Appeal dismissed both appeals and the cross-appeal. Giving the only substantial judgment, Sales LJ (as he then was) dealt with the appeals arising out of the ET proceedings with notable brevity, in these terms:

> **140. The focus of the submissions which Mr Coppel made on the appeal are that the ET and the EAT erred in failing to grapple with Mr Cooper's case that SOCA had been in breach of the DPA in using the Brighton custody material against him in the disciplinary proceedings which led to his dismissal, and erred in holding that SOCA's appeal panel was entitled to proceed on the assumption that it had been lawful for Sussex Police to pass that material to SOCA. These points are related.**
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> **141. I would dismiss this appeal. There was no error by the ET or the EAT in relation to their examination of the way in which SOCA's disciplinary panels dealt with the circumstances under which the Brighton custody material came into the possession of SOCA. Before the first panel, Mr Cooper raised no complaint regarding the way in which that material came into SOCA's hands. Before the appeal panel, his trade union representative (Mr Tully) mentioned that Mr Cooper had a concern about that, and the appeal panel conducted a proper examination of that concern by, first, clarifying whether Mr Tully was actually making an allegation that the way in which SOCA obtained the material and made use of it in its investigation leading to the disciplinary proceedings was unlawful (and determining that he was not making such an allegation) and, secondly, nonetheless making inquiry of Mr Kerr to obtain confirmation that he was not aware of any unlawfulness in what had been done. The appeal panel's inquiries were reasonable in the circumstances, as the ET was entitled to hold. I agree with the EAT's reasoning. On the basis that the appeal panel had made reasonable inquiry in relation to any issue concerning the lawfulness of what had been done and had satisfied itself that it did not need to take the matter further, the ET and the EAT were right to hold that it was unnecessary to go into the detailed merits of any argument based on the DPA.**
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> **142. Mr Murray presented the submissions for SOCA on its cross-appeal. He contends that the EAT was in error in holding that the case should be remitted to the ET to consider whether there was a special reason in Mr Cooper's case why SOCA, as employer, should have delayed hearing the disciplinary proceedings until after the criminal proceedings had come to an end, by reason of the particular risk that**

> **SOCA might send information from the disciplinary process back to Sussex Police which might then be used against Mr Cooper in the criminal proceedings. Mr Murray submits that the EAT should have found that it was implicit in the ET's reasoning that it had taken that point into consideration in reaching its conclusion that the dismissal process was fair.**
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> **143. I do not accept Mr Murray's submission. The EAT was right in its interpretation of the decision of the ET and in saying that one cannot be confident that the ET had properly factored this particular aspect of Mr Cooper's case into its conclusion at para. [65]. The correctness of the EAT's interpretation of para. [65] of the ET decision is reinforced by para. [19] of the ET's decision, in which the ET specifically said that the subject of the practice of SOCA of passing to a local police force information about any employee who has been charged with an offence by that force "did not appear to be directly relevant since the Claimant's challenge, as explained above, was to [SOCA] placing reliance on the police evidence, not the other way round …". Since the ET judge did not regard this issue as relevant to the claim – a point on which he was in error, since it did sufficiently appear from Mr Cooper's claim that he was complaining about the risk of SOCA passing information from the disciplinary process back to the police for possible use in the criminal proceedings – it is very difficult to say that he implicitly did deal with this aspect of Mr Cooper's claim in para. [65].**
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> **144. Accordingly, I would hold that the order of the EAT requiring remission of the case to the ET for consideration of this aspect of Mr Cooper's claim should stand.**

10. The Claimant's application for permission to appeal to the Supreme Court was refused.

11. It can be seen from the judgments of the EAT and the Court of Appeal that the question remitted for further consideration is narrow. The appeal was allowed on one ground only. The ET's discussion of the prejudice to criminal proceedings point was criticised only on the basis that it might have overlooked the single 'atypical' factor, namely the concern said to have been raised by or on behalf of the Claimant about information-sharing between the Respondents and the police and the risk that it might prejudice the criminal case if he participated in the disciplinary proceedings. On remission, the ET is asked to examine the case afresh with particular reference to the question whether, given the Respondents' practice of passing information arising out of internal proceedings to police forces, the appeal panel's refusal to postpone the appeal was unreasonable and rendered the dismissal as a whole unfair.

12. At a telephone hearing for case management held on 16 June this year to set up the remitted hearing and agree directions, I stressed to the Claimant the limited scope of the remission. There would be no fresh evidence. The bundle should be a substantially pared-down version of the original one. The focus needed to be on the few material paragraphs of the two superior court judgments. Regrettably, although no challenge was raised at the time to my directions, the Claimant appears not to have accepted my guidance. Thus the remitted hearing began with his misconceived application for permission to adduce fresh evidence. More generally, the case on remission suffered from his failure to concentrate on the only point which had troubled the EAT and the Court of Appeal. The result was that a great deal of his and Mr Gibbs's wide-ranging argument missed the mark.

The Facts

13. The facts were fully recited in my original judgment, which should be read alongside this. Here I will attempt to isolate the key facts relevant to the remitted issue. In doing so, I will reproduce some of my original findings.

14. The Claimant reported his arrest to the Respondents on 8 April 2012, the day of his release from custody.

15. An investigation followed, conducted by Mr Mark Kerr of the Respondents' Conduct Unit.

16. On 11 May, Mr Neil Craig, Case Administration Bureau Manager in the Respondents' Conduct Unit, wrote to the Claimant advising him that:

> **… it is necessary to investigate that on or about 8 April 2012 you allegedly committed a criminal act and may have behaved in a manor [sic] not expected of a SOCA Officer, whether on or off duty.**

He explained that the allegation had been "initially assessed" as gross misconduct, which might result in dismissal. He also drew attention to the right to be accompanied at disciplinary meetings.

17. On 25 May the Claimant appeared at the Magistrates' Court and pleaded not guilty to charges of being drunk and disorderly and assaulting a police officer. A trial date was set for 14 November. Asked to explain the gist of his defence, he responded to the effect that, on 8 April, he had been the victim of a "mass attack" and of the actions of "over-zealous" police officers. Mr Kerr was at court and witnessed the Claimant's explanation (in outline) of his defence.

18. The Claimant was aware that Mr Kerr wished to interview him about the events of 8 April but he made it known through Ms Anne Boucnik of the Respondents' Occupational Health Service that, owing to his ill-health, he did not wish to meet Mr Kerr. He suggested that he should rely on his notes taken at court on 25 May.

19. On 20 June Ms Rebecca Penny, HR Performance Manager, wrote to the Claimant inviting him to put forward mitigation or any other information to assist Mr Kerr to conduct a full and fair investigation.

20. On 18 July Mr Dave Watson, the Claimant's line manager, and Ms Sabina Augustine of HR visited the Claimant in Hove. The Claimant reported that he was under medication from his GP but felt a lot better. He said that he was willing to participate in the internal disciplinary proceedings by attending an interview, but would not set out his case in writing. He referred to a concern to avoid prejudicing the criminal case. Nothing was said about information-sharing.

21. Eventually, Mr Kerr succeeded in making arrangements with the Claimant to interview him at his home on 17 August. In advance of the meeting he prepared an interview plan. When the interview began the Claimant explained that on advice from his solicitor he would make no comment on any question relating to

the criminal case. Mr Kerr endeavoured to explain that the interview would not bear upon the criminal proceedings but would focus on the Claimant's conduct as an officer of SOCA. Nonetheless, he declined to answer questions concerning his behaviour on 8 April, citing his solicitor's advice. Asked if he wished to comment, not about the incident or the arrest or his behaviour in custody but generally on whether he had brought discredit on SOCA, he offered no reply. He did, however, volunteer that he had been attacked and that he had acted as he had and said "a few bad things" because of being attacked and because he felt that the incident was not being investigated by the police. Nothing was said about information-sharing.

22. Following his meeting with the Claimant, Mr Kerr completed his investigation report, which was dated 20 August. He concluded that the matter should go to a disciplinary hearing.

23. By a letter of 3 September the Claimant was notified by Ms Louise Bradshaw of HR that he would be invited to a disciplinary hearing and that the allegations against him "potentially" constituted gross misconduct.

24. By a letter of 12 September Ms Bradshaw invited the Claimant to attend a disciplinary hearing to be held on 11 October. She referred to the original formulation of the charges ("… that … you allegedly committed a criminal act and may have behaved in a [manner] not expected of a SOCA officer, whether on or off duty") and pointed out that the allegation had been amended to read:

> **Your inappropriate behaviour/conduct and breach of related SOCA policies and procedures which are contrary to the SOCA Code**

The Claimant was advised of the composition of the disciplinary panel and of his right to accompanied. The documents were promised by 26 September and he was invited to submit any further evidence or supporting documentation by 3 October.

25. By a letter of 24 September Ms Bradshaw advised the Claimant of the precise location of the disciplinary hearing and indentified the HR representative on the panel as Ms Michelle Cole. She pointed out that if he chose not to attend the hearing might proceed in his absence.

26. On 25 September the disciplinary hearing pack was sent to the Claimant by recorded delivery.

27. On 26 September the Claimant wrote to Ms Bradshaw stating that, on legal advice, he wished the disciplinary hearing to be deferred until after his criminal trial (then listed for 14 November). He maintained that the postponement was necessary in order to permit his full participation and ensure that the hearing proceeded in accordance with fairness and natural justice. The letter made no reference to information-sharing.

28. On 3 October Ms Augustine wrote to the Claimant advising him that his request for the hearing to be put back had been refused. She explained that the

disciplinary process was concerned with his conduct and an alleged breach of the organisation's standards. Findings in the disciplinary hearing would not automatically impact upon the criminal case or vice versa. She added that if he declined to attend, the hearing might proceed in his absence.

29. The disciplinary hearing was duly convened on 11 October. Those present were Mr Coates, Mr Mike Stevens, a senior manager, Ms Cole, Mr Kerr and, in the capacity of note-taker, Ms Bradshaw. The Claimant did not attend (although his non-attendance would not have been a great surprise to the panel, which, I find, had sight of the messages of 26 September and 3 October). Nor did he signal in advance that he would, or would not, attend. Nor did he apply for the hearing to be adjourned. Nor did he arrange to be represented. Nor did he submit any written representations. The panel members decided to proceed with the hearing. They noted the evidence in the documents. They also took time to view the CCTV footage. After deliberations in private, Mr Coates announced their decision that the Claimant would be dismissed, recording the panel's disappointment that he had declined to participate or put before them any material, by way of mitigation or otherwise.

30. By a letter of 17 October Mr Coates notified the Claimant of the panel's determination. He recited the charge (in its amended form) and referred to the importance of the SOCA Code and the principles underpinning it. He observed that there had been no real contribution to the investigation from the Claimant himself and that the panel had found the evidence against him "strong" and "compelling". All in all, a "clear breach" of the SOCA Code was established and his conduct amounted to gross misconduct. Accordingly he would be dismissed with effect from 11 October and paid eight weeks' pay in lieu of notice together with all outstanding entitlements. The letter also drew attention to the right of appeal.

31. The Claimant submitted a notice of appeal. In accordance with the Respondents' procedures (which provide for appeals to take the form of reviews rather than re-hearings) the appeal form offers three possible grounds of challenge as follows:

> **(a) Policy and/or procedure was not followed – please specify**
> **(b) Evidence did not support the conclusions – documents should be attached to introduce any new evidence**
> **(c) Disciplinary action was too severe**

Under (a) the Claimant complained of "procedural irregularities and breaches of his Article 6 rights and Natural Justice". Under (b) (although one would have thought that it belonged under (a)), he referred to the "matter" being *sub judice*, a breach of "due process" and a failure to "guard the integrity of the criminal justice system". Under (c) he alleged a "frenzied rush to blame and punish" and described his dismissal as, "a rum reward and miserable decision for 37 loyal years … in the service of my country". In the same form he stated that he was under the care of his GP and had been certified unfit for work until 17 December, attaching a copy of a new 'fit note', which appears to have a cited "anxiety and depression" or something similar. There was no reference in the notice of appeal to information-sharing.

32. By a letter of 26 November 2012 Ms Bradshaw advised the Claimant that his appeal would be heard on 6 December by a panel chaired by Mr Peter Davies and also comprising two other members. The disciplinary appeal pack was referred to in the letter and had by that stage already been sent to the Claimant.

33. Prior to the appeal hearing Ms Bradshaw advised the panel that the Magistrates' Court trial had been adjourned to 28 May 2013.

34. The appeal hearing duly convened on 6 December. Apart from the appointed panel, those present were Mr Stevens, to represent the disciplinary panel, Mr Kerr, as a witness, and Ms Bradshaw as note-taker. The Claimant did not attend or provide any documentation or written representations, but did authorise Mr Phil Tully, a trade union representative, to attend on his behalf.

35. At the outset Mr Tully explained that the Claimant was not present, owing to ill-health. He applied for a postponement of the hearing, but not on that ground. Rather, he argued that that the "*sub judice* matters" (the Magistrates' Court hearing) must go first, otherwise he would be denied a fair trial. The transcript includes these comments by Mr Tully (p2):

> **Now I've been asked to put forward to you that he believes that the underlying court case has been put back from November, which is out of his control, and he would have obviously liked to have had that done and dusted prior to any sort of internal misconduct proceedings … He's asked me … to tell you that he would have preferred that the original panel would have [not been] convened prior to his court case. He's concerned that … this may prejudice the outcome of the court case. We don't know whether the information from the original panel has got through to the people involved in the, is it Sussex, force in terms of them putting together the court case so he's worried that … this may prejudice his case there.**

Accordingly, Mr Tully argued that the Claimant should be "reinstated" pending the outcome of the criminal case. He added that this approach would also be fitting having regard to the Claimant's poor health. A little later Mr Davies is recorded as summarising the argument in this way:

> **Michael is awaiting a criminal court case of some kind. … And his view is … the panel process but also the appeal process should await the outcome of the criminal case before taking any action … the matter remains *sub judice* and the first duty is to the court of law in order to adhere to the high principle of rule of law …**

Mr Tully confirmed Mr Davies's understanding of the argument. Shortly afterwards he made the further point that the Claimant had read of Metropolitan Police officers standing trial prior to facing disciplinary charges and felt that the same should apply to him. The reasoning here was then extended to the point where Mr Tully is recorded as confirming the Claimant's general view that if criminal proceedings resulted in a not guilty verdict, there was no misconduct.

36. After exploring the initial application with care and obtaining clarity on the broad shape of the appeal (Mr Tully confirmed that it rested on all three grounds of appeal lodged by the Claimant), the appeal panel adjourned. Following private deliberations Mr Davies announced that the panel had decided to proceed with the hearing and to decline the application to adjourn. He noted that the Respondents'

procedures envisage that internal disciplinary proceedings can usually be investigated prior to the conclusion of a parallel criminal case. He also observed that it would not be in the interests of anyone, including the Claimant (having particular regard to his state of health), for the disciplinary case to be delayed into the future.

37. Following the ruling on the adjournment application, Mr Stevens was asked to comment. He stressed that the disciplinary panel had reached the clear conclusion that it should proceed with the hearing. The issues raised by the criminal and disciplinary charges were quite different. Different burdens applied. Asked by Ms Carolyn Woolley, a panel member, to clarify whether the disciplinary panel had inquired into the Claimant's guilt or innocence of the criminal charges or the alleged breach of the SOCA code, he replied:

> **We considered whether his behaviour, as described, breached the SOCA code.**

The appeal panel then examined the issues raised by the appeal in considerable detail. The transcript is testament to the care which it took. In my original reasons I made findings on what was said bearing on the Data Protection Act point. I do not need to repeat them here. As to the prejudice to criminal proceedings point, there was a brief reference (transcript, p11) to the exchange of correspondence on 26 September and 3 October 2012 (see above) but no argument was developed upon it. In particular, the bare complaint of 'prejudice' was not explained. Nothing was said about information-sharing. As HHJ Eady pointed out in her judgment, Mr Tully's arguments seemed at times confused. For example, at a late stage in the hearing, the transcript (p17) notes a request for reassurance addressed to Mr Kerr on behalf of the Claimant that the "private information" gathered by the Respondents had not prejudiced the criminal case. The question, posed in the immediate context of argument about the Data Protection Act point, seems to make little sense since (a) that point was about alleged unfairness of the disciplinary process, not the criminal proceedings, and (b) in any event the material gathered by the Respondents to date consisted largely of information received from the police, which was the very evidence on which the prosecution case would rest. Be that as it may, Mr Kerr, believing (probably rightly) that Mr Tully had seamlessly returned to the prejudice to criminal proceedings point, responded:

> **Nothing, there's nothing here that will prejudice his court case. His court case is still pending it's now been delayed until May next year, any documents that have come out of … my investigation, the initial hearing and this hearing will be the subject of disclosure … which I'll have to do , completing the MG forms and passing it on to the Crown Prosecution Service. But [that] only really affects him and it assists his defence.**

Mr Tully raised no challenge to this. Nor did he suggest that Mr Kerr had misunderstood his question.

38. At the end of the appeal hearing there was a further adjournment, after which 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 by Sussex Police, citing in that regard the remarks of

Mr Kerr concerning the routine practice of sharing evidence of this sort, (as to which, see my original reasons, para 18). Finally, he announced the appeal panel's view that the first-instance panel had reached a proper conclusion on the question of sanction.

39. By a letter of 17 December Mr Davies conveyed to the Claimant, in considerable detail, the conclusions of the appeal panel, adding that the disposal of the appeal had brought the disciplinary process to an end.

Analysis and Conclusions

40. I will leave my original findings and conclusions on all matters other than the prejudice to criminal proceedings point to speak for themselves.

41. As I have recorded in my narrative of the facts, it is not in doubt that the Claimant on several occasions raised a concern, said to be based on legal advice, that participating in the disciplinary process might prejudice the criminal proceedings. He did so for the first time on 18 July 2012 and for the last time, through Mr Tully, at the disciplinary appeal on 6 December that year. As I understand them, neither the EAT nor the Court of Appeal was critical of my judgment in so far as it concerned the general contention that internal proceedings should abide the outcome of a related criminal case.

42. As noted above, however, Judge Eady QC has stated that the Claimant's case (in the internal proceedings) included the assertion that he faced *particular* prejudice because he felt that what he might say in the course of the disciplinary process disciplinary would automatically be passed on to the police and the internal proceedings provided him with no real safeguards (judgment, para 47). And the Court of Appeal has affirmed Judge Eady's decision and her reasoning (judgment, para 143). It need not be said that I accept without question the correction of both higher courts. Where and how was the assertion of the *particular* prejudice expressed? It seems to me that it must lie in the things said by Mr Tully on the Claimant's behalf at the disciplinary appeal. Neither Judge Eady nor the Court of Appeal pointed to any prior communication of this concern, written or oral, and my own (second) review of the facts discloses none. Prior communications had not gone beyond making the general argument that the internal proceedings should be stayed to avoid the risk of prejudicing the criminal case. I have studied the transcript of the disciplinary appeal afresh and have cited above what appear to me to be the key exchanges. Unless I have missed something, it seems to me that Judge Eady's reference (judgment, para 47) to the absence of "real safeguards" (in internal proceedings) is based not on anything actually said at the appeal hearing but rather on her perception of what was implicit in Mr Tully's submissions or otherwise evident as a matter of ordinary experience. At all events, what does emerge clearly from the transcript is that Mr Tully did get across the Claimant's anxiety about a perceived risk of information being passed by the Respondents to the police and such information prejudicing the criminal case. This mention of information-sharing added a new strand to the argument. The first reference (transcript, p2) included Mr Tully's comment that he did not know if the "information" from the disciplinary hearing had "got through" to the police. Since the Claimant had not taken part in that hearing, the relevant "information" can only

have meant the material on which the charges were based (which itself had primarily come from the police) and the outcome, namely the decision to dismiss. The second reference (already discussed), muddled as it seems, was properly understood as a request for reassurance that any information gathered by the Respondents had not prejudiced, and would not prejudice, the criminal case. In light of the judgments of the higher courts and the context generally (including the very recent first reference just mentioned), I proceed on the footing that Mr Tully was, and was understood to be, voicing a concern about the perceived risks associated with what Judge Eady termed automatic information-sharing by the Respondents with the police.

43. It follows from what I have just said that, in my view, Mr Murray overstates his case in his skeleton argument, paras 8-23. I do not accept that Mr Tully raised concerns "solely" about the transfer of information by the police to the Respondents (the Data Protection Act point). He did also argue the prejudice to criminal proceedings point in the initial adjournment application and was rightly interpreted as having returned to it at a much later point in the hearing. And he did import into that argument a new strand, namely reliance on the practice of information-sharing between the Respondents and the police.

44. I return to the remitted question, which I formulate in this way: Given the case advanced by or on behalf of the Claimant on the prejudice to criminal proceedings point, was the Respondents' conduct in proceeding to determine the internal disciplinary case rather than adjourning pending the completion of the criminal case reasonable or unreasonable (*ie* did it fall within or outside a range of reasonable options open to them in the circumstances)?

45. It is necessary to examine the procedural management of the internal proceedings in two parts. At the disciplinary hearing the decision to proceed was, in my view, obviously unimpeachable. The Claimant did not attend and did not renew his application to adjourn, which had rested on an unexplained assertion that there was a risk of the criminal case being prejudiced and had quite reasonably been refused. The special feature which the decisions of the EAT and Court of Appeal turned upon was not mentioned to the disciplinary panel. In short, the panel was given no good reason to adjourn.

46. At the disciplinary appeal hearing, Mr Tully's representations on the Claimant's behalf, tentatively and less than clearly, brought the information-sharing argument into play for the first time. In the context of a complaint of the risk of prejudice, what did that add? In my judgment, very little. The supposed risk of prejudice resulting from information-sharing was not explained. It was not said, for example, that the Claimant would be unable to answer questions in the internal proceedings for fear of incriminating himself. If that had been said, Mr Tully would perhaps have been reminded that (a) the questions raised by the disciplinary charges were not the same as those raised in the criminal case, and (b) it would in any event have been open to the Claimant to rely on the privilege against self-incrimination if necessary. Nor was it said that if he participated in the disciplinary appeal he would be prejudiced by having to reveal his defence to the criminal charges in circumstances where that defence would be made known to the police (and through them the Crown Prosecution Service). If that had been Mr Tully's line,

the appeal panel would no doubt have wished to reflect on how real this supposed prejudice was in circumstances where the Claimant had already stated the gist of his defence at a public hearing in the Magistrates' Court. Nor (as I have pointed out) did Mr Tully voice any concern about the absence of 'safeguards' in the internal proceedings. If he had, the significance of this point in its particular context might have been explored and developed.

47. I do not discount the possibility that a different or better case on prejudice *might* have been advanced, but I have to weigh the actions and decisions of the appeal panel against the case which the Claimant, through his representative, put before it. It seems to me that that case can fairly be summarised as (a) making the general argument that the internal proceedings should await the outcome of the criminal process, (b) adding (obliquely) the information-sharing factor but offering no ground (certainly no persuasive ground) for saying that it increased the risk of prejudice, and (c) (towards the end of the appeal hearing) asking for reassurance on the question of prejudice. That reassurance, as I have noted above, was given by Mr Kerr at once. (What he said was consistent with what I recorded in my original reasons, para 19, about the practice of information-sharing between the Respondents and the relevant police force and the duty of the police to provide the Crown Prosecution Service with schedules of 'unused material' not forming part of the prosecution case. As I pointed out, the practice is dictated by criminal procedure legislation enacted to protect defendants from miscarriages of justice.) As I have noted, Mr Tully did not challenge or test Mr Kerr's reassurance in any way. The appeal panel had no possible reason to doubt it.

48. Having carefully re-examined the prejudice to criminal proceedings point in light of the judgments of the superior courts and the relevant evidence, I am satisfied to a high standard that the Respondents through the disciplinary and appeal panels acted reasonably, and at the very least permissibly, in declining to adjourn the internal proceedings. I repeat my original reasons, paras 61-65, with the important qualification that they should now be read as applicable to the remitted case and in particular the information-sharing factor. Quite simply, the case put forward on prejudice was notably weak and the decision-makers were eminently entitled to judge that the countervailing factors fully justified the refusal of the adjournment application.

Outcome

49. For the reasons stated, the remitted complaint of unfair dismissal fails and the proceedings stand dismissed.

EMPLOYMENT JUDGE- Snelson
01/09/2020

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Reasons entered in the Register and copies sent to the parties on 01/09/2020

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