

# Is there a different burden of proof in relation to misconduct cases in which there is a possibility that an employee who works with children may pose a danger? No, says the EAT in K v L UKEAT/0014/18/JW

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## Background facts

1. The Claimant had been employed by the respondents for 20 years as a teacher. On 30th December 2016 the Police entered his property having been granted a warrant to search for and seize computers in the possession of the Claimant. The warrant was based on intelligence that indecent images of a child or children had been downloaded to an IP address associated with the Claimant. The Claimant lived at the address with his son. One of the computers was found to have data that was of interest to the Police.
2. The Claimant advised the Head Teacher that he was involved in a Police enquiry into potential indecent pseudo images and he denied that he had anything to do with the photographs. He was suspended while matters were investigated.
3. The Claimant was charged under s 52A of the Civic Government (Scotland) Act 1982, which provides that it is an offence to have any indecent photograph or pseudo-photograph in one's possession. The case was referred to the Procurator Fiscal who decided not to prosecute. The letter advising the Claimant of this stated that "*I have now reviewed the case and have decided on the basis of current information available to me to take no further action against you at this time*". The Claimant was expecting the letter to state that he had no case to answer. He made enquiries with the Crown explaining that he was a teacher and that in order for his school to make an informed decision about his continued employment, they wished to establish what evidence they had against him. The Respondent also requested such information from the Crown.

4. The Crown responded stating that they had enclosed a copy of the summary evidence which was provided only for the purpose of their investigation and was not to be disclosed to anyone else. This letter was produced in evidence to the tribunal. However, the whole paragraph containing the summary of the evidence was redacted. The Respondent's HR advisor did not share the summary of evidence with the Head Teacher, the other investigating officer. The Head of Service (who conducted the disciplinary hearing) had no knowledge of this letter.
5. At the investigatory meeting, the Claimant confirmed that the computer that had been seized was his and he accepted that indecent photographs had been found on it, but denied they were anything to do with him. An Investigation Report was prepared, 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 became 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 GTC Code of Professionalism and Conduct which states "you should avoid situations both within and outwith the professional -5- context which could be in breach of the criminal law, or may call into question your fitness to teach."*

6. The Claimant was invited to a disciplinary hearing. He was advised that he was facing the following allegation:

*"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."*

7. No reference was made to the possibility that if the allegations became known, this might cause reputational damage to the Respondent.
8. At the disciplinary hearing, the Claimant accepted that the Police had found indecent images on the computer. He stated however that he did not know how they got there. He pointed out that he was not the only person with access to the computer- he shared the house with his son, and both his son and his son's friends had access to the computer. He said that it could have been his son's friends that downloaded the images. It was found that although the subject of reputational loss was referred to by the Senior HR Advisor during the hearing, there was not a great deal of discussion about it. The Head of Service had mentioned however that reputational damage might occur if in the future a prosecution occurred.

9. The Head of Service concluded that there was insufficient material upon which to conclude that the Claimant was responsible for downloading the images. However she decided that the Claimant should be dismissed for the following reasons:

*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 any current vacancy within the Council...If in the future, either by criminal prosecution or otherwise it was shown that you had committed an offence 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.*

### **Employment tribunal decision and grounds of appeal**

10. The Claimant brought a claim for unfair dismissal. The claim was dismissed and he appealed of the following grounds (inter alia):

- (i) The invite letter did not give notice that he was at risk of being dismissed on the ground of a risk of reputational damage;
- (ii) The burden of proof required in respect of a conduct dismissal is that the employer should be satisfied on the balance of probabilities that the offence had been committed, whereas here the dismissing officer had concluded that there was insufficient evidence to conclude that the Claimant was guilty. In such circumstances, the judge was wrong to find that the dismissal was fair.

### **Employment Appeal tribunal judgment of Lord Sumner**

#### **(i) Notice of grounds for dismissal**

11. The Judge accepted that the reason for dismissal was different in nature to the allegations which the Claimant faced. However, he concluded that the invite letter did reflect the matters for which he was dismissed. Lord Sumner concluded that this was an error of law. Case law has made it clear that an employer must give notice to an employee of the ground on which dismissal was sought [see Strouthos v London Underground Ltd [2005] IRLR 636]. This requirement is consistent with the basic requirements of natural justice that an employee should know the ground of complaint he or she faces. It is also consistent with the idea that the complaint should enable the employee to know what issues he or

she should be ready to address by way of suitable evidence and supporting submissions. It is insufficient for the matter simply to be referred to in the investigation report. As the case of Leach v The Office of Communications [2012] I.R.L.R. 839 shows, reputational damage secondary to misconduct is regarded as a separate ground of dismissal and raises a set of considerations that are connected to but distinct from dismissal based on misconduct. The matter of reputational damage was not addressed by the Claimant and this is a matter on which detailed submissions and suitable evidence would have been of benefit.

**(ii) Standard of proof**

12. The decision to dismiss was made on the basis, not that the Claimant had, on balance, downloaded the images, but rather that there was no absolute guarantee that he had not. This approach was endorsed by the tribunal. The Claimant argued that the incorrect burden of proof had been applied and relied on the case of Re B (Children) [2008] 3 WLR 1 in which it was held that:

*If a legal rule requires a fact to be proved (a “fact in issue”), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not.*

13. The Employment Judge did not consider that these observations were relevant to decisions made by employers in an employment context. Lord Summer disagreed. He was of the opinion that the Head of Services was fulfilling a quasi-judicial role and concluded that the obligation on an employer to act reasonably and in accordance with equity required the Respondent to apply the balance of probability test. Plainly she was not permitted to guess. Some objective standard had to be applied. It was unreasonable to apply a test that in effect entitled the employer to dismiss unless all doubt as to the Claimant’s guilt had been excluded. The Burchell guidelines indicate that the employer must have a “reasonable suspicion amounting to a belief” that the employee is guilty of the conduct in question. Given that it was concluded that there was insufficient evidence to show that the Claimant was guilty of misconduct, the Head of Service could not have the requisite belief. The proper question to be asked was whether it was likely that the Claimant had downloaded the images.

## Reputational damage

14. On the basis that Lord Summer's findings on the above may be subject to challenge, he addressed the position that would arise had the complaint been based in whole or in part on reputational damage.
15. The Respondent had relied upon the case of A v B [2010] IRLR 844 [which later became Leach v Office of Communications [2012] IRLR 839 when the matter reached the Court of Appeal and the anonymisation orders were overturned]. However, the tribunal did not cite this case in respect of reputational damage and its interrelationship with misconduct allegations. In Leach, the employer was the independent regulator and competition authority for the communications industry in the UK, and it had to have regard to the vulnerability of children. The employee was in a senior position. During his recruitment process, he was arrested in Cambodia on charges that he had sexually abused children. The case generated press interest. He gave false information to the press about his employer's identity. The case against him was later dismissed. He did not advise his employers of these matters. However when they found out, they investigated the allegations and was satisfied of his innocence.
16. Thereafter a body called the Metropolitan Police Child Abuse Investigation Command (hereafter "CAIC") got in touch with the employer and warned that they had intelligence that indicated he had engaged in paedophile activity in Cambodia. They warned the employer that they considered he was a risk to children. CAIC disclosed to the employer that the employee had pretended to be a doctor in order to gain access to children in Cambodia and that he had frequented brothels in Cambodia known to supply children. This led to a disciplinary hearing where the CAIC disclosures were discussed. The employer expressed a concern that if these allegations turned out to be true and became public knowledge they would suffer reputational loss if they continued to employ him. It was also argued that the relationship of trust and confidence had broken down as Mr Leach had withheld information from them. Mr Leach was dismissed and his claim for unfair dismissal failed.
17. Lord Summer was of the opinion that the facts in Leach were very different to the present case. For instance: the employer had been provided with detailed information with tended to support misconduct; the employer critically analysed the information they had with the employee and they sought to establish the reliability of the Police evidence so far as possible; there was press coverage of this matter, and their press advisor had evaluated

the risk of adverse coverage and considered it to be a real one; and the employee had there concealed the court case.

18. Leach demonstrates that dismissals based on reputational damage may be fair even though the conduct giving rise to the reputational damage is disputed by the parties. In these cases, given the nature of the allegation, there is an understandable reluctance to require the employer to make a finding as to the truth or falsity of the allegations. The Court of Appeal observed that the employer did not decide that the employee “*was in fact guilty of the matters disclosed by CAIC*” but nevertheless - “*.. was entitled to treat the information received from CAIC under an official disclosure regime as reliable... It was entitled to conclude that the responses (of the employee) were not... wholly convincing and not as convincing as they had been in the past. The employment tribunal held that it was reasonable for the employer to conclude that there was no significantly legitimate reason to discount or abandon the CAIC view.*”
19. In Leach, Underhill pointed out that a balance has to be struck between the competing interests of an employee who may be dismissed (and their career tarnished) on the basis of allegations which they did not have a chance to challenge in a court of law versus a need on some occasions for employers to be made aware of facts which may indicate that an employee is a risk to children.
20. Lord Summer distinguished this case on the basis that, as the Head of Service had not seen a summary of the evidence, the Claimant was dismissed in ignorance of what kind of images were downloaded, what level of gravity they were assessed to have, how many images were downloaded, when they were downloaded, or whether the images may have been accessed remotely. There was no indication that the Employment Judge had applied the guidance in Leach to the question of dismissal on the ground of reputational damage.
21. Lord Summer referred to the following observation in Leach, which had been cited by the Respondent in their submissions:

*“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”*
22. Whilst he acknowledged that this could be read as suggesting that dismissal was open if there was a *risk* that the misconduct had occurred, he disagreed that this was authority for such a proposition. The legal regime for those dismissed because of suspected of child sex offences is the same for employees who face other grounds of dismissal. The

protections afforded by s 98 of the 1996 Act are applicable to all employees although of course what is reasonable will vary according to the nature of the case.

23. Lord Summer thus allowed the appeal and substituted a finding of unfair dismissal.

## Commentary

24. The EAT provides helpful guidance to employers who may be navigating this extremely difficult area. It can be all too easy in a situation in which there is a serious allegation made against an employee who works with children to have a knee jerk reaction and to dismiss on the basis that *any* risk is too great a risk. However the EAT have made it clear that this is not the correct approach to follow. The usual standard of proof applies in conduct dismissals and the employer must come to an informed decision as to whether, on the balance of probabilities, the employee is guilty of the misconduct alleged. They must critically analyse all of the evidence and seek to establish the reliability of such evidence where possible.

25. However, it strikes me that there is something of a tension between the approach of Lord Summer (that an employer must make a finding as to the guilt of the employee) and the judgment in Leach. In Leach, the employer had *not* decided that the employee was guilty of the matters which were brought to their attention yet it was found that the dismissal was fair. This was on the basis that it was found that the employer was entitled to treat the information and viewpoint of the CAIC as reliable. The tension arguably can be resolved by the fact that in Leach, whilst misconduct had not been established, the dismissal was held to be fair on the basis of some other substantial reason. Employers may thus wish to consider that, if misconduct is likely to be difficult to prove, other potential grounds for dismissal (such as reputational damage or a loss of trust and confidence) should be relied upon as an alternative to conduct. Indeed this is likely to be the safest approach to take in such situations, as clearly the employer is not in a position to carry out their own full investigation into the alleged misconduct and may well struggle to form a reasonable belief in the employee's guilt in relation to events which occurred outside the workplace and to which they have no witness evidence.

26. If an employer does go down the route of relying upon reputational damage, this must be treated as a separate allegation to misconduct and not simply tagged onto the reason for dismissal at the end of the proceedings. An employee must be given sufficient notice of such an allegation, and the employer must put their mind to whether such a risk in fact exists.

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