EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4108518/14

Held in Glasgow on 19, 20, 21 and 30 June 2017

Employment Judge: P Wallington QC (sitting alone)

Mr Andrew Baisley	**Claimant** **Represented by:** **Mr L G Cunningham - Advocate** **Instructed by:** **Mr S Healey - Solicitor**
South Lanarkshire Council	**Respondent** **Represented by:** **Mr G Mays - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is as follows:-

(1) The claimant was unfairly dismissed by the respondent.

(2) It is not just and equitable to make a basic award under section 122 of the Employment Rights Act 1996 by reason of conduct of the claimant prior to his dismissal, namely the commission of criminal offences of which he was convicted in February 2016 and for which he was sentenced to 2 years` imprisonment on 10 March 2016.

(3) It is not just and equitable to make a compensatory award to the claimant under section 123 of the Employment Rights Act 1996 by reason of conduct

of the claimant prior to his dismissal, namely the commission of the criminal offences aforesaid.

(4) The claimant contributed to his dismissal by the commission of the aforesaid criminal offences, and had any compensatory award been due to him, that award would have been reduced by 100% by reason of said contributory conduct.

REASONS

1. In this case Mr Andrew Grant Baisley (the claimant) claims unfair dismissal against his former employer South Lanarkshire Council (the respondent). The claimant was dismissed on 19 May 2014, without notice or payment in lieu, for gross misconduct. He had earlier, on 19 February 2014, been arrested on suspicion of offences under the Civic Government (Scotland) Act 1982, and charged with offences of possession of, and of taking or permitting to be taken or made, indecent photographs or pseudo photographs of children. He was suspended on full pay from 23 February 2014 until his dismissal. The criminal charges materialised into an indictment, and the claimant was tried and convicted of these offences in February 2016, and on 10 March 2016 was sentenced to 2 years` imprisonment.

2. The claim in this case was presented on 8 October 2014. An issue of time bar was raised, and the Employment Tribunal hearing this issue determined that it had no jurisdiction over the claim by reason of time bar. The claimant appealed and the Employment Appeal Tribunal in July 2016 allowed the appeal, and remitted the claim to the Employment Tribunal to continue to be processed as an unfair dismissal claim. It is this remitted claim which I heard over three days, 19, 20 and 21 June 2017, with a further day, 30 June 2017, for written and oral submissions.

3. A procedural point was dealt with at the start of this Hearing. The respondent had originally served as its response a challenge to the jurisdiction of the Tribunal on the ground of time bar, and had not particularised its grounds of resistance to the case on its merits. Following the decision of the Employment Appeal Tribunal, the respondent submitted an application for permission to amend the response to set out particularised grounds of resistance on the merits. That application had not been determined prior to this Hearing, and it was renewed at the start of the Hearing by Mr Mays, who appeared for the respondent. Mr Cunningham, for the claimant, did not object to the amendment, and I allowed the amendment subject to a manuscript correction to refer to Section 52A of the Civic Government (Scotland) Act 1982.

4. The respondent called three witnesses, who gave evidence on oath or under affirmation, namely Miss Helen O`Neill, Mr Colin Reid and Mrs Elaine Maxwell. The claimant gave evidence under affirmation, but called no additional witnesses.

5. I found the claimant to be a generally truthful and straightforward witness, and on the relatively few points on which there was a conflict between his evidence and that of witnesses for the respondent which could not be resolved by reference to documentation, I preferred his evidence to that of the respondent`s witnesses. I considered that Miss O`Neill was a witness who did her best to give accurate evidence to the Tribunal, but in some respects I found her evidence less convincing than the evidence of the claimant with which there was disagreement.

6. I found Mr Reid to be a poor witness initially, but under cross-examination he was on occasions commendably frank about the shortcomings of the procedures adopted by the disciplinary panel over which he presided.

7. I considered Mrs Maxwell to be a straightforward and honest witness, but by the nature of her role in the proceedings against the claimant she was able to give only relatively limited assistance to the Tribunal.

8. The parties had agreed a joint bundle of productions running to some 200 pages, and a number of additional documents were put before me without objection in the course of the Hearing. I refer as necessary to those documents in the course of my findings in fact and analysis.

9. Having set out those preliminary points, I now turn to my findings in fact.

Findings in Fact

10. The claimant was employed by the respondent Council from December 2001 until his summary dismissal on 19 May 2014, initially as a trainee Trading Standards Officer, and thereafter as a Trading Standards Officer. He was at all material times assigned to the Clydesdale Division of South Lanarkshire, where he was the only Trading Standards Officer, working together with five Fair Trading Officers (who are of a lower grade and have lesser powers). His line manager at all material times was Miss Helen O`Neill.

11. The claimant`s employment record throughout the period until his dismissal was unblemished.

12. The responsibilities of a Trading Standards Officer involve the enforcement, by advice, warning and ultimately but infrequently report to the Procurator Fiscal for prosecution, of a relatively disparate range of statutory provisions broadly intended to secure fair trading by businesses with members of the general public. Although described, correctly, as a law enforcement role, enforcement through the Courts represented a small proportion of the claimant`s work, in as much as he only made three reports to the Procurator Fiscal during the 12 years of his service as a Trading Standards Officer.

13. The respondent has an Enforcement Policy which sets out the way in which Trading Standards Officers are expected to undertake their duties, which includes as an appendix a very lengthy list of the statutes, provisions of which the Trading Standards Officers may be called on to enforce. This includes some sections of the Civic Government (Scotland) Act 1982, namely sections 24 to 27, which require the licensing of certain secondhand dealers, principally secondhand car dealers. There are no secondhand car dealerships within the Clydesdale Division. In practice the claimant had virtually no involvement with the inspection of licenses under the 1982 Act, and it would not be his responsibility to take action in the event of coming upon an unlicensed dealership, beyond reporting the matter to the Licensing Department of the respondent.

14. One other duty performed on occasion by the claimant was the organisation of test purchases of tobacco and fireworks by persons under the age of 18 (the legal minimum age for the sale of tobacco and fireworks). This necessitated contact with the schoolchildren who were recruited to undertake the test purchases. The fact that schoolchildren were used meant that test purchases were undertaken on a Saturday, and therefore required the Trading Standards Officer supervising the operation to work overtime, which in the claimant`s case is voluntary. The claimant last undertook this duty in May 2013.

15. One other feature of the claimant's work which involved contact with children was a summer course for school pupils, referred to in evidence as 'crucial crew'. Working on this course was entirely voluntary. In fact the course was discontinued in 2014 for financial reasons, but it was not known at the time of the disciplinary proceedings that this was going to happen.

16. In the course of 2013 the respondent required additional cover because of a shortage of qualified Trading Standards Officers, and the claimant agreed to an increase in his hours of work from 35 hours a week to 42 hours a week, with a commensurate increase in his salary, for a period which was due to

end at the end of July 2014. I find that the probability is that, had the claimant not been dismissed in May 2014, he would at the end of July 2014 have reverted to his normal hours and salary.

17. On Wednesday 19 February 2014, the police visited the claimant at his home. His flat was searched and computer equipment seized, and he was arrested and taken to Motherwell Police Station, where he was detained, and later charged with possession of, and taking or permitting to be taken or made, indecent photographs or pseudo-photographs of children, contrary to sections 52 and 52A of the Civic Government (Scotland) Act 1982.

18. The next morning the claimant appeared at a private hearing at Glasgow Sheriff Court, where he was given conditional bail. One of the conditions of his bail was that he was not to use any device to access the internet which did not retain and permit the display of the history his internet use, that he must not disguise his internet use history, and that he must not use a device with file-wiping software (p 103).

19. The claimant was also advised by the police that as he was subject to the enhanced criminal record disclosure regime, he was required to inform the respondent immediately of the facts that he had been arrested and charged. This the claimant duly did, by telephoning his line manager, Miss O'Neill; at her request he subsequently confirmed the position in writing to the Executive Director of Community and Enterprise Resources.

20. Following discussions within the respondent, on Friday 21 February 2014 a decision was taken by Ms Karen Bain, a Personnel Manager in the Community and Enterprise Resources Directorate, that the claimant should be suspended on full pay. The reason given for this was to enable a fact-finding exercise to take place; this duty was later given to Miss O'Neill, the claimant's line manager, by her Head of Service, Ms S Clelland. It was agreed that the claimant would be suspended when he came into work on the following Monday (he was not at work on the Friday), but that he should

be given the option of staying at home and having the letter of suspension sent to him. Miss O'Neill was also tasked with conveying this option to the claimant, and telephoned him on the Friday evening to arrange to meet him at his home on Sunday 23 February 2014. Miss O'Neill met with the claimant as arranged, and he elected to have the letter of suspension sent to him. This was sent on 24 February 2014, together with a letter inviting the claimant to attend a fact-finding meeting on 27 February 2014.

21. Also on 24 February 2014, Mr Craig Brown, Environmental Services Manager, sent out an email to over 100 of the respondent's employees advising that the claimant had been suspended 'pending a trial in relation to criminal offences' (p 143). The nature of the offences was not specified; the email stated 'At this time police investigations are still ongoing and no trial date has been set. [The claimant] denies the charges against him'. At that time the facts of the claimant having been arrested, charged and brought before the Sheriff Court were not in the public domain; no decision whether to proceed with a criminal case had been taken by the Procurator Fiscal; and most of the recipients of the email had no legitimate need to know of the claimant's arrest. Mr Brown sent a further email to the same recipients on 26 February 2014 stating that, having taken advice, he realised it contained 'detail that should not have been given to you' and asking that it be treated as private and confidential (p 145; the original email had not been so headed). No action was taken against Mr Brown by the respondent over the email.

22. The fact finding meeting took place on 27 February, chaired by Miss O'Neill. Ms Aileen Lambie, a Personnel Officer, was in attendance to take notes, but also participated in the discussion. The claimant was accompanied by a trade union representative, Mr McLaughlin. Notes of the meeting (pp 35-7) were subsequently issued to the claimant, who considered them to be inaccurate in a number of respects (as indeed I find that they were), one of which later proved to be of considerable significance. He declined to sign the record of the meeting, and instead provided a list of proposed

amendments (pp 39-41), but no attempt appears to have been made by Miss O'Neill or Ms Lambie to secure agreement as to the record of the meeting; the comments were simply annexed to the note of the meeting.

23. In the course of this meeting the claimant confirmed that he had been arrested, that his computer equipment had been seized and that he was denying the charges. He complained about Mr Brown's widely disseminated email, which Ms Lambie said was being dealt with by the Head of Service (however there was no evidence given to the Tribunal of any action being taken against Mr Brown). The claimant also informed Miss O'Neill that he had been signed off work by his GP with a fit note for four weeks.

24. The point which later proved to be a significant factor in Mr Reid's decision to dismiss the claimant was his answer to a question as to whether he knew 'how this all came about'. The note taken by Ms Lambie records the claimant as saying:

> 'I don't know. The police said they had received a report. I don't know where the report had come from whether it was a company or a person. My lawyer said they can't probe into that as there is a human rights issue. I had paid for a few porn sites with my credit cards and some of them were American sites. I don't know if the report is an anonymous report or if it's because America has different laws or if it is a malicious allegation.'

25. Miss O'Neill's evidence was that that was an accurate note of what the claimant had said, and that she had confirmed it with Ms Lambie, who she believed had also spoken to Mr McLaughlin. The claimant disputed the correctness of the note, both at the time in his proposed corrections and in his evidence to the Tribunal. He said that the reference to 'American porn sites' and to using credit cards had been made by his representative, Mr McLaughlin, purporting to speak on his behalf but doing so inaccurately and speculatively. The claimant explained that there were issues between him

and Mr McLaughlin which led him ask for another representative for subsequent hearings.

26. The claimant further explained in evidence that the dates covered by the charges against him were from November 2013 to January 2014, and that he had entered into a trust deed in February 2013 a condition of which was that he was not allowed to have a credit card.

27. The reason that the question whether the notes of the fact finding meeting are correct or not is that the issue of the claimant using a credit card to purchase pornography on line was relied on by Mr Reid, who dismissed the claimant, to conclude that the claimant was being evasive in his responses during the disciplinary hearing. I consider that that was an unfair and unjustified conclusion. I also find that the claimant's amendments to the notes of the fact finding meeting represent what was said more accurately than the original notes, despite Miss O'Neill's evidence.

28. I make this finding for the following reasons. First, the claimant was in general a more credible witness. Secondly, it does not make sense for him to have referred to purchasing pornography by credit card in the context of a criminal investigation relating to a period nine months after he had ceased to have a credit card. Thirdly, the fact that he dispensed with Mr McLaughlin's services after the meeting is consistent with his explanation that he was unhappy that Mr McLaughlin had engaged in inaccurate speculation in purporting to put the his case. Fourthly, there are other points in the notes where it is clear that the claimant's version is more likely to be accurate than the respondent's. For instance, the original notes record the claimant as confirming that the police took away his PC, but his evidence was that he did not possess a PC, but only a laptop.

29. For these reasons I consider that the claimant's proposed substitution for the passage quoted at paragraph 24 above is the more accurate record of what was said. It reads as follows:

> [The claimant]: 'I don't know, the police just kept mentioning "report", I don't know if that's a report from a company or a person or an anonymous allegation through crimestoppers or whatever. My lawyer has said it could just be "intelligence" but I can probe the source further as I have a right to know and a right to a fair trial under Human Rights laws.
>
> [Mr McLaughlin]: [The claimant] has told me he has used a card to pay for access to porn websites and dating sites in the past. That could also be a source.'

30. Following the fact finding meeting Miss O'Neill produced a report on 18 March 2014. (pp 43-5). The respondent's Disciplinary Procedures Handbook for Managers (pp 157-210) provides detailed guidance on the conduct of the fact finding process. It makes clear that the fact finding manager's report should be a balanced assessment of the evidence and should not make any recommendations on whether or not to proceed to a disciplinary hearing (para 2.8, p 174). Responsibility for deciding whether disciplinary action is to be taken lies with a 'nominated manager'. This is a usually a Personnel Manager; in this case the nominated manager was Ms Karen Bain.

31. Miss O'Neill's report stated that the investigations undertaken comprised the interview with the claimant on 27 February 2014 and a review which she had arranged for the respondent's IT department to undertake of the claimant's internet usage over a three month period up to February 2014. The Findings section of the report recorded the sequence of events from the claimant's arrest through to the terms of condition (f) of his bail, and the comments attributed to the claimant in the notes of the fact finding meeting (in the version set out in the notes taken by Ms Lambie, with no indication that the claimant had disputed the accuracy of that part of the notes).

32. The report further recorded that the claimant's post involved him working periodically with children under the Under Age Test Purchase programme

and the crucial crew events, but without any reference either to the relative infrequency of the former or to the fact that both were voluntary activities undertaken in overtime. The report also (correctly) noted that the claimant required to access the internet in the course of his duties as a Trading Standards Officer. However it made no reference to whether the respondent's IT systems would allow him to access the internet using the respondent's facilities whilst complying with the conditions of his bail as to internet use; Miss O'Neill had not investigated this, although she was aware of the terms of the bail condition.

33. The points in paragraph 32 above were then repeated in the conclusions section, again with no qualifications; the report ended by stating that police investigations continued and a court date had not been set; the report did not make the point that no decision whether to proceed with criminal proceedings had at that stage been taken by the Procurator Fiscal.

34. At some point during the period between 18 March and 28 March 2014, Ms Bain took the decision that disciplinary proceedings should be instituted against the claimant for gross misconduct. The claimant was so notified by a letter of 28 March 2014 (pp 47-8), summoning him to a disciplinary hearing, to be conducted by Mr Reid, then Waste Services Manager, on 4 April 2014. (It should be noted that the claimant was still, and remained until dismissed, suspended on full pay.) The letter, which was signed in the name of Mr Reid, but appears to have been drafted by Ms Bain, made no reference to gross misconduct, although it did end by stating that 'the disciplinary sanction may be dismissal' (but there was no reference to the possibility of summary dismissal). The charges against the claimant were given as:

> 'Alleged breach of South Lanarkshire Council's Code of Conduct due to your criminal charges.
>
> Alleged inability to comply with your contractual obligations from Thursday 20 February 2014 onwards.'

35. No further particulars were given. The Code of Conduct (pp 107-22) is quite lengthy and covers, as would be expected, a range of aspects of employees' conduct, including relationships with members of the public and fellow employees, confidentiality, conflicts of interest and use of the respondent's equipment or resources. The only provisions of the Code which it was suggested could be relevant to the first charge against the claimant are in Section 3, Personal Conduct. This states that 'Employees should be aware that the way they behave reflects the image of the Council', and a little later that 'Any employee charged with or convicted of a criminal offence must advise his/her Executive Director immediately'. It was not in dispute that the claimant had complied with the second of these requirements.

36. The respondent's Disciplinary Procedure makes it clear that except in cases where there is already an outstanding disciplinary warning, dismissal is reserved for cases of gross misconduct. There is a 'non-exhaustive' list of what may constitute gross misconduct (para 26.60, p 130), which includes 'criminal convictions having a material bearing on employment'; it was not suggested for the respondent that this, or any other item in this list, was applicable to either of the disciplinary charges against the claimant (who of course had not at this stage been convicted of any offence).

37. The disciplinary hearing was held on 4 April 2014, as envisaged. It was adjourned by agreement, after each party's case had been presented, until 16 may 2014. Mr Reid presided, and was assisted by Ms Lianne Bain, a Personnel Officer, whose role was to take a note of the proceedings and provide advice to Mr Reid if needed. (This is what was stated in evidence; however I record that the very detailed Disciplinary Procedures Handbook for managers makes no reference to any role at all for a member of the Personnel department at disciplinary hearings.) Ms Bain's notes of the meeting (pp 53-64) are not agreed notes; by the time they were sent to the claimant he had already submitted an appeal, and he reserved his comments on the notes to the appeal; as no detailed note of the appeal

proceedings was taken it is not clear how far the notes of the disciplinary hearing are disputed, but I have taken them as the best record of what occurred available. Although Ms Bain's role was ostensibly to take notes and to provide advice to Mr Reid if asked, she in fact took an active role throughout the proceedings which would have given an observer the impression that she also had a role as decision taker.

38. The claimant was accompanied by Ms Denise McLay, a trade union representative. Also present was Miss O'Neill, in her role as fact finding officer. Her role in the proceedings was somewhat ambiguous. The respondent's procedure does not provide for a presenting officer to present the management case, as is common in local authority disciplinary hearings, and Miss O'Neill had had no responsibility for or input into the decision to bring disciplinary charges, other than in presenting her fact finding report, and none into the formulation of the actual disciplinary charges. Her role was limited to presenting her fact finding report and then answering questions from Mr Reid and from the claimant and his representative.

39. Miss O'Neill was asked whether in view of the claimant's bail conditions she could allow him to return to work. She was unable to give a clear answer as to whether the conditions as to internet usage could be accommodated by the respondent's IT system, not having investigated this in the course of her fact finding. She did not suggest that there was any other reason why he could not resume duties. At a later point in the proceedings Ms Bain volunteered that additional daily monitoring of the claimant's usage would be required (she did not say why) and that the respondent would be required to release the computer used by the claimant for inspection. Mr Reid did not investigate further how practicable these steps would be (or even, in relation to the former, whether it would in fact be necessary to prevent concealment of usage).

40. Miss O'Neill was next asked about the exchange at the fact finding meeting regarding use of a credit card. Miss O'Neill stated that her recollection was

that it was the claimant who had referred to his use of a credit card; he disputed this, referring to the correction he had submitted. Mr Reid concluded from this and later exchanges on the matter that the claimant was being evasive; however his contributions were entirely consistent with the corrections to the record of the meeting which he had submitted, and which I have found the more credible of the accounts given of that meeting.

41. In answer to questions from the claimant, Miss O'Neill confirmed that participating in the Underage Sales Programme and crucial crew was voluntary. Ms McLay asked which section of the Code of Conduct was relied on for the first disciplinary charge; it was Ms Bain who responded, referring to section 3, but not in any more specific detail.

42. The claimant and Ms McLay then summarised his case. Ms Mclay pointed out that the respondent had computers with no internet access, and the claimant confirmed that if required he could work without that facility. The claimant was then questioned by Mr Reid about the work of a Trading Standards Officer, and his law enforcement responsibilities, and asked the claimant 'do you feel your actions have been appropriate in relation to this case?' The claimant responded by pointing out that he was the subject of an unproven accusation to which he was pleading innocent.

43. In the course of Mr Reid's questioning of the claimant, Mr Reid disclosed that the respondent's Legal Services Department had been in contact with the Procurator Fiscal's office and had been advised that 'you have content which is illegal and that you have accessed illegal sites'. This assertion was repeated by Ms Bain. However in a letter to the claimant's solicitor (p 155; the letter is undated but was in response to a letter of 21 April 2017), the Procurator Fiscal's office stated that they had been contacted by the respondent on 4 April 2014 (the date of the disciplinary hearing) seeking information regarding the charges against the claimant, and that the respondent was advised that there had been a petition appearance on 20 February 2014, the nomen juris of the charges and the outcome of that

hearing (all of which was in fact information already known to the respondent through disclosure by the claimant).

44. It therefore appears that Mr Reid and Ms Bain were misinformed; no explanation of how this might have occurred was given in evidence. It would in any case have been highly inappropriate for the Procurator Fiscal's office to make a statement to a third party implying the claimant's guilt whilst his case was still in progress and he had not been convicted or pled guilty. Notwithstanding this, Mr Reid stated later in the hearing that 'we have information that you have accessed illegal sites'. This prompted Ms McLay to ask for an opportunity to respond after the claimant had spoken to his solicitor, and Mr Reid agreed to adjourn the hearing for this purpose. Ms Bain agreed to provide copies of any further information the respondent received from the Procurator Fiscal's office.

45. The hearing was then reconvened on 16 May 2014. Before then, the respondent had disclosed emails setting out the results of the further inquiries that had been made of the police and the Procurator Fiscal Service. An email dated 23 April 2014 from Ms Cairns, a legal services manager in the respondent's Legal Services Department (p 85) stated that the police had confirmed that the claimant had been charged with the offences of which he had notified the respondent in February, and, based on what had been found at the claimant's home, 'that they believe the charges are pertinent'. Ms Cairns added the comment that 'It is my understanding of the position that the police officers who raided [the claimant's] home would have a basis for charging him with these offences'.

46. A second email (pp 87-8) from a Ms Cannon, dated 2 May 2014, recorded a conversation that day with a representative of the Procurator Fiscal's office, who had said that the claimant had accurately described the charges against him, that there was limited information he could disclose as they were still considering whether to raise proceedings against the claimant on indictment, a decision which could take 'anything from 5 to 8 months'.

47. Ms Bain had also used the adjournment as an opportunity to contact Ms Lambie to ask whether it was the claimant or Mr McLaughlin who had referred during the fact finding meeting to using credit cards and accessing American pornography sites. Ms Lambie stated in an email of 25 April 2014 (p 89) that 'My recollection is that [the claimant] stated this and after checking through my notes, it has been confirmed that Grant did state this'. The notes of the fact finding meeting, which had been taken by Ms Lambie, had of course been the source of the point in the first place. Ms Bain also spoke to Mr Mclaughlin, and in an email of 7 May 2014 reported to the participants in the hearing that Mr McLaughlin 'confirmed' that it was the claimant who had made the references to American sites and use of credit cards. Mr Mclaughlin was not called or tendered as a witness for the resumed hearing.

48. The claimant had also contacted his solicitor, who provided a letter confirming that the dates referred to in the charges against the claimant were November 2013 to February 2014. The claimant offered Mr Reid a copy of this letter at the resumed disciplinary hearing, but he declined to take it; however the claimant read out the relevant part of the letter, although the dates were not recorded by Ms Bain in the note of the meeting (they are only recorded in the note of Ms McLay's closing submissions, at p 72).

49. The disciplinary hearing resumed on Friday 16 May 2014; the same persons were present as on 4 April 2014. Ms Bain's notes of the resumed hearing are at pp 64-73. Mr Reid again questioned the claimant about who had referred to American websites and the use of credit cards, and why he had been charged with downloading indecent images of children and why the police had said that the charges were 'pertinent'. In the course of this questioning Mr Reid stated that 'We are dealing with employment law at this disciplinary hearing. ... My decision is based on the evidence presented, my assessment of the employee as to whether they are open and honest and show integrity'. There followed a robust but inconclusive discussion of the

statement by Ms Bain at the earlier hearing that the Procurator Fiscal's office had stated that illegal websites had been accessed.

50. Mr Reid then invited Miss O'Neill to sum up the management case, which she did by again referring to the fact finding report. Ms McLay was then invited to sum up for the claimant. She commented on the lack of specificity of the disciplinary charges and the absence of any factual information about the practicability of the claimant complying with bail conditions. She also referred to the fact that the claimant's contact with children as a Trading Standards Officer was 'rare and optional', and submitted that his involvement in law enforcement actions was relatively limited.

51. In the course of her summing up Ms McLay commented that during his introduction Mr Reid had stated that he would be unbiased but that he had referred to 'what you [the claimant] have done', which she described as having prejudged the evidence (a comment I find to be legitimate given what Mr Reid had said). Both Ms Bain and Mr Reid made it clear that they took exception to this comment. After a short adjournment Ms McLay went on to raise questions about the information given at the first hearing to the effect that the Procurator Fiscal's office had stated that illegal sites had been accessed. At that point Ms Bain asked to speak to Ms McLay outside; Mr Reid made no attempt to stop her, and both Ms Bain and Ms McLay went outside the room. As neither of the two protagonists gave evidence, there is no direct evidence as to what was said outside the room, but I accept the claimant's statement (given in his grounds of appeal) that Ms McLay told him that Ms Bain had warned her that she was going too far in her criticisms of management, saying 'I suggest you watch your tome as you're verging on slander'..

52. After this episode, Ms McLay concluded her submissions, dealing first with the disputed issue of who had referred to American websites, and then submitting that the claimant was innocent, that dismissal would entail loss of

his career, and that he would be willing to accept continued suspension pending the outcome of the criminal case.

53. Mr Reid then adjourned the hearing to the following Monday, 19 May 2014, to consider his decision. He wrote up a statement setting out his decision and the reasons for it over the weekend, and when the hearing resumed on the Monday, he read out his decision (pp 73-5). His decision was to dismiss the claimant summarily for gross misconduct. His reasons included: that the respondent had the right to act on charges against its employees if the charges affected their ability to undertake their role or 'may present a risk of reputational damage to [the respondent]'; that the claimant had given differing accounts which 'clearly indicate in my opinion that you are not being fully open and honest and are withholding critical information from me'; that he found the claimant's explanation that he did not have illegal content on his devices not to be credible; that the information from the Procurator Fiscal confirmed that 'the charges against you are a breach of the criminal law'; that 'it is reasonable to conclude that the pending criminal case against you has substance and whilst this should not be the reason for any decision taken today it must still be considered during the decision making process'; that there had been 'inappropriate comments in relation to professional Council staff'; that he had never previously had his integrity questioned in any way; that the mitigation offered that the claimant did not have the answer (as to why the police had arrested and charged him) 'demonstrates again your failings to be honest and open'; that 'I do not find you to be a credible witness' ; that he did not feel that the claimant could comply with his contractual obligations 'to uphold and enforce legislation and advise others' because of a clear conflict of interest; that there could be a risk of reputational damage to the respondent; and that 'an authorised officer of the [respondent] being charged with two criminal offences does impact on the image of [the respondent]'.

54. Mr Reid formally confirmed the summary dismissal of the claimant by a letter of 19 May 2014 (p 77), which stated that he was dismissed 'on

grounds of gross misconduct', the details of which were given in the terms of the two disciplinary charges, with no further elaboration. The letter advised the claimant of his right of appeal. Neither the statement read out at the resumed hearing nor the letter of dismissal referred to why Mr Reid did not consider the continuation of the claimant's suspension to be a viable option, and the only reference to possible redeployment to another role pending the conclusion of the criminal proceedings (an option specifically provided for in the respondent's Disciplinary Procedure: see paragraph 26.39, p 127) was a bare statement that 'I don't feel that this is a viable option' (p 75).

55. The claimant exercised his right of appeal, setting out his grounds in detail (pp 91-101). He first referred to the lack of detail in the disciplinary charges, and to the fact that the fact finding report appeared to refer only to the duty to report criminal charges to the relevant Executive Director and to contractual obligations relating to internet use and work with children. He pointed out that he had notified his Executive Director as required, that his bail conditions did not prohibit access to the internet, that he could in any case fulfill his contractual obligations without internet access, and that he could opt out of duties involving contact with children.

56. The claimant went on to state that Mr Reid appeared to have reached his decision on a different basis, namely that he considered that the claimant's actions had brought the respondent into disrepute and affected its public image; that he had given differing accounts and withheld vital information; and that the statement by the police that the allegations were 'pertinent' had significantly influenced the decision. He pointed out that no decision had been taken to raise proceedings, and that the case had not entered the public domain. He further stated that he had not had the opportunity to respond to the claim of damage to the respondent's public reputation, and reiterated that he was entitled to the benefit of the presumption of innocence.

57. Further points made in the appeal statement included that the respondent had been unable to substantiate the claim made at the first hearing that the Procurator Fiscal's office had stated that the claimant had been accessing illegal websites; that he was improperly questioned again at the resumed hearing about matters other than the specific matters for which an adjournment had been agreed; that Mr Reid had overreacted to his impartiality being questioned; and that Ms Bain had told Ms McLay outside the hearing 'I suggest you watch your tone as you are verging on slander'. He concluded by stating that dismissal was an excessive punishment; that the reasons for dismissal differed from the allegations made; and that the disciplinary procedures were not correctly followed.

58. The respondent's Disciplinary Procedure provides for appeals against dismissal to be heard by a panel of Councillors. The hearing of the claimant's appeal took place on 29 July 2014, before Councillors Campbell, Convery and McDonald. The management case (described in the Minutes as the Resource case) was presented by Ms Karen Bain, the Personnel Manager who had originally decided to institute formal disciplinary proceedings and had framed the charges. She called as witnesses Ms Lianne Bain, who had acted as note taker and adviser at the disciplinary hearing, and Mr Reid, the disciplining manager. The claimant attended and gave evidence; he was accompanied by Ms Alison Cairns, his union representative. Ms Elaine Maxwell, a Personnel Manager, was present to advise the panel as required, and was in attendance during the panel's deliberations. The Panel had received a pack of papers prior to the hearing, prepared by Ms Maxwell in consultation with the representatives of both parties. Minutes were recorded by a Committee Clerk (pp 147-153). The minutes are a somewhat artificial record of what took place, as all statements, including contentious assertions, are recorded as the speaker 'advising' or 'confirming' what was asserted.

59. The evidence given by Ms Lianne Bain was largely to confirm the procedure that had been followed. However in the course of her evidence she

confirmed that she had asked to speak to the claimant's then representative, Ms McLay 'as she felt that [Ms Mclay] had made a number of inappropriate comments which brought her (L Bain's) professionalism into question and also that of C Reid'; what the comments were is not recorded in the Minutes. Ms Bain also reiterated the claim that the Procurator Fiscal had stated in a telephone conversation that the content on the claimant's computer was 'illegal'.

60. Mr Reid in evidence reiterated his view that the claimant had not been open and honest, and asserted that the claimant 'was trying to defend his case through technicalities', including as an example that the claimant had stated that it was Mr McLaughlin who had referred at the fact finding meeting to American websites. He also asserted that he had acted professionally and denied having been aggressive and that he had used the words 'after what you've done' ; that he considered that there was potential for a conflict of interest if the claimant returned to his post, and reputational risk to the respondent if the case got into the public arena; that the claimant was not providing as much information as he was able to; that no mitigation had been offered; and that suspension with pay was not a viable option as it was not known when the case would be heard.

61. The claimant in his evidence pointed out that the Procurator Fiscal had not yet decided whether to proceed with the case, and that it was therefore not definite whether the matter would ever become public. He reiterated his position in relation to the disputed issues in the notes of the Fact Finding meeting. In her summing up, Ms McLay pointed out that the charges against the claimant were unproven, that there was nothing in the public domain, and that the claimant would be able to undertake his duties, and had no direct contact with children. She also questioned Mr Reid's assertion that he had been impartial.

62. The hearing was relatively lengthy, lasting from 9.30 until the panel adjourned to deliberate at 12.10, returning to give its decision at 1.00. The

panel's decision was to dismiss the appeal. The reasons for the decision are recorded thus:

> 'The Appeals Panel was of the opinion that the investigation had been carried out in accordance with the [respondent's] Disciplinary Procedure and the Resource had acted reasonably. Consequently, it was the decision of the Appeals Panel that the grounds of the appeal had not been substantiated and the appeal was rejected.'

63. None of the panel members gave evidence to the Tribunal. The only evidence of the panel's reasons for its decision is therefore the statement quoted above, and evidence given by Ms Maxwell about the issues raised by panel members during the panel's deliberations and about the advice she gave in response. Questions raised by the panel included what was normal practice in cases where an employee of the respondent had been charged with a criminal offence; Ms Maxwell did not state what response she gave to that question. Panel members also asked about the respondent's IT arrangements and whether it was practicable to ensure compliance with the claimant's bail conditions. Ms Maxwell advised the Panel that employees could access any PC, but that it would be reasonable to limit the claimant's access to a single PC. Ms Maxwell also gave advice that it was reasonable for the respondent to take action prior to the criminal charges coming to trial.

64. The appeal was the final stage in the respondent's procedure.

65. The Procurator Fiscal subsequently decided to proceed with the criminal charges against the claimant. After delays caused by difficulties in engaging expert witnesses, the case finally came to trial in February 2016. The claimant was convicted, and on 10 March 2016 was sentenced to two years' imprisonment.

Relevant law

66. It is not in dispute that the claimant had the right not to be unfairly dismissed, that he had been dismissed, and (following the decision of the Employment Appeal Tribunal on the time bar issue) that the Tribunal had jurisdiction to hear the claim of unfair dismissal.

67. The test for what constitutes an unfair dismissal is to be found in section 98 of the Employment Rights Act 1996 ('ERA'). The first stage is that it is for the employer to show what was the reason or principal reason for the dismissal, and that that reason was one of the potentially fair reasons listed in section 98(2), or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A 'reason' for these purposes is simply a set of facts known to, or beliefs held by, the employer, which leads it to dismiss the employee. The only reason in section 98(2) relevant in this case is a reason related to conduct. The respondent relies on this, and in the alternative on some other substantial reason ('SOSR'), namely the reputational risk to the respondent if the claimant remained in its employment and/or the practical difficulty of his performing his duties whilst observing his bail conditions.

68. If the employer shows a potentially fair reason, the question for the Tribunal is then, the burden of proof at this stage being neutral, whether the employer acted reasonably or unreasonably in all the circumstances, having regard to the size and administrative resources of the employer and to equity and the substantial merits of the case, in relying on the reason shown as a sufficient reason for dismissing the employee. In approaching this question, it is important that the Tribunal does not substitute its own view of what was fair or reasonable for that of the employer. The test of reasonableness is an objective one, namely whether the decision taken was within the range of reasonable responses of a reasonable employer; only if not will the dismissal be found to be unfair. The 'range of reasonable responses' test applies equally to procedural as to substantive issues.

Within that context, a dismissal may be unfair either because it is a disproportionately severe sanction in the circumstances, such as to be outwith the range of reasonable responses, or because the procedure adopted, including any investigations undertaken, was so deficient as to fall outwith the range of reasonable responses, or for both reasons.

69. Where there has been an appeal, it is necessary to consider the fairness of the dismissal having regard to the procedure as a whole including the appeal. A fairly conducted appeal may cure any unfairness in the procedure leading to dismissal: **Taylor v OCS Group Ltd [2006] ICR 1602**.

70. There are some additional points arising in cases where conduct, or an SOSR reason closely related to conduct, is relied on as the reason for dismissal, which can be drawn from the authorities. the first is the well-known **Burchell** principles, taken from the judgment of the EAT in **British Home Stores Ltd v Burchell [1978] IRLR 379.** These indicate, in summary, that a dismissal will be fair if the employer held an honest belief at the time of dismissal, based on reasonable grounds, and following a reasonable investigation, that the employee was guilty of the misconduct of which he was accused. What constitutes a reasonable investigation is to be determined applying the same 'range of reasonable responses' test as is referred to above. The **Burchell** principles are of course subject to the point above about appeals, and to the point that dismissal as a sanction may be outwith the range of reasonable responses in the particular circumstances and for the particular misconduct in issue.

71. The commission of a criminal offence outwith the employee's employment may be sufficient grounds for a fair dismissal, depending on the circumstances, and in particular whether there is any, and if so what, connection between the offence and the employee's work, or whether the fact of the offence is in some way incompatible with the continued employment of the employee. This is of course highly fact sensitive, and often a difficult question to resolve even where the employer can rely on the

employee having been convicted of the offence as sufficient evidence of guilt. It is much more difficult where there is reason to suspect that the employee is guilty. There is authority to the effect that it may be fair to dismiss a number of employees each of whom is under suspicion of having stolen from the employer, when it cannot be established which employee was guilty: **Monie v Coral Racing Ltd [1980] IRLR 464, CA**; however that does not assist in a case where the employee is the only person upon whom suspicion has fallen, who has been charged with an offence but not convicted.

72. In this context the more relevant cases, on which both parties made observations in their submissions, are **Leach v OFCOM [2012] IRLR 839, CA** and **Z v A, UKEAT/0380/13.** These cases are examples either side of the line of fairness, and do not establish any general rule other than that the Tribunal must always apply the wording of section 98(4). In **Leach** the employer was warned by the Metropolitan Police Child Abuse Investigation Command that they had suspicions that the employee was involved in serious acts of child abuse; it was held to have been fair in the circumstances to have dismissed him for a breakdown in trust and confidence. In **Z v A** dismissal before police investigations had been concluded was held to be premature and unfair.

73. If a dismissal is found to be unfair, and unless there is a claim for reinstatement or re-engagement (which in this case there is not), the Tribunal must, in addition to declaring the dismissal to be unfair, consider the award of compensation. Compensation comprises a basic award calculated in accordance with sections 119 to 122 ERA and a compensatory award calculated in accordance with sections 123 and 124.

74. It is agreed between the parties that the basic award in this case is £5,568 (12 weeks' pay at the maximum weekly rate of £464), subject to the application of section 122. The relevant provision of section 122 relied on by

the respondent in this case is s 122(2), which so far as material provides that:

> 'Where the Tribunal considers that any conduct of the complainant before the dismissal ... was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.'

It is not necessary that the conduct contributed to the decision to dismiss in any way, or that the employer was aware of the conduct before dismissing the employee; it is simply a question of whether there was conduct, occurring prior to the dismissal but typically only becoming known to the employer later, of such a nature that it would be just and equitable to reduce the award. The words 'to any extent' encompass a possible reduction of 100%.

75. By section 123(1), and subject to provisions to be referred to shortly, the compensatory award is to be 'such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer'. Any award is subject to a maximum which in this case would be 52 weeks' pay (see section 124(1ZA)). it is well established that 'loss' for the purposes of section 123 means financial loss, and that it is usually just and equitable, other things being equal and subject to the statutory maximum, for the amount of compensation to equate to the financial loss sustained by the claimant in consequence of the dismissal.

76. The respondent relies on two provisions of section 123 which expressly provide for a reduction in what would otherwise be the just and equitable amount to be awarded. the first is the principle first enunciated by the House of Lords in **W Devis and Sons Ltd v Atkins [1977] ICR 662,** and embodied in the reference in section 123(1) to 'just and equitable'

compensation, that factors which can be considered in determining what it is just and equitable to award include misconduct on the part of the employee which did not contribute to the dismissal because it was unknown to the employer at the time of dismissal (and was thus not contributory conduct within section 123(6)). **Devis** is authority for the proposition that it may be just and equitable to award no compensation at all if the subsequently discovered conduct of the claimant was sufficiently egregious.

77. Section 123(6) provides that if the Tribunal finds that the employee has , by any action, caused or contributed to his dismissal, it is to reduce the compensatory award by such amount as it considers just and equitable. The conduct of the claimant relied on in this case is the commission of the offences of which he was subsequently convicted, which the respondent submits caused or contributed to his dismissal because but for the commission of the offences he would not have been arrested and charged. Any reduction in the compensatory award is conventionally expressed as a percentage, which may in an appropriate case be 100%.

78. Finally as to remedy, section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that in relation to claims of the categories listed in Schedule 5 to that Act, which include unfair dismissal, if it is shown that the employer unreasonably failed to comply with an applicable ACAS Code of Practice, any compensation awarded to the claimant may be increased by up to 25%. The applicable Code of Practice in this case is the Code on Disciplinary and Grievance Procedures (the 2009 version, as the dismissal of the claimant predated the issue of the current version in 2015). This Code applies equally to dismissal where the reason is an SOSR reason if the employer used its disciplinary procedures to effect the dismissal. Any increase in compensation is limited to the compensatory award: section 124A ERA; necessarily, if the compensatory award is nil, there can be no additional award under section 207A..

Conclusions: unfair dismissal

79. The first issue for consideration is whether the respondent has shown the reason or principal reason for the dismissal, and if so whether that reason is related to conduct, or alternatively is a SOSR reason. The reason given by Mr Reid in the letter of dismissal was gross misconduct, comprising the two matters with which the claimant had originally been charged, namely breach of the Code of Conduct and inability to discharge the duties of his post. However, Mr Mays, in his submissions for the respondent, pointed out correctly that an employer can rely at the hearing on reasons different from those given to the employee at the time of dismissal, and that an employer is not bound by a label put on the reasons at the time of dismissal.

80. Mr Mays' primary position was that the principal reason for dismissal was one related to conduct, in that Mr Reid as the dismissing manager had formed the view that the charges against the claimant had substance - a suspicion of guilt, as Mr Mays put it - leading to a belief that the respondent faced a reputational risk if the claimant was permitted to continue in employment. His esto position was that the principal reason was an SOSR reason, namely the reputational risk of retaining the claimant in employment, coupled with the practical difficulty of him working subject to the bail conditions limiting access to the internet.

81. Mr Cunningham, for the claimant, submitted that the reasons advanced by the respondent were so mixed up that I should find that the respondent had not shown what the reason or principal reason for the dismissal was, with the consequence that the dismissal was automatically unfair. He did not offer an esto position on whether is a reason was shown, it should be classified as one related to conduct or an SOSR reason.

82. The issue of what was the reason for the dismissal is in this case peculiarly difficult to resolve, mainly because of the insufficiency of the disciplinary charges laid against the claimant, and the shifting position of Mr Reid as

between the reasons he gave orally at the time of dismissal, the reasons given in the letter of dismissal and the reasons given in his evidence to the tribunal. The primary focus of the Tribunal must be on the reasons given by Mr Reid in evidence, insofar as that evidence is accepted, and any inferences as to his true reasons to the extent that they were not articulated in that evidence.

83. Mr Reid's evidence under cross examination was that it was the fact that the claimant had been charged, taken together with the nature of the offences with which he had been charged and his role as an employee of the respondent in enforcing certain areas of the law, including provisions of the Act under which he had been charged, that led him to conclude that the claimant should be dismissed. I consider it probable that his unstated view was that the claimant appeared to be guilty of the offences, a conclusion drawn from his perception that the claimant was being evasive, and from his emphasis on the rather meaningless statement the respondent had extracted from the police that they believed the charges to be 'pertinent'. However I have come to the conclusion that belief in the claimant's guilt of the offences was not the principal reason; as Mr Reid said in evidence, it was the fact of the claimant having been charged that was itself sufficient, given the nature of the charges and of his role.

84. It follows that the principal reason for dismissal was not related to conduct. Being charged with a crime is not conduct on the part of the person charged, and neither are any of the other circumstances - the nature of the offences charged, the fact of having a role involving law enforcement, and the dismissing officer's fear that these in combination would create a conflict of interest, and that publicity for the case could cause reputational damage. The fact that the letter of dismissal labelled the charges as gross misconduct cannot of itself turn into conduct that which was not. Indeed the second charge, of inability to discharge contractual duties, is not on its face a matter of conduct but of circumstance.

85. However I do accept that the respondent has made out its esto case, that the reason was an SOSR reason, namely that the claimant had been charged with criminal offences of a nature likely to attract public opprobrium if publicised, and that in consequence there was believed to be reputational risk to the Council, and a conflict between the claimant's position as a person under a criminal charge and his responsibilities for law enforcement.

86. Turning next to the question whether the dismissal was fair or unfair having regard to those reasons, it is necessary first to make the point that the actual reasons for dismissal were not the reasons given in the letter of dismissal, which merely repeated the disciplinary charges and labelled them as gross misconduct. In blunt terms, the charges were not made out, and the claimant was dismissed for other reasons which appeared to the dismissing officer to be sufficient but of which he had not been properly accused.

87. I consider that in this case the answer to the statutory question posed by section 98(4) is clear: the dismissal of the claimant was unfair. This is for a combination of several reasons. In reaching this conclusion, and in articulating my reasons below, I of course bear in mind the statutory test: did the procedure adopted fall within the range of reasonable responses, and was the sanction imposed within the range of reasonable responses, open to a reasonable employer.

88. The first question is whether there was a sufficient investigation. Three matters require consideration here. The first is the failure of Miss O'Neill to establish clearly from the respondent's IT department what steps would be necessary to enable the claimant to have internet access through the respondent's system whilst his compliance with his bail conditions was ensured, and what if any practical problems would be involved in putting in place such arrangements. This question was never clearly answered. Its relevance was clear to Miss O'Neill from the outset. It became considerably more important by the inclusion of a disciplinary charge against the claimant

of being unable to comply with his contractual obligations, which was at least in part, if not primarily, directed at this issue. I consider that any reasonable employer wishing to pursue such a charge, particularly one with the evidently substantial administrative resources of a large local authority, would have made more of an effort to get clarity on this issue. This is therefore a factor pointing to unfairness.

89. The second issue is the failure to secure an agreed version of the record of the fact finding meeting of 27 February 2014, in particular as to who said what in relation to the claimant using credit cards to access pornography on American websites. This was a regrettable failure, and the way in which Miss O'Neill bolstered her own (incorrect, as I have found) recollection of who had said it by obtaining and passing on the recollections of Ms Lambie and Mr McLaughlin, was at best unsatisfactory, as it denied the claimant any meaningful opportunity to challenge the consensus of the other persons present at the meeting. It was particularly unfortunate that this proved to be one of the issues on which Mr Reid based his (incorrect, as I have found) view that the claimant was being evasive and hiding behind technicalities in his evidence to the disciplinary hearing.

90. However I cannot say that no reasonable employer would have left matters in this state. The procedure required an attempt to get an agreed record of the meeting, but with clearly differing recollections that would have been unlikely, and the compromise of submitting the claimant's proposed revisions of the record was in my judgment within the range of reasonable responses. Accordingly, this is not a factor in my overall conclusion that the dismissal was unfair.

91. The third point is the email sent to 110 employees by Mr Brown. Whilst he made it clear two days later that the matter was private and confidential, the information in it should not have been disclosed in the first place to anyone who did not have a clear and legitimate need to know. It was an improper disclosure of confidential information by a senior manager which could

potentially have prejudiced the disciplinary proceedings. At the least it made it more difficult for Mr Reid to say, as he did, that there was a risk of reputational damage if the fact that the claimant had been charged got into the public domain, since dissemination on the scale that had occurred created a real possibility that that would have happened by the time of the disciplinary hearing several weeks later, yet there had been no reaction from either the local press or members of the public. However there was no evidence that the matter had come to public knowledge, and I do not consider the sending of the email to be a factor I can properly take into account as contributing to the overall unfairness of the dismissal. That said, I am concerned that there was no evidence of any action taken by the respondent to make clear to Mr Brown the inappropriateness of his action, and no apology to the claimant for the infringement of his right to privacy.

92. Much more serious is the disciplinary charges laid against the claimant. As a preface to my conclusions on the charges I note the rather unusual procedure adopted by this respondent that the decision whether to take disciplinary action and the formulation of disciplinary charges is reserved to a nominated Personnel Manager (in this case Ms Karen Bain). Whatever the reasons the respondent had for adopting this procedure, it has the consequence that neither the Fact Finding officer, who at the disciplinary hearing has the role of Presenting Officer, nor the manager charged with conducting the disciplinary hearing, had any input in the decision, the actual charges or the thinking behind the choice of charges. Moreover as Ms Bain was not called to give evidence, the Tribunal had no explanation of the reasons for the choice of charges or what conduct they were actually intended to cover, or indeed whether they were intended to be regarded as acts of gross misconduct, as they were found to be. The fact of this separation of roles does not of itself contribute to my finding of unfairness, but in its consequences in this case it may well have done so.

93. The first charge was 'Alleged breach of [the respondent's] Code of Conduct due to your criminal charges'. I consider this to be woefully unspecific. The

Code of Conduct is quite a lengthy document, but only two short sentences within it were identified as having any possible relevance as the basis of the charge. The first is at the beginning of Section 3: 'Employees should be aware that the way that they behave reflects the image of [the respondent]'. The implication of this is presumably that employees should not conduct themselves, in their private lives as well as at work (although that point is nowhere stated) in ways that would if coming to public notice reflect badly on the respondent; the commission of criminal offences, particularly of a kind that is likely to attract public opprobrium, would clearly fall within the scope of the interdiction. However the claimant was not charged by the respondent with having committed the offences with which the police had charged him. It is difficult if not impossible to identify what conduct of the claimant, short of the commission of the offences, could constitute a breach of the opening sentence of Section 3 of the Code. Nor did the respondent make any attempt to elucidate the point prior to the disciplinary hearing.

94. The other passage in the Code of Conduct to which I was referred, also in section 3, states: 'Any employee charged with, or convicted of a criminal offence must advise his/her Executive Director immediately.' It was not in dispute that the claimant had complied to the letter with this.

95. Accordingly the first disciplinary charge was not only deficient in identifying the conduct or circumstances relied on; it also alleged breach of a Code the claimant could only have broken by committing the offences with which he was charged. As that was not in fact what the respondent put forward as the conduct relied on, the charge is in effect meaningless.

96. It is also relevant in this context to refer to some of the provisions of the respondent's Disciplinary procedure. The first is the statement at paragraph 26.32 (p 126) that 'This notification [i.e. of the disciplinary charge] should contain sufficient information about the alleged misconduct... and its possible consequences to enable the employee to prepare to answer the case at disciplinary hearing.' By not identifying the passage in the Code

relied on, or in what way it was alleged that the claimant had contravened it, the first charge fell well short of what would be required to satisfy paragraph 26.32 of the Disciplinary Procedure.

97. In addition, the Procedure contains a list of examples of gross misconduct (para 26.60, p 130). This includes 'criminal convictions having a material bearing on employment'. Whilst the list is expressly stated not to be exhaustive, the choice of wording makes it extremely difficult to argue that merely being *charged* with an offence which, if the employee had been convicted of it would have such a bearing is capable of being gross misconduct (quite apart from the inappositeness of 'conduct' as a description of the fact of having been charged).

98. As for the second disciplinary charge, 'Alleged inability to comply with your contractual obligations from Thursday 20 February 2014 onwards', this was at first taken by Miss O'Neill to be a reference to the effect of the claimant's bail conditions on his ability to carry out duties which required access to the internet. The charge does not however make even that clear.

99. The scope of the charge appears to have been enlarged during the fact finding exercise to cover the fact that the claimant had been charged with offences under the Civic Government (Scotland) Act 1982, and that amongst the thirty or so Acts provisions of which fall within the enforcement remit of Trading Standards Officers is the 1982 Act. However there was no evidence that those particular provisions, which relate to the licensing of second hand car dealers, ever were enforced by the claimant, and his unchallenged evidence was that there are no second hand car dealers working in the area of South Lanarkshire for which he was responsible.

100. Mr Reid relied on the second charge as covering the altogether different issue of whether there was a general conflict of interest between the claimant's law enforcement role and the fact that he had been charged with a breach of the criminal law, and also the reputational risk he believed

existed should the criminal charges become public knowledge. Again, these uses of the disciplinary charge are not obvious from its wording and were never made clear to the claimant before the disciplinary hearing. The second charge too was both lacking in essential detail and not a charge of what could properly be classified as gross misconduct at all.

101. Thus the claimant faced disciplinary charges the scope and nature of which were not made clear prior to the disciplinary hearing, and which were relied on as grounds for dismissal in ways which both were not made clear and are not apparent from the wording of the charges themselves; and in addition in relation to the first charge, absent an allegation that the claimant was guilty of the criminal offences, the charge had no meaning at all.

102. It is well established by authority that disciplinary charges, particularly of serious misconduct, should be clear and precise. It is sufficient to refer to **Strouthos v London Underground Ltd [2004] IRLR 636**, at paragraphs 38 and 41, where Pill LJ makes it clear that an employee should only be found guilty of the charge which is put to him: that 'a defendant should only be found guilty of the offence with which he has been charged'. That presupposes that the charge sufficiently identifies the offence, a feature absent from the charges in this case.

103 Insofar as alleged gross misconduct was a reason for the dismissal (and I have found above that it was not the principal reason) the principles enunciated in **British Home Stores Ltd v Burchell [1978] IRLR 379** are of course engaged: the questions for the tribunal are whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of the employee; whether the dismissing manager had reasonable grounds for that belief; and whether the employer had carried out as much investigation as was reasonable in the circumstances. It was not suggested by Mr Mays that these relieved the respondent of the need to articulate charges which properly identified that of which the claimant stood accused, or to confine its decisions to decisions about the claimant's guilt of the charges put to him.

104. Moreover, Mr Reid did not have reasonable grounds to believe that the claimant was guilty of gross misconduct; whatever the potential consequences of the fact that he had been charged with criminal offences, the evidence that Mr Reid had as to whether the offences had indeed been committed was no more than exiguous; the police had said that the charges were 'pertinent'; having laid them they could scarcely have said they were not. The Procurator Fiscal had done no more than to say what the charges were, and that it was a petition case, which indicated the seriousness of the charges but said nothing about whether the claimant was guilty. Mr Reid had no knowledge of the strength of the evidence. A 'no smoke without fire' approach to the fact of criminal charges, even if combined with an impression that the employee is being evasive in his explanations for having been charged, does not amount to reasonable belief in the employee's guilt.

105. The deficiencies I have identified in the investigation, so far as relating to IT use, the ineptness and lack of proper specificity of the charges, and the changing of the substance of what was relied on as grounds for dismissal during the disciplinary hearing, taken together, in my judgment are such that viewed objectively, and subject to what follows as to the appeal, dismissal was not in this case reasonable.

106. The respondent relied on **Leach v OFCOM** as a basis for justifying dismissal because the claimant had been charged with serious offences of a kind that were relevant to his employment as a Trading Standards Officer. That case is however readily distinguishable from the present case. Mr leach had been tried and acquitted of serious sexual offences against children in Cambodia. The police had concerns that he was nevertheless a danger to children, which they shared with OFCOM. It was not known at the time of the dismissal that Mr Leach was to face a further trial in Cambodia resulting in a 12 year prison sentence, so that OFCOM had to decide whether to act on the basis that their employee was a suspected paedophile. A case more in point is **Z v A**, where the dismissal was held to be unfair because the employer acted whilst police investigations (which led

to the withdrawal of charges, but only after the employee had been dismissed) were still under way at the time of dismissal.

107. There are further factors which I consider support the conclusion that the dismissal of the claimant was unfair. The first is the failure by Mr Reid properly to consider the possibility of redeploying the claimant, or continuing his suspension, rather than dismissing him. I do not say that it would have been unreasonable, in the sense of being outwith the range of reasonable responses, to reject the possibility of deferring a decision and either continuing the claimant's suspension or investigating whether he could be redeployed to a position not involving law enforcement; but it was not the action of a reasonable employer simply to ignore the possibilities.

108. The second is the serious procedural irregularity perpetrated by Ms Lianne Bain during the disciplinary hearing when she took the claimant's representative outside the room and warned her against repeating statements that Ms Bain perceived were an attack on her and Mr Reid's professionalism. Such conduct, particularly in the absence of any genuine grounds for believing that her professionalism had been attacked, in my judgment must have created at least an appearance of unfairness. Mr Reid's over-reaction to a challenge to his impartiality must have served to compound the impression of unfairness a reasonable observer would have formed of the situation.

109. A fairly conducted appeal may cure earlier unfairness in the procedure leading to dismissal. However in this case I consider that the failings described above are too fundamental for the appeal as it was conducted to have cured the unfairness. Without direct evidence of the reasons for which the members of the panel decided to reject the appeal, I can only take account of the reasons summarised in the Minutes. These include a view that the investigation had been carried out in accordance with the respondent's Disciplinary Procedure. This indicates that the appeal was concerned with procedural correctness rather than a re-evaluation of the

substance of the charges and whether they constituted gross misconduct. There is no acknowledgement in the panellists' brief reasons of the fact that the grounds for dismissal were not reflected in the original charges, or that there was no basis, absent a finding of guilt of the criminal offences, for the labelling of the reasons for dismissal as gross misconduct. The bare statement that 'the Resource (i.e. the relevant managers) had acted reasonably' does not begin to engage with the issues raised by the claimant in relation to his dismissal.

110. For all of these reasons I find that the claimant was unfairly dismissed.

Conclusions: remedy

111. This however may be somewhat of a pyrrhic victory for the claimant. There was at the time of his dismissal no proper basis for the respondent to conclude that he was guilty of the offences with which he had been charged, and he was of course entitled to be presumed innocent unless and until found guilty. But in February 2016 he was found guilty. The offences of which he was convicted were those with which he had been charged in February 2014; it necessarily follows that he had committed them before then, and before his dismissal.

112. The respondent submits that it would not be just and equitable to award the claimant either a basic award or a compensatory award because of his conduct, i.e. the commission of the offences of which he was subsequently convicted, and that the basic award and compensatory award should each be reduced by 100%, respectively under section 122(2) ERA and applying the principle in **Devis v Atkins** to the compensatory award, relying on the reference to 'just and equitable' in section 123(1) ERA as the authority for doing so.

113. In the alternative or in addition the respondent seeks a 100% reduction in the compensatory award under section 123 (6) ERA by reason of the

claimant having caused or contributed to his dismissal by committing the offences of which he was subsequently convicted.

114. The claimant argues against any reduction in either award. Mr Cunningham pointed in particular to the injustice suffered by the claimant of having his employment terminated on a false basis of charges which only became gross misconduct at the conclusion of the disciplinary process. He also limits the claim for loss of earnings to the period up to the date on which the claimant was sent to prison; even so, and despite the fact that the claimant secured some alternative employment, and that there is no claim for pension loss, the claim in this case has been quantified at almost £30,000, with an additional 25% claimed for failure to comply with the ACAS Code.

115. I know nothing of the details of the offences of which the claimant was convicted, save that the court trying him judged them to be sufficiently serious to deserve a sentence of two years' imprisonment. I take into account that they were offences unrelated to the claimant's work (there was no evidence that he had used the respondent's facilities, or of any other connection between the offences and his work). I also take into account that a claimant who has been unfairly dismissed and has suffered financially in consequence should normally receive at least some compensation for his losses. 100% reductions under **Devis v Atkins**, and under section 122(1), are rare, and should only be applied in relatively exceptional cases.

116. Taking all of these considerations into account, I have concluded on balance that it would not be just and equitable for the claimant to be awarded compensation, either by way of a basic award or a compensatory award, in circumstances where he committed serious criminal offences, of a kind that would inevitably make his continued employment on conviction of the offences impossible, and which were of sufficient gravity to attract a sentence of two years' imprisonment. The fact that the claimant's job was one involving law enforcement, and for a public body, made it unrealistic to anticipate that he could have continued in that post, or in the respondent's

employment, once convicted. The seriousness of offences attracting a two year prison sentence is self-evident: sufficiently so in my judgment to justify the relatively exceptional step of reducing each of the awards to nothing. I therefore reduce the basic award of £5,668.00 by 100% to nil. As to the compensatory award, it is not necessary for me to set out the computation of the award, as I reduce it too by 100% to nil.

117. Turning to the issue of contributory fault, I also accept the respondent's case on this. The claimant would not have come to the attention of the police if he had not committed the offences with which he was charged. As it was the fact of having been charged which resulted in his dismissal, it is a legitimate analysis that he caused or contributed to his dismissal by the commission of the offences. In the alternative, I would therefore have reduced the compensatory award by 100% under section 123(6) for contributory conduct.

118. In reaching these conclusions I have not overlooked the claimant's fallback submission that I should at least award compensation equivalent to the net pay the claimant would have received for his notice period, to reflect the injustice of an unfair dismissal and the fact that the reasons for his dismissal do not amount to gross misconduct, for which alone he could be dismissed without notice. There are two short answers to that point. The first is that there is no claim in this case for wrongful dismissal. The second is that such a claim would have been met with the venerable but still authoritative decision of the High Court in **Boston Deep Sea Fishing and Ice Co Ltd v Ansell (1888) 39 Ch D 339**, which holds that it is a sufficient answer to a claim of wrongful dismissal to point to conduct of the employee prior to dismissal which would if known have justified the summary dismissal of the employee.

119. That is the mirror image in the common law of the principle in **Devis v Atkins**. Whatever arguments there might be as to whether commission of the offences committed by the claimant amounted to repudiatory conduct

such as to justify summary dismissal, the point is not before me in those terms. The **Boston** case does however provide reinforcement for my view that it would not be just or equitable for the claimant to receive any compensation in the rather stark circumstances of this case; and that, rather than points of contract law, is the test I am required to apply in an unfair dismissal case..

120. t follows that it is also unnecessary to determine the claimant's claim for an uplift on the compensatory award by reason of the respondent's unreasonable failure to comply with the ACAS Code on Disciplinary and Grievance procedures, and I do not do so.

Employment Judge: Peter Wallington

Date of Judgment: 17 August 2017

Entered in register and copied to parties: 21 August 2017