EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102122/17

Held in Glasgow on 1, 2, 3, 6, 7, 8 & 16 November 2017

Employment Judge: Laura Doherty

Mr K — **Claimant**
Represented by:
Mr M Allison - Solicitor

L — **Respondents**
Represented by:
L's Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was not unfairly dismissed and the claim is dismissed.

REASONS

1. The claimant presented a complaint of unfair dismissal on 4 July 2017. The respondents accept dismissing the claimant; their position is that dismissal was fair, and was for the SOSR identified in the letter of dismissal produced at document 70 in the bundle.

2. The first issue for the Tribunal is to consider the reason for dismissal, and whether the respondents have established a fair reason in terms of Section 98 of ERA. It is not accepted by the claimant that the reason advanced by the respondents is a fair reason. Mr Allison's position is that the decision to dismiss the claimant was pre-determined, and there was bad faith on the part of the respondents.

3. Thereafter the fairness of the decision is attacked on numerous grounds. The claimant's position is that the respondents concluded that the claimant presented an unacceptable risk to children, however there was no factual basis for such a conclusion; it was perverse for the respondents to conclude there was a risk of reputational damage on the basis of future events which might not occur, and which had not occurred. The respondents failed to carry out any reasonable enquiry before concluding there would be reputational damage.

4. The fairness of the dismissal was also attacked the basis of time the procedure took; the fact the respondents did not wait for the outcome of the GCTS investigation: there was no fair notice of the offence for which the claimant was unfairly dismissed; and that the respondents carried out investigations after the disciplinary hearing, but before dismissal.

5. The decision to dismiss was also attacked on the basis that it fell out with the band of reasonable responses.

6. This case is subject to a Restricted Reporting Orders, and an Order to Prevent Disclosure of Identities to the Public, pursuant to Rules 50(3)(d) and (b) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules). Where necessary, in order to comply with those Orders, individuals are referred to in these reasons by a job title.

7. For the respondents evidence was given by the Head Teacher, the HR Adviser, and the Head of Service.

8. The claimant gave evidence on his own behalf, and evidence was given by his Employment Rights Adviser.

9. Parties lodged a joint bundle of documents.

10. It became apparent that there are significant issues arising from the remedy in this case The claimant's is seeking reinstatement/re-engagement, which is opposed by the respondents. There are also potentially arguments in relation to mitigation of loss. Given the time allocated to this Hearing, a decision was taken to split the merits and remedy, and therefore the Tribunal dealt only with the merits of the claim at this Hearing.

Findings in Fact

11. The respondents are a local authority with responsibility inter alia, for the provision of a primary and secondary education service. They have a significant number of employees and enjoy the support of an internal HR and Legal Department.

12. The respondents have a number of policies and procedures in place for the management of staff, including a Disciplinary Policy and Procedure. This is split into two parts, the first of which sets out the aims of the policy, and the second deals with how the policy is applied.

13. The main section of the Policy, under the heading “Principals”, identified that one of the principals is to deal with disciplinary issues as quickly as possible, and to deal with issues promptly, and not unreasonably delay meetings, decisions or confirmation of those decisions. The principals are also identified as follows:-

- *“carry out if necessary, investigations to establish the facts in each case;*

- *inform employees of the basis of the problem and give them an opportunity to present their case in response before any decisions are made."*

14. Section 5 deals with types of indiscipline, and provides at 5.1.3:-

"Generally if disciplinary action is applied, it will be for either capability or conduct. However, there may be occasions where a lack of capability has lead to an incident or action of misconduct or gross misconduct, and thus both capability and conduct may be considered together. "

15. Examples of gross misconduct were given at 5.3, and include:-

- *"being charged with and/or convicted of a criminal offence which, in the opinion of the Council, demonstrates unsuitability for continued employment with the Council either in the current post or any other post."*

16. This section also includes "a serious breach of trust and confidence".

17. Part 6 of the policy deals with Categorisation, and provides that:-

"To ensure efficient application of procedures, at the point where an alleged incidence of indiscipline occurs, an assessment will be made of its severity which will determine how the remainder of the procedures are followed:

Category 1 Not Complex Case
Category 2 Moderately Complex Case
Category 3 Complex Case"

18. The types of Categorisation then determine the procedure which will be adopted by the respondents. Part 3.4 of the policy deals with Category 3 Complex Cases and provides that these cases will always require an investigatory stage in the form of a full investigatory hearing. The policy also provides that HR will always be involved in person at investigatory and disciplinary hearings of cases within this category as they require direct specialist support. The policy provides the investigatory hearing will normally be heard within 28 days of the incident occurring and the disciplinary hearing will normally be heard within 28 of the investigatory hearing concluding. There is provision that cases in this Category will normally be concluded within 12 weeks of the incident occurring.

19. Paragraph 4.3.1 provides that where, following a case Categorisation, a full investigatory hearing is required a manager should prepare a case management plan, and gives examples of what this should include. For example, identifying who will carry out the investigatory hearing, who will conduct any subsequent hearing, whether or not there will be suspension, who needs to be interviewed as a witness, what the timescales are, and what documentary evidence is needed.

20. Section 5 deals with notification of when the disciplinary hearing is, and provides that when a disciplinary hearing is arranged, the employee will be advised in writing of the disciplinary hearing arrangements, the reasons for the hearing and details of his/her right to be represented.

21. At Section 4.2.4 the policy provides that:-

> *"It is the responsibility of the Employee or their representative to take minutes of the hearing if they so chose. The investigatory facts report and/or the Disciplinary Hearing outcome letter represent the only formal detailed documentation. No further minutes, notes or reports will be provided. "*

22. The policy also provides for the right of appeal. It provides at Section 10 of Part 1 of the policy that:-

> 7n *cases of appeal against dismissal on the ground of misconduct, gross misconduct, final written warnings and punitive action, these will be considered by the Council's Human Resources Appeals Board (Elected Members)."*

23. All letters of appeal must be submitted within 14 days of the outcome letter.

24. Section 12 of Part 1 of the policy deals with confidentiality and provides as follows at 12.1:-

> *"AH matters relating to discipline are confidential and no employee of the Council will disclose any information to anyone else within or outside the Council not involved in the case proceedings, including in circumstances where an employment reference has been requested, without the approval of the Head of organisation Development, Human Resources & Communications, or in the case of Chief Officers, the Chief Executive (or any delegated officer whom they deem appropriate)"*

25. Elected members who sit on appeals panels are not bound by the confidentiality provisions of the respondent's policy, but they are bound by a code of conduct.

26. The claimant was employed by the respondents as a school teacher. He has been employed by the respondents in that capacity since 1996.

27. The claimant was due to return to school after the winter break, on 5 January 2016. The claimant did not attend, and after a number of attempts to contact him by telephone the Head Teacher became concerned, and sought advice from HR. It was suggested to her that she ask a member of staff to visit the

claimant's home address, which she did. That member of staff (the Deputy Head) managed to make contact with the claimant.

28. The claimant phoned the Head Teacher at approximately 3pm that day and advised that he was involved in a Police enquiry into potential indecent pseudo images, (which the Head teacher recorded in her statement as online child abuse). He told her that he had several computers in his home, and that one had been removed by the Police. He also told her that he did not live alone, but his son also resided with him. The claimant told the Head Teacher that he had a doctor's appointment later in the week.

29. The Head Teacher told the claimant that due to the nature of the disclosure, and the fact that he had an appointment with his doctor on Thursday he should not attend work on Wednesday and that she would seek HR advice and contact him later in the week.

30. The Head Teacher sought advice from the HR Adviser. The HR Adviser formed the view that this case was likely to fall within Category 3 of the respondent's policy, and suggested to the Head Teacher that she and another member of staff make up typed statements of their involvement to date, which they did and which are produced at pages 1 and 2 of the bundle. These statements were ultimately included in the appendix of the papers sent to the claimant as part of the disciplinary process.

31. The HR Advisor also suggested that the claimant should be called into an investigation meeting. The Head teacher and the HR advisor were joint investigatory officers.

32. A letter was sent to the claimant on 7 January asking him to attend an investigatory hearing on 12 January in relation to his conversation with the Head Teacher on 5 January.

33. The letter also advised the claimant that there may be a requirement for the respondents to make a referral the General Teaching Council of Scotland Council (CTCS) who may carry out their own investigations to determine whether there was any issue in relation to his continuing registration to teach, and he was told that he would be informed in advance if the respondents decided on this action. The respondents considered it premature to make a referral to the GTCS at this stage.

34. The claimant attended an investigatory hearing on 12 January, along with the Head Teacher and HR Advisor. Notes of the meeting were produced at pages 4 and 5. The claimant was reminded he could have a representative present; he was content to proceed on his own.

35. The claimant was asked to talk through events. He provided information to the effect that the Police knocked on his door on 29/30 December, and advised they were making enquiries into an IP address which related to his email/computer. It was noted that it related to online abuse Images. The claimant advised that the Police checked 3 computers in total; 2 were fine and 1 was taken away for further investigation. The claimant advised that his son lived with him and he was also taken to the Police Station. They were integrated separately. He said that they were both released without charge but were advised there was an ongoing Police enquiry.

36. The claimant advised that after his phone call with the Head Teacher on 5 January the Police said there was no issue with him going back to work. He said the Police had indicated that the computer could have been accessed remotely and this would be checked on their investigation.

37. The claimant said he had not reported his absence on 5 January as he has been prescribed sleeping pills and they had an effect on him.

38. The claimant said if there was something on his old computers, then he queried why he would keep them, as it would make no sense to do so.

39. The claimant was asked if the Police had given any indication of how long the enquiry might take, and he advised about a month to 6 weeks, depending on forensics.

40. The claimant advised that he had a medical certificate up to 8 February. He was told that at normal absence reporting and absence management processes would be implemented, and these would be overseen by the Head Teacher, it was agreed that there would be regular contact between the claimant and the Head Teacher. The claimant was offered counseling services which he declined.

41. The claimant maintained regular contact with the Head Teacher regarding his absence.

42. On 25 February 2016 the claimant contacted the Head Teacher. In her note of their conversation (page 6 of the bundle) she recorded that the claimant had told her that the charge against him had changed to "*possession of a computer with indecent images"* but the Procurator Fiscal was not progressing with this charge. There was a discussion between the claimant and the Head Teacher about the fact the claimant was not suspended, but remained unfit for work.

43. The Head Teacher then discussed matters with the HR Advisor, and a letter was sent to the claimant on 8 March asking him to attend a reconvened investigatory hearing on 14 March. He was advised the hearing would be chaired by the Head Teacher. Enclosed with the letter was the Head Teacher's note of the telephone conversation of 25 February. The claimant was advised this would be referred to during the meeting. The claimant was advised that he had a right to be accompanied at the meeting.

44. Prior to the meeting taking place, on 10 March, the HR Advisor contacted Police Scotland, (a DCI Hay), to ask if she could confirm if the Police investigation had concluded. DCI Hay advised the HR Advisor that enquiries were outstanding.

45. The claimant attended a meeting on 14 April unaccompanied. Before the meeting began, he indicated that his preference was to be accompanied, and there was a brief discussion, in the course of which the claimant indicated that the PF was not pursuing the charges, and he would receive a letter from the PF. By this stage however the claimant decided that he wished to be represented, and the meeting was postponed to allow him to obtain representation. The HR Advisor provided him with details of an adviser whom she thought might be able to act on his behalf (the Employment Rights Advisor).

46. The HR Advisor wrote to the claimant on 14 March (page 8) advising the meeting was reconvened for Tuesday 5 April. The letter advised it was the intention to discuss the recent information which the claimant provided on 25 February as well as any further updates received; the claimant was advised that the respondents had received an update from Police Scotland advising the matter was still under investigation. Enclosed with this letter, was a copy of the respondent's disciplinary policies and procedures.

47. The meeting on 15 April did not proceed. The claimant telephoned the respondents to ask if the meeting was going ahead; during the discussion it emerged that the claimant had not yet received a letter from the Procurator Fiscal, and it was decided there was no point in the meeting proceeding without this further information.

48. The claimant did receive a letter from the Procurator Fiscal's Office on 6 April (page 9) which stated the following:-

> *"/ have now reviewed the case and have decided on the basis of the current information available to me to take no further action in the case against you at this time.*
>
> *You should be aware that there is an obligation on the prosecutor to keep cases under review. This includes cases in which the prosecutor has decided to take no further action. I therefore reserve the right to prosecute this case against you at a future date*
>
> *If you have a solicitor you should show him or her this letter.*
>
> *If not and you have any questions about this letter, you may wish to speak to someone at Citizens Advice or consult a solicitor.."*

49. The claimant contacted the Head Teacher on 21 April, to advise he had received this letter from the Procurator Fiscal's Office. He was asked for a copy.

50. On 17 May the Head Teacher wrote to the claimant again asking for a copy of the PF's letter, which the claimant hand delivered to the respondents on 18 May.

51. The HR Advisor had anticipated the letter from the PF' Office would say the claimant he had no case to answer. She did not consider that letter confirmed this and she did not understand what the letter meant. She sought legal advice from the respondent's internal legal department (the principal solicitor). The information the HR Adviser received was that she should contact Police Scotland and ask if their investigations have concluded. She did so, and spoke with Police Scotland on 1 June. She was told that she should write to the PF.

52. The HR Adviser then contacted internal legal again for advice, and advice was sought from someone with expertise in data protection. It was suggested to the HR Advisor that she should write to the Crown Office which she did on 13 July (also writing to the Police on that date). A letter was drafted (in part) by the respondents legal department, which was approved by the HR Adviser, (page 12/14) as follows:-

> *"To enable both the disciplinary and the child protection investigations to be progressed to a conclusion, it is vital the Council Officials involved in the investigation are in receipt of as much background information as possible to enable them to make informed decisions on the individual's continued employment, and the suitability of the employee to work with children, going forward. Against that background, I am writing to ask that you share with (the respondents) the information which you hold concerning the alleged incident for the purpose of these investigations, to enable us to properly understand the context of the decisions. Alternatively, I would be grateful if you could advise me whether someone from your office would be willing to be interviewed as part of these investigations.*
>
> *(The respondents) has a statutory duty, in relation to the protection of children within (the respondents' area) principally in terms of the Social Work (S) Act 1968, and the Children (S) Act 1985 as well as its duties under the Education (S) Act 1980 towards pupils within the district. In light of the need to protect children within (the area) it is appropriate that the information requested by made available. Legal Proceedings in a civil context are anticipated and accordingly it is the view of the Council that the exemption under Section 35 of the Date Protection Act 1998 applies"*

53. The HR Advisor also wrote to the claimant on 13 July (page 11) advising that a letter had been sent to the Crown Office and Police Scotland in order to

seek clarification of proceedings and it is hoped to have information prior to the school holidays.

54. In the meantime, the claimant was certified as fit to work shortly before the beginning of the school summer holidays, and he contacted the Head Teacher, who in turn consulted HR and a decision was made by the Head of Service that the claimant should not return to the classroom, and he was asked to report to the respondents head offices, at the beginning of the new school term.

55. The Crown Office wrote to the respondents on 5 August (page 17) as follows:-

> *"Your request is being considered by Crown Counsel. In the meantime, Crown Counsel has requested that the following information be provided:-*
>
> *3. What is the precise statutory basis of the Respondents investigation into the child protection issues raised?*
>
> *4. What is the precise nature of the legal proceedings which the Respondents has in contemplation against the accused? Would these involve legal proceedings designed to remove him from his employment?*
>
> *5. How does the Respondent intend to use any information provided?"*

56. The HR Adviser was on holiday when this letter was received, but on her return she again sought advice from the principal solicitor in the respondent's internal legal department.

57. The HR Adviser wrote to the claimant on 16 August to advise that that the internal proceedings had not yet been concluded and the respondents

required to consider work relocation, and advised the claimant that he was to report to the respondents head office.

58. On 19 August a letter which was drafted by the respondent's legal department was sent to the Crown Office signed by the Head of HR. This letter, and subsequent letters to the Crown Office were signed by the Head of HR but he did not any have input into the process beyond signing the letters, and the letters they were in fact the responsibility of the HR Adviser. The letter of 19 August was signed by the Head of HR as a matter of expediency because the HR Advisor was not present in the office, and she wanted the letter to go out; thereafter, his name was appended to the letters sent to the Crown Office for the sake of consistency, and also because of the seniority of his position.

59. The letter of 19 August set out the reasons why the respondents were seeking information. The letter at paragraph 4 stated :-

> *" Legal proceedings within the respondents anticipate that they may be involved are (i) without pre-empting the outcome of any disciplinary investigation into the conduct of the employee, if the employee was dismissed by the respondents for a potentially fair reason detailed in Section 98(2) (b) of the Employment Rights Act 1996, that employee may raise an Employment Tribunal claim for unfair dismissal against the respondents in which the respondents would become involved as the respondent and/or (ii) if the employee was in contact with children in circumstances whereby, in the opinion of Social Work, a risk of significant harm to any given child arose, the respondents may require dot apply for a Child Protection Order under Section 38 or 39 of the Children's Hearings (Scotland) Act 2011 and/or (Hi) if a child was harmed by the teacher at school, the Education Authority may be Defenders in civil proceedings raised on a child's behalf based on the Education Authority being vicariously liable for the employee's actions. "*

60. The letter goes on:-

> *"The difficulty which the respondents have in assessing risk based on the information which we hold at present is that a wide variety of reasons could be behind the decision of the Procurator Fiscal's Office not to proceed with prosecution. For example, one possibility may be that there is no evidence that the employee has engaged in wrongdoing. Alternatively, the assessment may be that whilst some evidence exists, it is insufficient to prove that the employee was guilty of a criminal offence beyond reasonable doubt. In the latter situation, in light of the fact that different legal tests require to be overcome in civil employment cases than in criminal prosecutions, and in light of the different burden of proof which applies to civil employment cases from criminal prosecutions, it is possible that whereas the evidence available is such that a criminal case could not be proven beyond reasonable doubt, the evidence available may indicate that the employee has a disciplinary case to answer within the respondents. Until the Investigating Officers within the respondents see the information which you hold, this assessment cannot take place."*

61. A further letter was sent to the Crown Office on 5 September (page 25) asking if advice could be given as to whether the employee would potentially pose any risk to a child. An email in similar terms asking whether comment could be made as to whether the claimant posed a risk to children was sent to the Police on 22 September.

62. The Crown Office responded to the respondents on 5 September 201 6 (page 26) stating that: *"Ordinarily COPFS would respond to such requests for information when submitted by the General Teaching Council for Scotland (GTCS)",* and asked the respondents to confirm whether he matter had been referred to GTCS.

63. The letter went on to state:-

> *"I understand that referral is mandatory where employment has been terminated or otherwise ceases when concerns such as those in the claimant's situation arise",*

64. The HR Adviser responded to the Crown on 21 September (page 30) stating :-

> *"In your correspondence dated 5 September, you highlight the need to make a referral to the GTCS if the employee has been dismissed or employment otherwise eases. I write to confirm that a discretionary referral has been made to GTCS as of 8 September 2016. I should also confirm that the claimant is still in employment with us. He has not been dismissed nor has he resigned from post"*

65. The HR Adviser asked for information to be sent as quickly as possible to enable them to conclude matters.

66. The respondents are under an obligation to make a referral to GTCS in some circumstances, but they also have the ability to make a discretionary referral. Consideration had been given by the respondents to making a discretionary referral to GTC but it had been felt that it was too early to make a referral, and they wished to obtain more information before deciding whether to do so.

67. On receipt of the letter from the Procurator Fiscal's Office, the HR Adviser considered it was implied a referral had been made, and she took the view that the respondents should be making a referral. She also took into account information which another employee had provided to her about the discretionary referral process, and the HR Adviser decided that a discretionary referral should be made. She advised the Head of Service of this, and she supported a referral being made.

68. The HR advisor telephoned GTCS on 8 September to discuss the process. She was advised to complete a referral form which she did.

69. The HR Adviser spoke to the claimant on 8 September, to advise that a referral to GTCS would be made, and she also advised him that they had obtained legal advice to contact the Crown Office and Police Scotland to request a disclosure of information.

70. The HR Adviser wrote to the claimant on 3 October to provide him with an update of the ongoing investigation process as follows:-

> *"You will recall from our conversation that the respondents was legally advised to contact both the Crown Office and Police Scotland to request a 'disclosure of information'. When we spoke on the 8th September, I explained that a referral to the General Teaching Council for Scotland (GTCS) and Disclosure Scotland was about to be undertaken on the basis of correspondence we had received from both the Crown Office and Police Scotland. The full referral paperwork has now been completed and was issued to both organisations on 22nd September. A further letter has been submitted to the Crown Office in response to their letter dated 7th September 2016.*
>
> *We had hoped to be in a position to conclude our formal investigation some time ago but due to the processes of third parties, matters have taken longer than we both expected. We hope the process will conclude shortly and I will update you as soon as I hear back from the Crown Office, GTCS and Disclosure Scotland. In the meantime, I have attached a chronology of events so far which also details where there is outstanding information. It is important that you review this document and if there are any amendments please let me know."*

71. The HR Adviser also advised in this letter that the claimant's temporary work location at the education headquarters would continue until such times as

they concluded the formal process. He was advised that his teaching post at the school was being advertised on a temporary basis only. The claimant was advised the respondents had not requested earlier to have his post backfilled because it was thought matters would have been concluded earlier.

72. A decision had been taken to fill the claimant's post on a temporary basis, as the Head Teacher was finding it difficult to fill the post on supply cover, and she had to ensure a measure of consistency for the pupils. The post was not filled on a permanent basis.

73. The Crown replied to the respondents on 28 September 201 6, and a redacted copy of their letter is produced at page 31 .

74. The letter stated inter alia:-

> *7 enclose a redacted copy of the summary of evidence provided by COPFS in this case and advise that the information is provided only for the purposes of allowing you to carry out your investigation and should not therefore be used or disclosed for any other purpose"*

75. There then follows a paragraph in the letter which is redacted, and which contained some information about why a decision was taken not to proceed by the Procurator Fiscal's Office. This letter goes on to state:-

> "*COPFS is not able to provide a view on any potential risk that (the claimant) may or may not pose to children. The obvious concern in this case relates to the nature of the offence. I am not aware of the claimant being reported to COPFS for any analogous matters. Please contact me if you need to discuss this matter further. "*

76. When the HR Adviser received the letter of 28 September from the Crown Office she contacted the principal solicitor of the respondent's internal legal

department and sought advice, as she was unsure as to whether she could use the information provided by the Crown Office.

77. The HR Adviser wrote again to the Crown Office on 6 October, querying the statement that the information was provided only for the purposes of "*allowing you to carry out your investigation and should not therefore be use or disclosed for any other purpose"* She reiterated that consent was sought for the information to be shared in a number of circumstance which included the claimant's disciplinary hearing, the appeal and the Employment Tribunal proceedings. The Crown Office responded on 11 October (page 41) stating:-

> **7 can advise that COPFS would be content for the information to be passed to the GTC to assist them with their investigation. COPFS will consider any additional requests for information from the GTC in respect of their investigations. At this stage COPFS would not be willing to authorize the release of the information to any other party. In the event that the respondents would wish to refer the matter to the Report of the Children's Hearing or social work those agencies will be able to follow their own protocol in order to obtain the relevant information for their inquiries"*

78. When the HR Advisor received this correspondence from the Crown Office she again sought advice from the principal solicitor.

79. Having taken advice the HR Adviser concluded, on the basis of the contents of the Crown Office's letter of 12 October that she was not permitted to share the information which had been provided with anyone. She also reached the conclusion that she had obtained as much information as she was going to be able to get and that she was not going to be able to obtain more information from the Police or the Crown Office.

80. The HR Advisor did not share any of the correspondence which she had had with the Crown and their responses with the other investigating officer (the

Head Teacher) as she did not consider that she was permitted to share the information.

81. The HR Advisor did not pass on any information which she received from the Crown Office to the GTCS, but she provided them with details of the individual she had been corresponding with at the Crown Office.

82. The HR Advisor wrote to the claimant on 10 November advising that the respondents were in a position to reconvene the formal investigatory hearing, and the claimant was asked to attend a hearing on 24 November with the Head Teacher, and the HR Advisor. The letter stated:-

> *"The reason for this meeting is to further investigate the details provided by you on 5 and 12 January, specifically that you were subject to a police investigation relating to on-line child image abuse and that the police had removed one of the old computers from your home address.*
>
> *Furthermore we would like to discuss the details provided by you to (the Head Teacher) on 25 February 2016 that the charge against you had been changed to possession of a computer with indecent images but the Procurator Fiscal was not intending to progress with the matter. You advised you were expecting a letter from the Procurator Fiscal confirming this outcome and we asked you to provide a copy on receipt.* We *received a copy of the Procurator Fiscal letter from you on 18 May 2016; however the content of the letter states 'I have now reviewed the case and have decided on the basis of the current information available to me to take no further action in the case against you at this time. You should be aware that there is an obligation on the prosecutor to keep cases under review. This includes cases in which the prosecutor has decided to take no further action. I therefore reserve the right to prosecute this case against you at a future date'. Given the role you undertake at the respondents it is important that we*

meet to discuss these matters further and conclude the investigation stage of the formal disciplinary process."

83. Notes of the meeting are produced at page 44 to 48 of the bundle. At the beginning of the meeting the claimant sought to clarify the purpose of the meeting and how it related to the information provided to the GTCS. The HR Advisor said that the GTCS were conducting their own investigation and the respondents were carrying out their own procedures in line with their disciplinary policy. She explained that this was at an investigatory stage and a report would be compiled following the meeting, and presented to the Head of Service with recommendations, and that the claimant would also receive a copy of this.

84. The claimant's right to representation was also discussed. At the outset of the meeting, he confirmed he wished to go ahead unrepresented at the meeting.

85. In the course of investigation meeting the claimant confirmed that he could not remember exactly when he bought the computer, but he thought that he purchased it from Comet. He confirmed that his son had access to the computer. He said his computer was not in use at the time when the Police removed it from the premises and that it was kept as a backup and that he had a couple of computers in the house. He confirmed the Police retained the computer; he had received no feedback from the Police regarding it.

86. In relation to the charges being changed, the claimant confirmed that that was not correct and there were no charges to change. The Police took the computer away and told him there were images on it and asked if he owned it. He confirmed to the Police he did own it, and they charged him. The charge was possession.

87. The claimant was asked what feedback he had received the Police on the images. He said the Police took the computer away to do a forensic report for

about a month. He said that they told him that there was illegal material on the computer and he was advised he was being charged with possession of a computer with indecent images and a report was being sent to the Procurator Fiscal, but he had no other feedback.

88. In the course of the Hearing the claimant clarified that at no time had he said the Police told him they were dropping anything; it was always the same charge.

89. The claimant was asked about the content of the Procurator Fiscal's letter and was asked what advice his lawyer had given him in relation to the content of it. The claimant said that it was a *"bog standard* [1] letter which was issued to anyone who was in a similar situation. He said his son received a letter in exactly the same terms. He said it was explained to him by his lawyer that it leaves the door open for the Procurator Fiscal to link it with any future issues; that's all it means. He said, for example, if someone had been charged with theft but released from charge, then stole at a later date then the Fiscal could link it to a past event.

90. The claimant was asked if he had received any information from Police Scotland on whether they had fully closed their investigation. He said he had received nothing.

91. The HR advisor apologised for asking this question, but asked the claimant if he had in his possession within his household a computer with indecent child images. The claimant confirmed he had, and his response was noted as *"Obviously yes".*

92. The claimant was asked if he could offer reassurance that there was no outstanding process in relation to the matter which would be brought to the respondent's attention later and confirmed there were none.

93. The claimant was asked if there was anything he would like to add to the investigating fact finding process prior to the production of the investigation report, and he responded *"No"* he just wanted this finished. He wanted the Police to finish it, and he wanted to exonerate himself.

94. At the conclusion of the investigation hearing the HR Adviser and the Head Teacher discussed matters, and decided that the matter should be referred for consideration of disciplinary action.

95. The HR Adviser drafted an investigatory report, and the terms of the report were agreed with the Head Teacher. The investigatory report (pages 51/55) comprised notes of the meetings which had taken place, statements from the Head Teacher and the Deputy Head Teacher about their involvement in January 2016, notes of the Head Teacher's telephone discussions with the claimant, and the letter the claimant received from the Procurator Fiscal's Office.

96. The report dealt with the background events; the hearing of 12 January and the information given by the claimant at that hearing; and the investigatory process, to include the reference to the fact that a referral had been made to the GTCS and Disclosure Scotland on 8 September. The report stated that GTCS were currently carrying out their own investigation and that Disclosure Scotland did not intend to undertake any investigation at this stage. The report dealt with the investigatory hearing on 24 November and summarised the points which had emerged from that, including that the claimant had explained the Procurator Fiscal's letter was a standard letter and that the claimant had explained that his lawyer had described it as leaving the door open for the Procurator Fiscal to link it to any further issues.

97. The report recorded, inter alia, that as part of the investigatory hearing the claimant had been asked "Do *you have possession within your household a computer with indecent child images",* and the response *"Obviously yes".*

98. The report also recorded that the claimant had been asked if there was any outstanding processes relating to this matter, and he had responded *"Absolutely none",*

99. In the conclusions section, the report stated it was clear that after a forensic investigation Police Scotland felt there was enough evidence to charge the claimant with being in possession of a computer with indecent images and a report was submitted to the Procurator Fiscal. The conclusions also highlighted that the Procurator Fiscal had decided not to take any further action based on the available information at the time. The report Conclusions at 5.5 and 5.6 stated:-

> "7he *charges by Police Scotland of being in possession of a computer with indecent child images are of a serious nature and if it had become publicly known, this may have brought the respondents into disrepute."*
>
> *The claimant holds a position of trust within the organisation and may be considered in breach of the GTC Code of Professionalism and Conduct which states you should avoid situations both within and out with the professional context which could be in breach of the criminal law, or may call into question your fitness to teach"*

100. The Recommendation of the report was>

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

101 . The HR Adviser did not advise the Head Teacher of the correspondence she had with the Procurator Fiscal's Office, or about the fact that the Procurator Fiscal's Office had sent the respondents a redacted summary of evidence, but had placed constraints upon how this could be used, or disclosed.

102. This was information which was not contained within the report, and which did not go to the Head of Service, with the report.

103. The report was passed to Head of Service on 1st December 2016 along with the various appendices, it was also sent to a Senior HR Adviser, whose responsibility it was to advise the Head of Service.

104. The respondents practice was that a Head of Service would generally be appointed as the disciplinary officer in serious cases where dismissal was a potential outcome. The Head of Service had been involved, to the extent that she had an overview of matters, and she required to monitor the situation in relation to provision of teaching cover for the school where the claimant worked; she was involved in the arrangements for alternative work for the claimant pending the conclusion of the investigation. She also was involved to the extent that she supported the decision to make a referral to GTCS.

105. The Head of Service considered that there were a number of questions which needed to be answered, including the why the PF decided not to proceed. She considered that because of the nature of the images which had been found, and the fact that the claimant was engaged as a teacher, that she had no choice but to proceed with a disciplinary hearing.

106. The claimant was invited to attend a disciplinary hearing in a letter dated 7 December (page 49), on Monday 19 December. He was advised the hearing would be conducted by the Head of Service, accompanied by HR Service Manager. The letter stated:-

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

It is important that you are aware that due to the seriousness of the allegations against you, dismissal may be considered and any other live disciplinary warnings will be referred to."

107. The letter advised that the claimant would be given an opportunity to explain his views, and call witnesses at the hearing. He was also advised of his right to be accompanied.

108. The claimant was given a copy of the investigatory report and the appendices attached.

109. The claimant was unable to attend the hearing on 19 December, and this was rescheduled to 16 January 2017. By this stage, the claimant had obtained advice from the Employment Rights Adviser.

110. The claimant sought a postponement of the hearing on 16 January 2017 on the basis that the respondents should defer disciplinary procedure, until such time as the GTCS referral had been dealt with. This hearing was postponed and some enquiry made about the progress of the GTSC investigation.

111. The claimant's solicitor wrote to the respondents on 17 January 2017 advising that as he understood it the GTCS had intended to commence an investigation before Christmas but he had not received any update that he could share with them.

112. The Head of Service understood from the respondents Senior HR Adviser that they were unable to obtain confirmation from GTCS as to when investigations would be completed. It was The Head of Service's experience that GTCS investigations took generally some considerable time to complete, and she concluded that as the respondent's procedure was separate to that of the GTCS, and that different tests were applied (the GTCS considering fitness to teach and the respondents considering continued employment) she should not defer consideration of the disciplinary charges further. She

accordingly refused to postpone the disciplinary hearing until such times as GTCS had completed their investigations.

113. The claimant was asked to attend a disciplinary hearing on 10 February 201 7 and he did so accompanied by his Employment Rights adviser. He also brought as a witness, his criminal solicitor, Ms McDonald. The Head of Service attended a hearing, assisted by the Senior HR advisor. The Head Teacher attended on behalf of management, and presented the management case.

114. In accordance with the respondent's policy, there were no typed minutes of the hearing, and neither side produced minutes.

115. At the outset of the hearing the Head Teacher read from a document which summarised the management case. This document was not enclosed with papers which had been sent out the claimant in advance of the hearing and objection was taken to this by the claimant's representative.

116. In the course of the disciplinary hearing the claimant was asked by Head of Service if he had a computer at his home which contained indecent images of children, and he accepted that he did. He was asked if he knew how the images got on his computer. He responded that he did not know how they got there. He was asked if he put the images there and said no. He said his son and his son’s friends had access to the computer. He said it could have been his son’s friends.

117. Evidence was given at the hearing by Ms McDonald. She was asked why the Crown had not proceeded in this case. She explained she could not answer that; the Crown would not tell her but she gave examples of circumstances where the Crown might decide not to proceed. She explained that the Crown might not proceed if there were insufficient evidence, or if there was more than one person who potentially guilty of the wrongdoing and the Crown could not decide or establish which one was responsible on the basis of the

evidence which they had. She indicated that the Crown might not proceed if the charges were downgraded.

118. In the course of the disciplinary hearing by the Senior HR Adviser raised potential damage to the respondent's reputation in connection with safeguarding. There was not however a great deal of discussion about reputational risk. The Head of Service indicated the respondents had to consider safeguarding pupils and reputational risk to the respondents, in the event charges went ahead and it was discovered that they had known about them. The claimant was asked if he was aware of his child protection obligations and he confirmed that he was. The Head Teacher said the claimant had been trained in child protection.

119. The Head of Service asked the claimant steps he had taken in relation to the security of his computer following the events of January 2016. He was asked if he had installed anti-viral software, and the claimant said no. He was asked if he had taken any gate keeping steps to prevent access to his computer, and replied no.

120. At the conclusion of the disciplinary hearing the Head of Service discussed matters with the Senior HR Adviser. The Head of Services' opinion, which was echoed by the Senior HR Adviser, was that there was insufficient material upon which to conclude that the claimant was responsible for downloading the offensive images.

121. The Head of Service concluded, however, that she could not guarantee the claimant had not been involved, and although she could not conclude the claimant was guilty of gross misconduct, she did not exclude the possibility that the claimant had been involved, and this gave rise to concerns about safeguarding, and reputational risk. She concluded if something occurred later and the claimant was charged, and it emerged that the respondents had been aware that he had previously been charged, the respondents would suffer reputational damage. She concluded that the claimant could not return

to his teaching post. She carried out an informal risk assessment along with the senior HR advisor and the Head of HR the conclusion of which was that the claimant could not return to work. The Head of Service also considered whether the claimant could be redeployed in another post within the council but concluded that redeployment was not a viable option due to the relationship of trust and confidence between the claimant and respondents being damaged, and the reputational damage which could arise by the claimant continuing to be employed by the respondents in any capacity in these circumstances.

122. Having taken legal advice the Head of Service considered that it would be helpful if a formal risk assessment was carried out, and this was carried out on 14 December.

123. The background information contained in the risk assessment is as follows:-

> *"The teacher has been charged, though no legal action has been taken yet, with a serious crime which is emotive and given the current occupation of the employee would have significant reputational risk and for the Council and have significant concerns for people the employee will have been in contact with through the course of his employment This is subject to separate disciplinary procedures and investigation.*
>
> *The employee lives in the local area and given his current occupation he is likely to be well known in the local area.*
>
> *While there is no current publicity in regard to this there are concerns that this could change dependent on any potential legal action which may be taken.*

The employee is currently employed as a teacher working with young people in a school setting (due to the nature of the alleged offence he has been withdrawn from this environment). "

124. The overall risk of the claimant returning to work as a teacher was deemed to be unacceptable in terms of the risk assessment.

125. The Head of Service relied on the risk assessment to the extent she considered it was confirmatory of her position. Had the risk assessment deemed the claimants return to his post to be an acceptable risk, the Head of Service would not have been obliged to follow it.

126. The Head of Service sought legal advice as to the position from the Principal solicitor and the Head of Legal and having taken that advice she Head of concluded that the claimant should be dismissed for some other substantial reason. That reason is set out in the letter of dismissal at page 73 as follows:-

- *"You have been charged by the Police with an office in respect of indecent images of children having been found on a computer within your home. I believe that you have been charged with an offence under Section 52A of the Civic Government (Scotland) Act 1982.*

- *You have received a letter from the Crown Office and Procurator Fiscal Service in which you were advised that having reviewed the case they had decided on the basis of current information available to them that no further action would be taken against you at that time. You were further advised that there was an obligation on the prosecutor to keep cases under review. This included cases in which the prosecutor had decided to take no further action, and that they reserved the right to prosecute the case against you at a future date.*

- *You have admitted that a computer was located in your household which contained indecent images of children.*

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

- *As a consequence of the set of circumstances which have arisen, risk assessments have concluded that it would present an unacceptable risk to children for you to return to your current teaching post or to any current vacancy within the Council.*

- *The Council is a high profile public authority. The Council has statutory responsibilities for child protection and is trusted with the custody of thousands of children on a daily basis to their case at school and other locations. Council staff are also in contact with children and vulnerable adults in the community on a daily basis. The Council has access to information in relation to members of the public. If, in the future, either by criminal prosecution or otherwise it was shown that you had committed an office involving indecent images of children it would cause the Council serious reputational damage if we continued to employ you in any post in circumstances whereby it became public knowledge that we were aware of the allegations against you yet continued to employ you.*

- *This set of circumstances have resulted in an irretrievable breakdown of trust and confidence between yourself and the Council and an unacceptable level of risk to the Council of serious reputational damage. "*

127. The letter of dismissal (pages 70 to 74) was drafted on behalf of the Head of Service by the Senior HR Adviser. The Head of Service was satisfied with the terms of the letter of dismissal and she considered it accurately reflected her decision, and the reasons why she had taken the decision to dismiss the claimant.

128. The claimant had the right to appeal the decision in terms of the respondent's procedure. The appeal would have been be considered by Elected Members. The claimant took advice from his Employment Rights Advisor regarding an appeal. The claimant was concerned about publicity, and about the possibility that those dealing with the appeal were not bound to keep matters confidential, in the manner in which those employees engaged by the respondents kept matters confidential. On the basis of the risk that details of the appeal were not kept confidential, the claimant decided not to exercise his right of appeal.

Note on Evidence

129. There was not a great deal of dispute on the facts in this case. The issue is essentially on how the facts are to be interpreted.

130. There are however a few exceptions to this. One is in relation to whether, as suggested by Mr Allison, there was a predetermination on the part of all of the respondent's witnesses that the claimant should be dismissed; this is a matter which is dealt with below.

131. In resolving any relevant conflict in the evidence, the Tribunal had regard to its impression of the witnesses generally and the evidence of the witnesses with regard to the specific points which were in conflict.

132. The Tribunal firstly heard from the Head Teacher. It formed the view that she was a credible witness, and that while from time to time she could not recall

events, the Tribunal were satisfied that any lack of reliability was explained legitimately by the passage of time.

133. The Tribunal heard from the HR Adviser whom it found to be an entirely credible and reliable witness. The Tribunal formed the impression that the HR Advisor went to some pains to deal with what was a difficult case in a way that she considered to be fair.

134. The Tribunal was not persuaded by Mr Allison's submission that the question she asked of the claimant towards the conclusion of the investigatory hearing, *"Did you have in possession within your household a computer with indecent child images?"* amounted to case building. This question was followed immediately by one which was potentially exculpatory. The Tribunal did not find anything unreasonable in asking this questiorf, in circumstances where the HR Adviser knew the claimant had been charged with an offence arising from his having possession of a computer with indecent child images.

135. Evidence was also given by the Head of Service. The Tribunal also found her to be a credible and reliable witness. Her evidence was criticised by Mr Allison on the basis that on occasion when answering questions under cross-examination she paused before giving an answer, and gave evidence about her thought process. Mr Allison submitted this impacted on both her reliability and credibility. This, however, was not the impression which the Tribunal formed of her evidence. Rather the manner in which her evidence was given supported the conclusion that she had approached what she considered to be a difficult and complex matter with some care, and that she exercised care in answering questions put to her in cross-examination.

136. For the claimant the Tribunal firstly heard from his Employment Rights Adviser. The Tribunal formed the impression that the Employment Rights Adviser was in the main credible, but his reliability (and hence on occasions the credibility) of his evidence was at times was impacted by the passage of time.

137. The Tribunal formed the impression that the claimant was in the main a credible and reliable witness albeit, as accepted by Mr Allison, his evidence was from time to time emotive; the Tribunal draws no adverse conclusion from the fact that this was so in the circumstances of this case.

138. The principal conflict which the Tribunal had to resolve refers to what was said at the disciplinary hearing. Consistent with the respondent's disciplinary policy, no notes of this meeting were produced, and therefore the Tribunal had to rely on the recall of the parties present at that meeting.

139. It appeared to the Tribunal there was potentially a conflict in the evidence given by the claimant, the Employment Rights Adviser and the Head of Service as to whether the claimant accepted that there was a computer within his household with indecent child images.

140. In his evidence in chief the Employment Rights Advisor said that issue was taken with the fact that there were indecent images on the claimant's computer. He was critical of the Head of Service for placing reliance on the question and answer at the earlier disciplinary hearing asking the claimant if he had in possession within his household a computer with indecent child images.

141. The claimant's Employment Rights Adviser said the claimant admitted that the Police had taken the computer, but he did not admit that there indecent child images, and he said that he went into that in some detail. He did not however explain in his evidence what that detail was, but only said that he thought the claimant was disputing that indecent images were found on a computer.

142. That evidence was inconsistent with evidence of the Head of Service, who said she repeated the question which had been asked of the claimant at the investigatory hearing, as to whether he accepted that he had in possession within his household a computer with indecent child images, to which the

answer was 'Yes". She asked how the images got there; the claimant said he did not know. He explained that his son had access to the computer, and his son's friends may have had access to the computer and it could possibly have been his son's friends.

143. It was put to the Head of Service in cross-examination that it had not been established that there were indecent images on the claimant's computer in the course of disciplinary hearing. The Head of Service said it was not her recollection; there had been challenge was about how the images got there, but not about the fact they were there.

144. The Head of Service's evidence was corroborated to an extent by the evidence given by the claimant, who said that he was asked by her in the course of the investigatory hearing how the images got onto the computer, and answered he did not know, and said that his son lives with him, and had access to the computer, and that some of his friends may have access to the computer.

145. On balance the Tribunal was satisfied that in the course of the disciplinary hearing the claimant advanced the position that he did not know how the images got on the computer, but there was no denial that illegal images were on the computer. The Tribunal is fortified in its conclusion that the claimant had sight of the minutes of the investigatory meeting for a considerable period prior to the disciplinary hearing taking place, and at no point had he sought to correct the notes of that hearing to the effect that he had answered *"Obviously yes",* to the question *"Did you have in possession within your household a computer with indecent child images?".*

146. In his evidence in chief, the claimant suggested there were a number of inaccuracies in the notes which the respondents produced, but he also accepted, that in some instances what had been said, and what was recorded was very close, and it did not appear to the tribunal that anything material turned on this.

147. In connection with the conduct of the investigatory hearing of 24th November 2016 the claimant said his answer was *"Obviously yes - for the reason I have Just given",* but that the latter part of his reply was not contained in the minutes. It appeared to the Tribunal, that this omission from the notes did not alter the sense of what the claimant was asked or his answer.

148. The Tribunal was satisfied that no issue was taken by the claimant to the effect that he had in his possession in his household a computer with indecent child images in the course of the disciplinary hearing.

149. The claimant and his Employment Rights Adviser both accepted that there was mention of reputational risk, and child protection issues in the course of the disciplinary hearing. Their evidence was that this was not discussed at any length in the disciplinary hearing. The Head of Service's evidence was that these matters were raised, but, the flavour of her evidence was that there was not much discussion about them. The Head of Service and the claimant both gave evidence to the effect that there were questions about safeguarding; if the claimant had been trained and was aware of his obligations in relation to safeguarding.

150. There was no significant inconsistency between the evidence of the claimant and the Head of Service as to the questions which the claimant was asked about steps that he had taken to ensure the safety of this computer since January and the answers he gave.

151. There was also no material dispute between the evidence of the Head of Service, and that of the claimant and his Employment Rights Adviser about the evidence given by the claimant's criminal lawyer in the course of the hearing.

152. The Employment Rights Advisor was critical in his evidence of the fact that Head of Service asked the criminal lawyer on three occasions about the explanation which she had proffered as to why the Crown might not proceed

when more than one person was involved; however the Tribunal was satisfied that nothing turned on this, and it accepted the Head of Education Service's explanation that this was something that she had not encountered before and she wanted to understand it.

153. On balance the Tribunal did not conclude that the environment of the meeting was hostile , as suggested by the Employee Rights Advisor in his evidence, but rather concluded that it was a difficult meeting on account of the difficult issues which the parties attending had to contend with.

List of Authorities

154. The Tribunal had before it the following authorities:-

1. ***A - v - B [2010] UK/EA T 0206/09 281***
2. ***Westminster City Council -v- Cabaj [1996] ICR 96***
3. ***Baker -v- Birmingham Metropolitan College [201 1] WL 12848975***
4. ***Bailey -v- BP Oil Kent Refinery Ltd [1980] IRLR 287***
5. ***Michael Strouthos -v- London Underground Limited [2004] EWCA Civ 402***
6. ***Stephen Boyd -v- Renfrewshire Council [2008] SCLR***
7. ***Magill -v- Porter [2001] UKHL 67***
8. ***W Devis & Sons Ltd -v- Atkins [1977] ICR 662***
9. ***Easton Ltd -v- King [1999] S.L. 7. 656***

10. ***Michael Leach -v- The Office of Communications [2012] EWCA Civ 959***

11. ***Code of Practice on Disciplinary and Grievance Procedures, ACAS, March 2015***

12. ***Andrew Baisley -v- South Lanarkshire Council UKEA T/0002/16/JW***

13. ***Securlcor Guarding Ltd -v- R [1994] IRLR 633***

Submissions

155. Both parties produced written submissions, which they supplemented with oral submissions.

Respondents Submissions

156. L's solicitor took the Tribunal to the evidence which had been heard. She submitted it was clear dismissal was for the other substantial reason identified by the respondents at the point of dismissal, and the decision which fell within the band of reasonable responses. In that connection, L's solicitor referred to the case of ***A -v- B [2010] UK/EAT 0206/09 281*** She referred to the EAT judgment in that case, in which it was said:-

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

157. L's solicitor submitted that that case was similar to this. She referred to the evidence given by the Head of Service for the basis of her decision. Whilst it was a difficult decision it was a reasonable decision for her to have taken in

the circumstances. No evidence was led at the disciplinary hearing which removed the risk that the claimant had been responsible for the images which were found in his computer. The claimant understood the seriousness of the accusations which were being leveled against him and the impact of those on his work as a teacher. He worked as a teacher which involved unsupervised work with children. It was reasonable for the Head of Service to reach the conclusions which she did based on the set of circumstances before her and it was then reasonable for her to assess the risk and to consider whether the claimant could be redeployed in another post. Indeed, the decision taken by her was the only appropriate decision that she could have taken in the circumstances. There was no information before her which disproved the risk that the claimant was responsible for the images found on his computer.

158. In relation to the respondent's decision not to use the information from the Crown Office, L's solicitor submitted that the HR advisor was put in a difficult position. The direction she received from the Crown in relation to what was effectively live criminal proceedings required to be treated with the greatest respect for obvious reasons, and a failure to comply with it could have had serious consequences. The decision to refrain from using the information in the investigation and to take steps to ensure the disciplinary panel had no knowledge of it was a reasonable course for them to take.

159. The respondents did not concede they failed to make appropriate enquiries with the Crown. In L's solicitors submission it was self evident that any prohibition on the sharing of information applied equally to the part of the redacted part of the letter which summarised the enclosed redacted information as well as the information itself, which explained why it was redacted. The approach taken by the respondents ensured there were no preconceived ideas at the disciplinary hearing.

160. L's solicitor rejected the notion there was no fair notice given to the claimant of the issues to be discussed at the meeting of 10 February and subsequently the hearing and the issues which ultimately led to his being dismissed. The

substance of the allegation was more important than the precise label attached to it. The claimant was aware that he was at risk of dismissal on being called to that meeting.

161. L's solicitor submitted that the claimant had failed to exercise his right of appeal, in breach of Rule 26 of the ACAS Code.

162. If the Tribunal concluded that the respondents had made procedural errors, it was not the case that any procedural error rendered the dismissal unfair, and she referred in that connection to the case of ***Westminster City Council -v- Cabaj [1996] ICR 96*** and to the case of ***Bailey*** -v- ***BP Oil Kent Refinery Ltd [1980] IRLR 287.***

Claimant's Submissions

163. Mr Allison provided outline written submissions, which he supplemented with detailed oral submissions. These are dealt with in more detail in the body of the Consideration section below, but in summary, Mr Allison submitted that the dismissal was fundamentally unfair, this was not a case where it could be said there had been a technical fault. The employers failures went to the very heart of the matter ***(WDevis & Sons Ltd*** -v- ***Atkins [1977] ICR 662, Eaton Ltd*** -v- ***King [1999] S.L. T 656).***

164. Mr Allison took issue with the reason for dismissal; it was contended that the reason for dismissal was in bad faith. The respondent had predetermined that the claimant was to be dismissed.

165. Even if the Tribunal did not find bad faith the dismissal was still unfair. There were numerous grounds upon which the fairness of the dismissal was attacked. The allegations against the claimant were not clearly focused. The respondents did not give the claimant notice that he faced an allegation of gross misconduct. The reason for dismissal did not reflect the allegations and were of an entirely different nature to the allegations which he faced. The

respondents did not disclose to the claimant that it had changed the focus from submission of the criminal case to a full investigation where the claimant was guilty of the conduct alleged. The claimant was entitled to notice of the matters being investigated. The respondents had not carried out a reasonable investigation. They did not seek to procure information on material points and answer questions outstanding in the minds of the investigating officer. The respondents took information out of the investigation and it was not seen by the investigating or disciplining officer or the claimant. The respondents failed to make the claimant aware that they had procured this information. The respondents acted unreasonably in seeking information from the Police as to whether the claimant posed a risk to children. The respondents acted unreasonably in the failure to delay matters pending investigation and determination of the claimant's GTCS case. The conduct of the disciplinary hearing, and the failure to give notice of the grounds of dismissal which went beyond what was set out in the invitation letter and was unfair. There was unfairness attached to the risk assessment process. There were numerous persons involved at different stages, which gave rise to the impression of bias. Lastly the disciplinary procedure did not comply with the ACAS Code.

166. Mr Allison then addressed the Tribunal on the legal principles and returned to the fact that the charge calling the claimant to a disciplinary hearing was not focused. Mr Allison submitted that the conclusion which was reached as to the allegations of misconduct was flawed and that the claimant was expected to prove his innocence. This could not be right either in terms of the respondent's procedure or employment law generally. It was insufficient to say that it could not be concluded the claimant was guilty of misconduct, but on the other hand his involvement could not be excluded. The respondents had failed to carry out a reasonable investigation into reputational damage. The respondents were not entitled to assert in this case as they did, there was a breach of the implied term of mutual trust and confidence.

Consideration

167. The claimant has the right not to be unfairly dismissed in terms of Section 94 of the Employment Rights Act 1996 (ERA). In terms of Section 98 of ERA, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show:-

> *"(a) the reason (or, if more than one, the principal reason) for dismissal, and*
>
> *(b) that it either a reason falling within subsection (2) of some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held". (SOSR)."*

168. The onus rests with the respondents to establish the reason for dismissal. It is said by the respondents that the dismissal in this case was for an SOSR. At the outset of the hearing L's solicitor identified the SOSR, as being summarised in the bullet points detailed in the penultimate page of the claimant's dismissal letter dated 24 February 2017, which are set out above in the Findings in Fact.

169. The SOSR was that the claimant had been charged by the Police with offences in respect of indecent images of children having been found on a computer within his home (it being believed the charge under Section 52A of the Civic Government (Scotland) Act 1982); the PF decided that no further action would be taken against the claimant but advised that there was an obligation on the prosecutor to keep the case under review and it reserved the right to prosecute the case at a further date; the claimant admitted that there was a computer was in his household which contained indecent images of children; that the dismissing officer was unable on the evidence before her to exclude the possibility of the claimant having been responsible for the indecent images of children which he admitted to having been found on a

computer within his home; as a consequence of those circumstances a risk assessment concluded that it represented an unacceptable risk to children for the claimant to return to his current teaching post or to any current vacancy within the respondents organisation; the respondents are a highly profiled local authority with statutory responsibility for child protection and are trusted with the custody of a large number of children on a daily basis at school and at other locations. The respondent's staff is in contact with children and vulnerable adults in the community on a daily basis. The respondents have access to information in relation to members of the public, and if, in the future, criminal prosecution or otherwise had shown that the claimant had committed an offence involving indecent images of children it would cause the respondents serious reputational damage if they continued to employ the claimant in any post in circumstances whereby it became public knowledge that the respondents were aware of the allegations but continued to employ the claimant; this had resulted in an irretrievable breach of trust and confidence and an unacceptable level of risk to the Council of serious reputational damage

170. In order to succeed in establishing an SOSR under Section 98(1)(b) the reason must be genuine and substantial, and not frivolous or trivial. The respondents required to show only there that the substantial reason for dismissal was a potentially fair one. If the Tribunal is satisfied that that reason has been established, and then must decide whether the employer acted reasonably under Section 98(4) in dismissing for that reason.

171. Mr Allison submitted that while issue was not taken the fact that the true reason for dismissal was potentially a fair reason (in that it was contended to be an SOSR within Section 98(1)(b)) the claimant did put at issue the reason for dismissal in that it was contended that the true reason for dismissal was that the respondents believed that the claimant was guilty of the offence for which he had been charged, or, alternatively believed the fact the charge was of itself blameworthy conduct. Mr Allison contended the respondents acted in bad faith in suggesting the reason for dismissal was for the SOSR advanced.

172. In support of this position Mr Allison adopted what was said in paragraph 20 of the paper apart to the ET1. That was that on any reasonable analysis the respondents harbored a belief that the claimant was guilty of possession of indecent images, and having concluded that it could not legitimately (a) arrive at that conclusion; and (b) dismiss the claimant because of such an unreasonably held view, the employer delayed matters awaiting a possible change of circumstances and when this did not transpire, arrived at a contrived reason for the claimant's dismissal.

173. In addition, it was submitted the respondents already had a replacement in post for the claimant prior to the investigatory process concluding.

174. Dealing with the latter point first the Tribunal was satisfied that as a matter of fact, that the respondents did not have a replacement for the claimant's post. There was no effective cross-examination of the respondents witnesses on this point and the Tribunal was satisfied that the claimant's post was filled on a temporary basis only. The Tribunal accepted the respondents explanation that it was difficult to fill the claimant's post with supply teachers; the post was filled on a temporary basis but there was no permanent replacement for the claimant. The Tribunal was also satisfied that the nature of the cover put in place was explained to the claimant by the HR Advisor.

175. Secondly, the Tribunal was not satisfied that the respondents delayed matters awaiting a change of circumstances as suggested. The Tribunal found all the respondents witnesses to be credible and reliable and was not persuaded there was a deliberate attempt on their part to delay matters in the hope that something would emerge that was prejudicial to the claimant, and assist them. The HR advisor gave credible evidence as to the steps which were taken in the course if the investigation and the Tribunal was satisfied the disciplinary process took time for a combination of reasons, including the investigations carried out and the availability of the people involved, and that the length of the process was unconnected to the motivation attributed to the respondents by Mr Allison.

176. Thirdly, the Tribunal did not conclude that there was a pre-determination on the part of the Head Teacher, HR Advisor, or the Head of Service, that the claimant should be dismissed.

177. In reaching this conclusion the Tribunal takes into account the submissions made by Mr Allison to the effect that the HR Adviser had said that she had concerns about the claimant returning to his job. The Tribunal did not consider a great deal was to be taken from this passage of evidence. The HR Adviser was asked in cross-examination if she had articulated the view to the Principal solicitor that the claimant might not return to work. She responded "Yes", and said she had concerns and spoke to internal legal, given the nature of the charges and the claimant's job. She could not recall when she had that conversation, but she denied that the fact that she had had that conversation was one of the reasons why information was sought from the PF. Her evidence was that the reasons why wrote to the PF office was because DI Harvey had told that she should, and she had asked for assistance from internal legal.

178. The Tribunal did not conclude that this evidence supported a conclusion that there was a pre-determination that the claimant would be dismissed, but rather formed the view that it was an honest articulation by the HR Adviser of a concern that she had in the course of her investigation.

179. In reaching this conclusion the Tribunal also took into account the fact that the Head of Service having conducted the disciplinary hearing, sought legal advice, and thereafter articulated the reason for dismissal as an SOSR.

180. The Tribunal could not infer from this that the respondents had already pre-determined the claimant was to be dismissed. It was not unreasonable for the Head of Service, having concluded the disciplinary hearing to take legal advice on the respondent's position. Nor was it unreasonable having taken that advise at the conclusion of the disciplinary hearing, to determine the reason for dismissal was an SOSR as opposed to conduct, in circumstances

where the Head of Service was satisfied she could not conclude the claimant was guilty of misconduct, but had concerns about the claimant returning to work, based on the conclusions she had reaches and the nature of the claimant's employment. The Tribunal was not persuaded such an approach on the part of the respondents was unreasonable or supported the conclusion that the respondents acted in bad faith.

181. The Tribunal was satisfied that against the factual matrix of the criminal charge and the fact that there was no issue that the offending material was found in a computer in the claimant's home, the reason set out above was not frivolous, that it was genuinely held and that it passed as a substantial reason in terms of Section 98(1)(b) of ERA.

182. The Tribunal was satisfied that the respondents had established the reason for dismissal. That however, was not the end of the matter and the Tribunal had to go on to consider the reasonableness of that dismissal in terms of Section 98(4) of ERA which states:-

> *"(4) ..... 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 employer, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

183. The Tribunal reminded itself, in considering questions of reasonableness that the burden of proof is neutral, and the Tribunal has to apply an objective test;

the objective tests which apples to substantive issues, applies equally to procedural issues.

184. The Tribunal firstly considered Mr Allison's submission to the effect that the allegation against the claimant in the letter calling him to the disciplinary hearing was not clearly focused. This he submitted was a breach of the ACAS Code (paragraph 9). The respondents had not given the claimant notice that he faced allegations of gross misconduct, which formed the basis of the allegations in the mind of both the investigating and disciplinary managers. It was a fundamental principal of the disciplinary procedure that an employee should know the case against him *(Stephen Boyd* -v- *Renfrewshire Council [2008] SCLR 578 at 586-7,* paragraph 34), and the allegations should be precisely framed *(Michael Strouthos -v- London Underground Limited [2005] IRLR 636 at 637,* paragraph 12). It was submitted that the respondents failed to give the claimant notice of the gravity of the allegations in there was no reference to gross misconduct *(Boyd -v- Renfrewshire Council supra,* paragraph 33).

185. The letter calling the claimant to the disciplinary hearing stated:-

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

186. The letter did not identify this as a charge of gross misconduct, but went on to state; *"It is important that you are aware that due to the seriousness of the allegations against you, dismissal may be considered and any other live disciplinary warnings will be referred to".*

187. The claimant therefore knew that he was at risk of dismissal on going into the disciplinary hearing.

188. The claimant was asked in evidence in chief did he have an understanding from the letter calling the disciplinary hearing, that it was a misconduct issue or something else. The claimant answered to the effect that he understood that it was misconduct, and it was the fact that he had a computer in home with illegal images, and that he was a teacher. He said he understood the respondent was saying you have illegal images on your computer at home and you are a teacher, and that you might be dismissed.

189. Those were the elements which the dismissing officer had in her mind approaching the hearing, and which ultimately formed the basis of her decision to dismiss (albeit for an SOSR). The employer will act reasonably, if the employee is aware of the charges which he faces going into a disciplinary hearing. The Tribunal was satisfied on the basis of the claimant's evidence, and the contents of the letter calling him to a disciplinary hearing, that he was aware of the issues that would be discussed and their potential implications on going in would to the hearing, and of the potential consequences of the disciplinary procedure.

190. Mr Allison submitted the reasons for dismissal did not reflect the allegations and they were of an entirely different nature to the allegations which the claimant faced.

191. The claimant was not dismissed for misconduct reason, but for an SOSR. However that SOSR was based on the elements identified in the letter calling the claimant to the disciplinary hearing, and highlighted in the disciplinary investigation report which the claimant had sight of going into the disciplinary hearing.

192. One of the matters which the respondents relied upon was reputational risk; while this was not identified specifically in the letter calling the claimant to the hearing, it was identified at 5.5 of the investigatory report which stated that:-

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

193. It was not unreasonable for the respondents having embarked on a disciplinary procedure, to conclude that the claimant was not guilty of any misconduct, but thereafter on the basis of the conclusions which they reached to have legitimate concerns about whether the claimant could continue in their employment. To that extent, the SOSR is of a different nature to the allegations which the claimant faced, but did reflect the matters which were set out in the letter calling the claimant to the disciplinary hearing, and in the disciplinary investigation report, and such an approach on the part of the respondents could not be said to be unreasonable.

194. Mr Allison also submitted that the respondents had not disclosed to the claimant that it had changed its focus to a full investigation of whether the claimant was guilty of the conduct alleged. He submitted the claimant was entitled to be given notice of matters being investigated and in this connection Mr Allison referred to paragraph 4.1.2 of the disciplinary bundle at page 96. In this connection Mr Allison criticised the respondents for embarking on what he said was a wide ranging enquiry of the Crown.

195. The Tribunal did not conclude the respondents had changed its focus of enquiry into one of whether the claimant was guilty of the alleged criminal conduct. All the respondents witnesses involved in this process were very clear in their evidence that it was not their function to make a determination of this, and the Tribunal accepted that evidence. In the course of the disciplinary hearing the Head of Service asked the claimant if he knew how the images got onto the computer, and he answered "No". The Tribunal did not consider applying an objective test that this could be construed as the respondents embarking on a wide ranging enquiry into matters, of which the claimant did not have notice.

196. Mr Allison also submitted that the respondents did not carry out a reasonable investigation, in that they did not seek to procure information about the issues which were outstanding and which were material questions in the mind of the investigating officer. Firstly, whether and in what circumstances the Crown might prosecute; secondly why the Crown had not prosecuted in this case, by posing those direct questions.

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

198. The respondents wrote to the Crown Office querying the position; the terms of the correspondence are set out above findings in fact. The respondents asked the Crown if they were permitted to share with them information which they held concerning the alleged incident, alternatively, if somebody could be interviewed as part of the investigation. This was a broad request for information, which was not unreasonable. The failure to ask the specific questions identified by Mr Allison did not render the request which was made for information from the Crown as part of the investigation unreasonable.

199. Mr Allison also submitted that unfairness arose to the extent that information was taken out of the investigation by the HR Advisor, and not seen by the co-investigating officer or the disciplinary manager. Further, he submitted it was unfair that the respondents had not made the claimant aware that it had procured and held information in relation to (a) the totality of the evidence available to the Crown and (b) the reason why he was not prosecuted. In this connection Mr Allison submitted that the letter of the Crown Office of 28 September, which contained the summary of redacted evidence, did not state that the letter itself (as opposed to the evidence) should not be shared with the claimant, or other parties.

200. The respondents produced this letter in the bundle, but had redacted a paragraph, which it is accepted contained information as to why the Crown had not proceeded. The HR Adviser could not recall specifics of the

information in the paragraph which had been redacted but did recall that she had taken advice from their legal department, and that was the reason why it was redacted.

201 . The Tribunal was satisfied as a matter of fact that neither the Head Teacher, nor the Head of Service knew that these enquiries had been made, or had any knowledge of the content of the letters which the Crown Office had sent, or the fact that a redacted summary of evidence had been provided.

202. The Tribunal considered whether it was reasonable for the respondents HR Adviser to take the approach which she did, and having sought legal advice, not to disclose the information supplied by the Crown to any of the other parties involved. Applying an objective test, the Tribunal could not conclude that such an approach was unreasonable. It was not unreasonable for the HR Adviser to conclude on the basis of the content of the letter from the Crown Office, and the advice which she obtained, that she was not permitted to share the information the Crown provided given the very limited disclosure the Crown was prepared to permit. It was not unreasonable for the HR Adviser to take the view that she was precluded from using the information as part of the disciplinary process, which would inevitably have meant sharing it with others, (potentially quite extensively in the event of an appeal) and therefore to exclude it entirely from the investigation, both insofar as the claimant and the management side were concerned.

203. Mr Allison submitted that it was unfair of the respondents not to advise the claimant they had contacted the Police and Fiscal's Office; however it could not be said to be unreasonable for the respondents not to appraise the claimant of the fact that that line of enquiry had been followed, when none of that information from that was used in the disciplinary process.

204. Mr Allison further submitted that the respondents question to the Crown Office and Police as to whether the claimant *"posed* a *risk to children"* was a delegation of the respondents function. The Tribunal, however, again

applying an objective test, did not consider that it was unreasonable for the respondents to ask this question given there had been a Police investigation, and a criminal charge brought against the claimant.

205. Mr Allison submitted that it was unfair of the respondents not to delay matters pending the investigation and determination by the GTCS. It was apparent from page 119 of the bundle which comprised a list of papers of the GTC investigatory panel, that the redacted summary of the evidence has been produced. Had the respondents delayed, these papers would have been available and the issue of proceeding without the information from the Crown would not have existed.

206. The decision not to delay the respondent's internal disciplinary process pending the outcome of the GTC investigation was taken by the Head of Service. Before making that decision, enquiry was as to the timescale of the GTCS decision making process; the information which the Head of Service received was that no timescale could be given by the GTCS. Her own experience was that such matters took a considerable time at the GTCS. The factors which the Head of Service took into account were that no timescale could be given by the GTCS, and the fact that the test which they applied was different to the test which she had to apply, the GTCS deciding on fitness to teach, and the respondents considering whether the claimant should remain in employment, were reasonable for her to have taken into account, and in the circumstances her decision not to delay could not be said to be objectively unreasonable.

207. In relation to the conduct of the disciplinary hearing the respondents disciplinary policy provides that no notes will be taken and given that that was the case, while this might be unusual, it cannot be said to be unreasonable for the respondents not to produce notes of the disciplinary hearing.

208. Mr Allison also submitted that the disciplinary hearing was unfair because the claimant could not know what was in the respondents mind at the hearing.

The claimant was not put on notice of the misconduct, and he could not be expected to know what was in their minds.

209. As dealt with above, in coming to the disciplinary hearing the claimant had the Investigation Report, which identified in the Conclusions section at 5.5, issues of reputational damage, and under Recommendations at point 6, the relevance of the matter to the claimant's employment as a teacher. The evidence supported that reputational damage and safeguarding were both discussed in the course of the disciplinary hearing albeit not at length and were not the main focus of the hearing The claimant was accompanied by an Employment Rights Adviser at the hearing, and was able to call a witness, who was his criminal solicitor. Albeit no notes of the hearing were produced, it could not be said that the manner in which the hearing was conducted was out with the band of reasonable responses.

210. Mr Allison submitted that there was involvement of numerous persons at different stages, he said the extent of this was unclear, but it gave the impression of apparent bias, and in this context he referred to the House of Lords case of ***Porter -v- Magill [2002] 2 ACC 75,*** and he referred the Tribunal to Lord Hope's speech at paragraphs 60 and 61.

211. As is apparent from the findings in fact, there were various individuals involved throughout these proceedings. In terms of the respondent's policy, there were two investigating officers; the HR Adviser sought advice from the principal solicitor. The correspondence which the HR Adviser sent to the Crown was signed by the Head of HR, however the Tribunal accepted the HR Adviser's evidence that the first letter to the Crown was signed by the Head of Human Resources initially as a matter of expediency as the HR advisor not in the office and did not want to delay sending the letter, and thereafter the correspondence continued to be signed by the Head of HR to ensure consistency and because of his seniority and the nature of the correspondence. She gave evidence to the effect that he had no involvement on a substantive basis that she approved the letters which were sent in his

name, and she, not he, received the correspondence sent in reply. The Tribunal was satisfied with the HR Adviser evidence on this point, and it did not conclude that the Head of HR had any substantive involvement at the investigatory stage.

212. At the disciplinary state, the hearing was conducted by the Head of Service, who was assisted this time by a Senior HR advisor; advice was taken from the principal solicitor, and on one occasion, a meeting was held which was attended by the Senior HR advisor, the principal solicitor, the Head of HR and the Head of Legal Services. The Head of Service was adamant, however, that the decision to dismiss the claimant rested on her, and her alone, and the Tribunal accepted her evidence on this point.

213. The Tribunal also accepted the evidence of the two investigating officer's to the effect that the decision making in relation to the recommendations made rested with them.

21 4. The respondents are a large organisation with the benefit of internal legal and HR support and it was not unreasonable for individuals beyond the decision makers to be asked to provide advice and support, and the Tribunal was not satisfied that objectively this gave rise to neither bias, nor the appearance of bias.

215. In reaching this conclusion the Tribunal takes into account that the letter dismissing the claimant was drafted by the HR representative. The Head of Service gave evidence to the effect that she considered that she had made a very good job of encapsulating the reasons for dismissal. She also said it would not be usual for advisers to draft letters on her behalf, and the Tribunal did not consider that the fact that the letter of dismissal, which set out detailed reasons for the dismissal, was drafted by HR reasonably gave rise to a conclusion of bias or apparent bias, in circumstances where the disciplinary letter reflected the views and conclusions of the decision maker.

216. Mr Allison also submitted there were numerous breaches of the ACAS Code, and he submitted point 5, 6, 9, 12 and 31 of the Code had been breached. While he accepted that the Code did not necessarily apply to the SOSR dismissals, he submitted that it was relevant information for the Tribunal to take into account.

217. Clause 5 of the Code provides that it is important to carry out necessary investigations into matters without unreasonable delay.

218. There is no doubt that there was considerable time between this matter first arising, and the decision ultimately being taken, however, it could not be said the delay was unreasonable in circumstances where initially the claimant was ill, and was waiting to hear from the Crown regarding the charges, and thereafter the respondents were endeavoring to ascertain the position with the Crown, and on occasion, delay was occasioned due to the claimant or his representative being unable to attend any hearing.

219. Clause 6 of the ACAS Code provides in misconduct cases different people should carry out the investigation and disciplinary hearings. In this connection Mr Allison submitted that the Head of HR and the principal solicitor both had input both at the investigatory and disciplinary stages. For the reasons given above, the Tribunal was not satisfied that the Head of HR had any substantive input at the investigatory stage, nor was there any evidence to allow the Tribunal to conclude that he had substantive input at the disciplinary stage. The principal solicitor is a legal adviser, and it was not unreasonable for the respondents to seek legal advice both at the investigatory and disciplinary stage from the same adviser.

220. Clause 9 of the Code provides that employees should be notified in writing of the disciplinary case and notification should contain sufficient information about alleged misconduct; this is a matter which is dealt with above.

221 . Clause 12 provides that at a disciplinary meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered and the employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. Again, these are matters which are dealt to above, and the Tribunal was not satisfied that the respondents had been in breach of clause 12 of the ACAS Code in their conduct of the disciplinary hearing.

222. Clause 31 of the ACAS Code provides:-

> *"If an employee is charged with, or convicted of a criminal offence this is not normally in itself reason for disciplinary action. Consideration needs to be given to what effect the charge or conviction has on the employee's suitability to do the job and the relationship with the employer or work colleagues or customers."*

223. The Tribunal considered this alongside Mr Allison's submissions to the effect the respondents acted unreasonably in failing to carry out an investigation into reputational damage, and acted unreasonably, in connection with the instruction of the risk assessment process.

224. While it has dealt with Mr Allison's submission individually, the Tribunal also considered the wider question of fairness and considered whether dismissal for the SOSR advanced by the respondents was fair or unfair against the against the statutory test in Section 98(4), including whether dismissal for that SOSR fell within the band of reasonable responses.

225. In doing so, the Tribunal firstly considered whether the respondents were reasonably entitled to reach the conclusions which they did in determining the SOSR for which the claimant was dismissed.

226. The Head of Service was clear that she could not conclude, and did not conclude, that the claimant was responsible for the indecent images, but she went on to conclude however that, *"7am equally not in a position to exclude the possibility of you having been responsible for the indecent images which have been found on a computer within your home"*

227. Mr Allison submitted that this sentence was manifestly factually incorrect. It bears out in evidence was that the claimant could not unequivocally prove his innocence. There was no basis for such an approach in the respondent's policies and procedures, or in the ordinary practice in employment law. Mr Allison referred to the case in the matter of *B (Children) [2008] UKAHL 37* in support of the submission that the system was binary. If there was insufficient evidence to say someone did something, and then it must follow the allegation is not proved and therefore cannot be said to have occurred.

228. The Tribunal observes however that the case in the matter of B (Children) deals with decisions made by a Judge of a Jury, as opposed to an employer, within an employment context.

229. The Tribunal considered that in reaching the conclusion that the Head of Service was not able to exclude the possibility of the claimant having been responsible, what she was effectively concluding was that there was a risk the claimant had been responsible. In the circumstances, that could not be said to be an unreasonable conclusion for her to reach. The claimant accepted that the indecent images had been found in a computer in his possession. In the course of the disciplinary hearing, he said he did not know how they came to be there, only that his son's friends could have been responsible. At the investigatory stage, he had said that the Police had told him that his computer could have been remotely accessed. These are possible different explanation, but they could not reasonably be construed as the explanation of how the images got to be there, and in these circumstances it could not be said to be unreasonable for the Head of Service to conclude

that she could not exclude the possibility of the claimant having been responsible for the images.

230. The respondents were reasonably entitled to conclude (indeed there was no issue) that the claimant had been charged by the Police within an offence and in respect of indecent images of children having been found on a computer within his home; and that he received a letter from the Crown Office advising they decided on the basis of the current information available to them to take no further action, but the claimant had been advised that there was an obligation on the prosecutor to keep cases under review and this included cases in which the prosecutor had decided to take no further action and reserved the right to prosecute the case against the claimant at a further date.

231. For the reasons given above the Tribunal satisfied that the claimant did admit that a computer was located in his household which contained indecent images of children, and it was not unreasonable for the Head of Service to conclude that this admission had been made.

232. The Head of Service then went on to conclude that as a consequence of the circumstances which had arisen, the risk assessment had concluded that it presented an unacceptable risk to children to have the clamant return to his current teaching post or any current vacancy within the Council.

233. The Head of Service's evidence was that she had already concluded the claimant could not return to the classroom or the Council but on legal advice had instructed a risk assessment. Mr Allison submitted it was unreasonable for the respondents to carry out a risk assessment, and take that into account without any input from the claimant.

234. The Tribunal was satisfied, however, that the risk assessment was instructed after the Head of Service had come to her conclusions in relation to reputational risk and safeguarding. The Head of Service said in her evidence

that she had come to the conclusion that the claimant could not return to his teaching job, and it was recommended that she instructed a risk assessment. The was not part of the disciplinary process in which the claimant was involved but something which the Head of Service instructed having taken advise, and the risk assessment took into account matters she had reached conclusions upon about safeguarding, and reputational risk. The fact that this is the case is reflected in the background section of the risk assessment, at page 64 which states:-

> *"The teacher has been charged, though no legal action has been taken yet, with a serious crime which is emotive and given the current occupation of the employee would have significant reputational risk and for the Council and have significant concerns for people the employee will have been in contact with through the course of his employment. This is subject to separate disciplinary procedures and investigation."*

235. It was not unreasonable for the Head of Service to take the step of instructing a risk assessment without input from the claimant, in circumstances where she had reached these conclusions after the conduct of the disciplinary hearing. The Head of Service explained that she would not have been bound to follow the recommendation in the risk assessment, and in the circumstances it was not unreasonable for the Head of Service to instruct a risk assessment to be carried out against a background of the conclusion which she had reached following the disciplinary process.

236. The Head of Service concluded at bullet point 6 of the SOSR that the respondents were a high profile local authority, which has statutory responsibility for child protection and is trusted with the custody of thousands of children on a daily basis. It was not suggested that this was a conclusion which she was not entitled to reach.

237. The Head of Service concluded that if in the future either by criminal prosecution or otherwise it was shown the claimant had committed an offence involving indent images of children it would cause the respondents serious reputational damage if it was known it had continued to employ the claimant in any post in the circumstances whereby it became public knowledge that they were aware of the allegations against the claimant yet continued to employ him.

238. The respondents argued that reputational risk to the respondents was self evident. Mr Allison relied on the case ***of Securicor Guarding Ltd -v- R [1994] IRLR 3633,*** paragraphs 14 and 18 of that case and submitted that the respondents were under an obligation to carry out an investigation into reputational risk.

239. The Tribunal takes into account what is said in the ***Securicor*** case, however, each case has to be considered on its own facts and circumstances, and the claimant's employment is a relevant consideration in this case. The ***Securicor*** case at paragraph 18 stated **:-**

> *"The Tribunal had to ask itself whether in those circumstances the employers, not having carried out, indeed been unable to carry out, any enquiry into the truth of the allegations against him; having entirely neglected the obvious enquiry of the customer to see what they thought of the situation and how they would wish it to be dealt with; and having entirely ignored the provisions of their own disciplinary code; they could have acted reasonably in dismissing the employee"*

240. Given the nature of the charges and the fact that the claimant was employed as a teacher, it could not be said that the respondents acted unreasonably in failing to carry out enquiry with 'customers' (which could include pupils or parents) as to reputational damage in the circumstances. The concerns which both sides legitimately had about maintaining confidentiality in this case and which were spoken about by the claimant in explaining why he did not appeal

the decision to dismiss, illustrate the difficulties in undertaking such enquiry and render the failure to make such enquiry not unreasonable.

241. Mr Allison argued that there was no possibility of matters becoming public. The respondent's employees were bound by confidentiality, and the claimant was unlikely to make public what had occurred. That, however, was not the only eventuality which the Head of Service had in mind. It was not unreasonable for her to take into account the reputational damage which might arise if it was shown the claimant had committed an offence, and the respondents were aware of the allegations.

242. The Tribunal took into account that this again is a risk, but in the circumstances of this case, the respondents position reasonably has to be considered against the fact that it was accepted there were indecent child images on a computer in the claimant's possession in his home, and that there had been a Police investigation and charge, and in these circumstances, it was not unreasonable for the respondents to conclude that there was a risk of reputational damage.

243. The last bullet point in the letter of dismissal setting out the SOSR refers to reputational damage and the inevitable breakdown in trust and confidence between the claimant and respondents. This takes the Tribunal to the issue of whether the respondents were entitled to conclude that there was breakdown of trust and confidence, and whether the dismissal circumstances fell within the band of reasonable responses.

244. The Tribunal had regard to the case of ***Leach -v- Ofcom [2002] IRLR 893, referred*** to by Mr Allison. It is important to remember in this case, is that each case turns on its own facts and circumstances, and the Tribunal has to remind itself of the statutory test under Section 98(4) in considering whether dismissal was fair or unfair.

245. The Tribunal had regard to paragraph 3 of that case, which was referred by Mr Allison:-

> *"Unexpected difficulties are bound to crop up in the course of efforts to reconcile the statutory rights of one employee to the procedural and substantive fairness and legitimate interests of the employer. Underhill J commented, in particular, on the increasing number of cases in which an employer, as here, gives 'breakdown of trust and confidence' as the reason for dismissal. The trust placed by an employer in an employee is at the core of their relationship, which can break down in a wide spectrum of circumstances. Some cases fall short of a 'conduct' reason for dismissal. The legislation is clear: in order to Justify dismissal the breakdown in trust must be a 'substantial reason'. Tribunals and courts must not dilute that requirement. 'Breakdown of trust' is not a manta that can be mouthed whenever an employer is faced with difficulties in establishing a more conventional conduct reason for dismissal."*

246. The Tribunal was satisfied that the respondents had established their reason for dismissal which was a substantial reason. They were objectively entitled to reach the factual conclusions which they did in relation to the charges brought against the claimant, and the decision of the Procurator Fiscal thereafter. They were also entitled to reach the conclusion that the claimant accepted that there was a computer in his possession in household, which contained illegal child images, and on that basis, it was not unreasonable to come to the conclusion that it was impossible to exclude the possibility that the claimant was responsible for these (that there was a was a risk he was responsible). This was not a case where it was simply that allegations had been made against the claimant. There was in addition an element present in this case, which was the fact that the offending material was in a computer in the claimant's possession. The Head of Service was entitled to treat the claimant's statement it could have been his son's friends, or that the computer could have been remotely accessed as possible explanations, as

opposed to the explanation of why the material were there The respondents were reasonably entitled to take into account the nature of the claimant's employment, and his exposure to children in his job, and their safeguarding responsibilities, and that in the circumstances, it was not unreasonable for the Head of Service to conclude that the claimant's continued employment was not an acceptable risk, and that there was a serious risk of reputational damage. In these circumstances, it was not unreasonable for the Head of Service to conclude there was a breakdown of trust and confidence.

247. Applying an objective test the Tribunal was satisfied and that dismissal for the SOSR identified in the letter of dismissal, while a very difficult one, was a decision which fell within the band of reasonable responses, and the claim is dismissed.

Employment Judge: Laura Doherty
Date of Judgment: 05 December 2017
Entered in register: 08 December 2017
and copied to parties