

Is mere suspicion of guilt enough to dismiss a teacher because of safeguarding concerns?

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L v K [2021] CSIH 35

This appeal to the Court of Session concerned a teacher at a school in Scotland. Police Scotland officers attended his home to carry out enquiries related to an IP address linked to online indecent images. Subsequently he was charged with possession of a computer containing indecent images of children, together with his son, who lived with him and had access to the computer. However, ultimately, no criminal proceedings were brought against either of them. The prosecuting authority sent the teacher a letter stating that he was not being prosecuted, but the right to do so was reserved. His solicitor advised that this letter was in standard terms, and his son received a similar communication.

The teacher attended an investigatory hearing arranged by the local education authority, his employer, and disciplinary proceedings were initiated. The teacher accepted that he had a computer in his home which contained indecent images, but said he did not know how they came to be there. His son and his son's friends had access to it. His solicitor also gave evidence. She could not say why there had been no prosecution, but provided possible reasons, for example, insufficient evidence. The issue of reputational risk to the employer was raised at the disciplinary hearing, but there was no significant discussion of it. At the conclusion of the hearing, the view of the head of service and HR was that it could not be concluded that the teacher downloaded the images, but it could not be confirmed that he had not been involved. This gave rise to safeguarding concerns and to reputational risk, the latter at least in part if he was prosecuted in the future and it became known that in the meantime the employer had taken no action. A formal risk assessment came to the conclusion that the teacher posed an unacceptable risk to children. A letter of dismissal was issued, and the teacher did not exercise his right of internal appeal.

The teacher made a claim of unfair dismissal to the Employment Tribunal. The employer submitted that the dismissal was for "some other substantial reason of a kind justifying

dismissal” (SOSR) in terms of section 98(1)(b), namely that the teacher had been charged with possession of a computer which contained indecent images of children; the right to prosecute had been reserved; the teacher accepted that his computer contained indecent images; his responsibility for this could not be excluded; and that as a result he was deemed to present an unacceptable risk to children. In addition, there was the potential for reputational risk to the employer. There was a breakdown in the trust and confidence which the employer required to have in the teacher. The main contention on the teacher’s behalf was that the true reason for the dismissal was the employer’s belief and pre-determination that was guilty. However, the ET was satisfied that the reason given for the dismissal was genuine and substantial and was potentially a fair one. It also determined that the employer had acted reasonably in dismissing for that reason, so the claim was dismissed.

The teacher appealed to the EAT, which upheld two of his five grounds of appeal. First, the letter of invitation to the disciplinary hearing gave no notice that reputational damage was a potential ground of dismissal, which rendered the dismissal unfair. Second, the EAT’s understanding was that the dismissal was on grounds of misconduct, and the teacher could not be dismissed because he *might* have committed the offence. In the EAT’s view, the case could be distinguished from *Leach v The Office of Communications*: the evidence was insufficient to support dismissal on the ground of reputational damage, as the risk of that had abated with the decision not to prosecute. In the EAT’s view, the teacher could only be fairly dismissed if the evidence indicated that the employer was satisfied that he was responsible for downloading the images.

The Court of Session disagreed. The EAT had proceeded on the erroneous basis that the reason for the dismissal was conduct related. However, as the ET found, the teacher was dismissed for “some other substantial reason”, which did not include a belief that the teacher was responsible for, or involved in, the images being on his computer. Once the ET had determined that the SOSR was genuine and substantial, the only remaining question was whether the employer had acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. The ET had correctly recognised that the issue was whether the decision to dismiss for the stated reason fell within the band of reasonable responses and its decision was free of error or legal flaw. The Court of Session commented that the decision in *Leach* was that a substantial reason for dismissal had been established and that dismissal was a reasonable response by the employer, notwithstanding that it carried a grave risk of serious injustice to the employee. This was essentially a question for the ET’s assessment of the facts found in the particular case. As for the question of procedural fairness,

again that was primarily a matter for the ET, whose decision should be respected unless it was tainted by an error in law.

Comment

This is a case involving a scenario which practitioners may have encountered before among employers concerned with the safeguarding of children: where a suspicion attaches to an employee that they pose a risk to children, but there is insufficient evidence to establish their innocence or guilt, and there is an associated reputational risk to the employer. The Court of Session observed in this case that an employment contract is a bilateral relationship, and such cases throw the parties' respective interests into acute and direct conflict. Nonetheless, however the case may seem from the perspective of the employee, particularly if in fact he is blameless, once a substantial and genuine reason in terms of section 98(1)(b) is established, the statutory test in subsection 4 must be applied.

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