EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 35
XA82/20

Lord Menzies
Lord Malcolm
Lord Woolman

OPINION OF THE COURT

delivered by LORD MALCOLM

in the Appeal

by

L

Appellant

against

K

Respondent

Appellant: Miller, solicitor advocate; Clyde & Co. (Scotland) LLP
Respondent: Bain QC; A & WM Urquhart

7 July 2021

Introduction

[1] In this appeal from a decision of the Employment Appeal Tribunal (EAT), the background circumstances can be summarised as follows. Police Scotland officers attended at the home of the respondent (hereafter referred to as "the teacher") to carry out enquiries relative to an IP address linked to online indecent images. They removed a number of computers. Subsequently he was charged with possession of a computer containing indecent images of children, all in terms of section 52A of the Civic Government (Scotland)

Act 1982. His son, who lived with him, was similarly charged. Ultimately no criminal proceedings were brought against either of them. The police retained possession of the computer.

[2] The teacher informed the headmaster of the school where he was employed as to what had happened. The headmaster sought advice from the local education authority (hereafter referred to as "the employer"). Its HR department asked the prosecuting authority (COPFS) as to why there had been no prosecution, and advice was sought as to the level of risk posed by the teacher. It was told that such information would normally be provided only to the General Teaching Council for Scotland, but it was sent a redacted summary of the evidence obtained. The HR employee receiving this understood that it was strictly for her eyes only, so it was not sent to the headmaster nor did it play any part in the subsequent procedure.

[3] The teacher attended an investigatory hearing arranged by his employer. He could not recall where he had purchased the computer. His son had access to it. The police had told him that it contained illegal material. After he was charged he was told that a report would be sent to COPFS, which in due course sent him a letter stating that he was not being prosecuted, but the right to do so was reserved. His solicitor had advised that the letter was in standard terms. His son received a similar communication. When asked whether a computer with indecent child images had been in his possession within his household, he answered "Obviously yes."

[4] Disciplinary proceedings were initiated. The headmaster and HR reported on the findings of the investigatory hearing, including the teacher's acceptance that the computer contained indecent images of children. The employer's head of service instigated a disciplinary hearing at which the teacher again confirmed that he had a computer in his

home which contained indecent images. He did not know how they came to be there. His son and his son's friends had access to it. His solicitor gave evidence but could not say why there had been no prosecution. She provided some possible reasons, for example, insufficient evidence; if the party responsible could not be identified; or if the charges were downgraded. The issue of reputational risk to the employer was raised but there was no significant discussion of it.

[5] 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; however 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. The teacher did not exercise his right to an internal appeal against that decision.

The proceedings before the Employment Tribunal

[6] The teacher made a claim of unfair dismissal. It was considered by an Employment Tribunal (ET) which heard evidence. The issues were first, whether there was a fair reason for the dismissal in terms of section 98(1)(b) of the Employment Rights Act 1996, and second, whether the decision to dismiss was within the band of reasonable responses in terms of section 98(4).

[7] Once the evidence had been heard, the parties made their closing submissions. The employer drew attention to its statutory responsibility for child protection. It 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.

[8] The teacher's representative presented a large number of lines of defence. The main contention was one of bad faith in that the true reason for the dismissal was the employer's belief and pre-determination that he was guilty. The decision had been delayed in the hope that he would be prosecuted. When that did not happen a reason for dismissal had been contrived. His replacement had been appointed before the investigations were concluded.

[9] The ET noted that the teacher's post had been filled on a temporary basis. It held that there had been no deliberate attempt to delay matters. The employer had not pre-determined matters against the teacher. The ET was satisfied that the reason given for the dismissal was genuine and substantial, and was potentially a fair one. In the context of the criminal charge and the fact that it had not been disputed that the images were on the teacher's computer, it concluded that the test for SOSR of a kind justifying dismissal under section 98(1)(b) of the 1996 Act was met.

[10] The issue then was whether, in terms of section 98(4), the employer had acted reasonably in dismissing for that reason. The test is an objective one. The teacher knew he was at risk of dismissal. He was aware of the charges and the potential consequences of the disciplinary proceedings. It was reasonable for the employer to have legitimate concerns as to his continuing employment. It was reasonable to conclude that there was a risk that the

teacher was involved. He had not explained how the images came to be on his computer. He had been charged by the police. Though not prosecuted, he had not been exonerated by the police or the prosecuting authority. There was an unacceptable risk to children if he returned to work. It was reasonable to conclude that there was a risk of reputational damage, and also that there had been a breakdown in trust and confidence. The SOSR reflected the matters set out in the letter calling the teacher to the disciplinary hearing, the terms of which could not be said to be unreasonable. The focus was not on whether the teacher was guilty. Clarification and further information had been sought from COPFS. It had not been unreasonable for the information provided to have been excluded from the investigation. The ET held that the decision, while a difficult one, fell within the band of reasonable responses. The claim was dismissed.

The appeal to the Employment Appeal Tribunal

[11] The teacher appealed the ET's decision. The Employment Appeal Tribunal (EAT) upheld two of his five grounds of appeal. First, the view was taken that the letter of invitation to the disciplinary hearing was based on misconduct and gave no notice that reputational damage was a potential ground of dismissal. It was of no consequence that it was mentioned in the report issued after the investigation stage. The lack of notice in the letter rendered the dismissal unfair.

[12] Secondly, the EAT's understanding was that the dismissal was on grounds of misconduct. Given that his guilt could not be established, the alleged misconduct should not have been taken into account. The teacher could not be dismissed because he might have committed the offence. There was only one standard of proof, namely the civil one of balance of probabilities. Reference was made to observations of Lord Hoffman in *In re B*

(Children) [2009] 1 AC 11 at page 17 to the effect that if a legal rule requires a fact to be proved, a judge or jury must decide whether it did or did not happen. This analysis was applicable here; though it was also observed that if the dismissal had been based on a substantial doubt short of probability the employer's argument based on section 98 "would have had more force".

[13] In recognition that these views might be open to challenge, it was said that the case could be distinguished from *Leach* v *The Office of Communications* [2012] ICR 1269. In light of the "strictures in *Leach*" the evidence was insufficient to support dismissal on the ground of reputational damage. In any event the "spectre of reputational damage" had abated with the decision not to prosecute, thus the approach adopted was unreasonable and not compliant with section 98(4). The hypothesis of a future conviction only arose as a concomitant of an approach to risk that was unlawful. Matters had to be assessed on the evidence, not on the basis of unknown risks.

[14] It is plain that the EAT's view was that the teacher could only be fairly dismissed if the evidence indicated and the employer was satisfied that he was responsible for downloading the images. A decision of unfair dismissal was substituted and the case remitted to the ET for further procedure. The employer has appealed against that decision to this court.

The submissions for the employer

[15] An ET enjoys a wide margin of appreciation as to the tests of fairness and reasonableness. A decision of an ET is not flawed simply because the EAT takes a different view. Earlier appellate decisions reached on their own facts do not alter this. They do not impose rules or strictures. That said, the present circumstances bear similarities to those in

Monie v *Coral Racing Ltd* [1981] ICR 109 (CA). The decision in that case confirms that, depending on the particular circumstances, a suspicion of wrongdoing can be sufficient to justify dismissal.

[16] The ET was entitled to take the view that the teacher was made aware of the issues facing him at the disciplinary hearing and thus the procedure was fair. A difference of view on this did not entitle the EAT to interfere, see *Boyd* v *Renfrewshire Council* 2008 SCLR 578 at paragraph 29. The main problem in *Boyd* was the failure to warn of the risk of dismissal. Here the teacher was told that he might be dismissed. The EAT erred in approaching matters on the basis that unless everything is specifically mentioned in the letter of complaint the dismissal is automatically unfair. The touchstones are fairness and reasonableness. Thirteen months elapsed before the hearing during which there had been three investigatory meetings. By the time of the tribunal hearing, the contentions for the teacher included a denial that there were any indecent images on the computer, a position inconsistent with his earlier statements and rejected by the ET. He was afforded a proper opportunity to put forward a defence, for example by way of an explanation as to how much access his son and his friends had to his computer.

[17] Much of the EAT's decision focussed on the issue of reputational damage, but the employer was also concerned that it had a statutory responsibility to protect children. It required to be able to have trust and confidence in its teachers. The EAT did not engage with this important part of the reason for dismissal. In terms of section 98, and, contrary to the understanding of the EAT, the dismissal was for SOSR under section 98(1)(b), not misconduct under section 98(2). The ET was not disabled from rejecting the claim of unfair dismissal in the absence of proof that the teacher committed a criminal offence. The authorities demonstrate that there can be circumstances short of a belief in guilt which can

justify dismissal. Reference was made to the observations of Mummery LJ in *Leach* at paragraphs 51-53. The section 98 test "is essentially a question for the employment tribunal's assessment on the facts found in the particular case". The EAT should have recognised this and respected the decision of the ET.

[18] In any event, even if there was merit in some or all of the EAT's concerns, the correct approach would have been to remit to the fact-finder to proceed in the light of its guidance rather than resolve the merits of the dispute. Reference was made to *Jafri* v *Lincoln College* [2014] IRLR 544 (CA) at paragraphs 21 and 45-46.

The submissions for the teacher

[19] The issue before the EAT was a question of mixed fact and law. The EAT could interfere because the ET wrongly applied the law to the primary facts.

[20] Reputational damage was the main factor influencing the decision to dismiss, yet it was not mentioned in the letter of complaint. The employee must know the complaint he is facing: see *Boyd* (cited above) at pages 586-587 and *Strouthos* v *London Underground* [2004] IRLR 636. There was a duty to make reference to reputational damage in the letter. In any event there was no evidential basis for a concern of reputational damage.

[21] The EAT correctly required a decision on guilt or otherwise, as per Lord Hoffman's observations in *In re B*, which had to be established on the civil standard of proof. In order to justify dismissal the employer needed to establish its belief in the teacher's guilt and that there were reasonable grounds for such. However there was never more than a cloud of suspicion over the teacher.

[22] *Monie* could be distinguished because in the present case the suspicion of wrongdoing was not confined to employees. The guidelines in *British Home Stores Ltd* v

Burchell [1980] ICR 303 were applicable. They were not met given that the employer expressly accepted that the teacher's guilt had not been established. Under reference to *Leach* at paragraph 29, the ET failed to recognise that a decision to dismiss could only be reasonable if a critical view was taken to the information about the employee.

[23] By way of an illustration of the proper approach reference was made to *Z* v *A* [2014] IRLR 244 (EAT). It concerned an allegation of historic abuse levelled at a school caretaker where it was held that the school could not dismiss simply because an allegation had been made. There had to be some evidence to support it. The available information here was insufficient to support a fair dismissal, for example as to the number and nature of the images. A mere risk of harm is not enough for dismissal on the ground of reputational damage. There is no burden on the employee to disprove an allegation.

[24] There being no outstanding factual issues, there was no need for a remit to the ET. The EAT was entitled to substitute its own decision on the merits of the claim.

Analysis and decision

[25] The EAT proceeded on the erroneous basis that the reason for dismissal was conduct related, namely the downloading of indecent images of children by the teacher, see the summary section of the judgment and paragraphs 34-35. This led to the view that Lord Hoffman's observations in *In re B* were applicable, and that the employer and the ET had to be satisfied that there was a proper basis for believing that the teacher was probably guilty. Conduct (or misconduct) is one of the specified potentially fair reasons for dismissal in section 98(2), but, as the ET made clear, the teacher was dismissed for "some other substantial reason" as provided for in subsection 1(b), all as set out above.

[26] In our view once the ET determined that the SOSR was genuine and substantial, and leaving aside the lack of notice point, the only remaining question was whether "the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee", a matter to be determined in accordance with the substantial merits of the case, see section 98(4). In this regard it can be noted that the SOSR did not include a belief that the teacher was responsible for, or involved in, the images being on his computer.

[27] Once the nature of the reason for dismissal is properly understood, the case can be distinguished from others where, in the context of an allegation of misconduct, it was held that a reasonable belief in guilt was necessary. It was clear that the teacher had been charged under section 52A with possession of a computer containing indecent images of children. There was no question but that the right to prosecute had been reserved. The teacher had accepted that his computer contained such images. The employer was entitled to proceed on that basis, and that his involvement in their existence could not be excluded. Being an education authority the employer was conscious of its statutory responsibility to protect the children entrusted to it. In the proven circumstance it decided that it could no longer place the necessary trust and confidence in him, not because it was satisfied that he was guilty, but because there was a real possibility that he was an offender. In short the employer was not prepared to take the risk that the teacher was responsible for the images. There was an additional concern as to reputational risk. It was submitted that this was the main reason for the dismissal but we see nothing to support this in the findings of the ET.

[28] The ET rightly described the decision facing the employer as a "difficult one". There may be education authorities who would not have dismissed the teacher. They might take the view that they needed more information, for example as to the number and nature of the

images. They might consider that it would be wrong to dismiss someone who could well be innocent. Notwithstanding their child protection responsibilities, they might be prepared to take the risk which the employer here considered to be unacceptable. However that such can be described as reasonable responses, does not mean that this employer's decision to dismiss was unreasonable. The ET applied the correct test to unchallenged findings of fact, and it is well established that an appeal can be taken only on a question of law. That an EAT or Court of Appeal might have taken a different view from the ET is neither here nor there; see *Melon* v *Hector Powe Ltd* [1981] ICR 43, Lord Fraser of Tullybelton at page 48. The ET correctly recognised that the issue is whether the decision to dismiss for the stated reason fell within the band of reasonable responses, and for the reasons summarised above, which we regard as free of error or legal flaw, held that it did.

[29] In *Monie* it was known that one or both of two employees stole from the employer. Which one was responsible, or whether both were involved, could not be determined. In such circumstances the EAT held that the employer acted unreasonably in dismissing them both. It would require to have grounds for believing that that both were involved. Likewise the certainty that at least one of them was involved was insufficient. Neither should have been dismissed.

[30] This view did not prevail in the Court of Appeal. The only question was whether the employer acted reasonably. Proof as to who stole the money was not a pre-condition of reasonableness. Each case depends on its own facts and circumstances. Counsel for the teacher sought to distinguish the case in that unless both were dismissed it was certain that a thief remained on the books, whereas in the present case continued employment of the teacher did not guarantee that the children in his care were exposed to someone who views indecent images. That is a difference, but it does not remove the importance of confirmation

of the primacy of the test in section 98(4), as opposed to any supposed blanket rule that an employee cannot be dismissed on the basis of a suspicion of wrongdoing.

[31] The EAT was influenced by the observations, described as guidelines, of Arnold J in *Burchell* at page 304 and, in particular the following:

> "What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time".

[32] In *Monie* Sir David Cairns noted a Court of Appeal decision which cited this passage, but he added that the Lords Justices were not saying that it was of universal application. His Lordship considered that in the particular circumstances of *Monie* the industrial tribunal did not err "in asking themselves whether there were solid and sensible grounds on which the employers could reasonably infer or suspect dishonesty", and it was entitled to find that the employers acted reasonably, see page 122. Stephenson LJ, who was on the bench in the earlier case, agreed. He was anxious that a valuable guideline should not become "an inflexible rule which constrains tribunals to decide cases contrary to justice and equity and to the letter and spirit of the statute." For Dunn LJ it was not necessary for the employer to believe in the guilt of one of the two employees; the question was whether the employer acted reasonably in treating the reason, namely that equal suspicion fell on both rendering it impossible that either could be retained, as sufficient for dismissal. "That is essentially a jury question - and there was ample evidence on which the industrial tribunal could so find." (page 124)

[33] The EAT was also influenced by concerns expressed by Mummery LJ in *Leach* (cited above), a case which bears some similarities to the present. The principal reason for dismissal was reputational damage if the employer continued to engage someone subject to

an unproven accusation of child abuse in Cambodia. It was said that there was a breakdown in trust and confidence, hence the dismissal. His Lordship observed that the trust placed by an employer in an employee is at the core of their relationship, and that such trust can break down in a wide spectrum of circumstances, sometimes falling short of a "conduct" reason. However, if it is to justify a dismissal, the statute requires that the other reason must be "substantial". His Lordship stressed that the phrase "breakdown in trust" is not a mantra to be mouthed if there are difficulties in establishing a more conventional reason, see paragraph 3.

[34] Plainly this is a proper and legitimate concern, but it is worth noticing that the decision in *Leach* was that a substantial reason 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. The test in section 98(4) required to be applied. This was "essentially a question for the employment tribunal's assessment on the facts found in the particular case". An appeal could not be used to re-argue a case in the hope of a more favourable outcome, see paragraph 52.

[35] An employment contract is a bilateral relationship. Cases such as the present 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. We consider that the EAT not only erred in its categorisation of the reason for dismissal, it also wrongly interfered with a decision which was open to the ET and was free of legal error.

[36] Similar issues arise in respect of the other basis for the EAT upholding the appeal, namely the absence of any mention of reputational risk in the letter requiring the teacher to

attend a disciplinary hearing. The section 98(4) test can be failed if there is procedural unfairness which renders the decision to dismiss unreasonable. Again this is primarily a matter for the ET whose decision should be respected unless it is tainted by an error in law, or is itself beyond the bounds of reasonableness, in other words is perverse.

[37] The letter stated that the reason for the disciplinary hearing was the police investigation into illegal child images on the teacher's computer found in his home and its relevance to his employment as a teacher. It stated that he should be aware of the seriousness of the allegations and that dismissal may be considered. He would be given an opportunity to explain his position and to call witnesses. He could be accompanied. He was given a copy of the investigatory report and its appendices. At the hearing he was accompanied by his employment rights adviser. He and his solicitor gave evidence. As noted above, reputational risk was discussed at the hearing.

[38] A number of alleged deficiencies in the letter were presented to the ET in submissions and each was addressed. The main contention was that the letter failed to mention a charge of gross misconduct. Having quoted the letter the tribunal noted that the teacher was aware that he might be dismissed. He understood the nature of the complaint, namely that he was a teacher who possessed a computer which contained indecent images of children. The reason for dismissal was based on the elements identified in the letter and which were highlighted in the report provided to him in advance of the hearing.

[39] One of the criticisms was that the letter did not mention reputational risk. The ET noted that it was mentioned in the report. It stated that the charge was of a serious nature which if it became publicly known could bring the employer into disrepute. Overall the ET detected no unreasonableness in the procedures adopted or flowing from the terms of the letter.

[40] Effectively the EAT proceeded on the basis that in the absence of a mention of reputational risk in the letter, the ET had to conclude that the employer acted unreasonably in deciding to dismiss for a reason which included such a concern. Each tribunal referred to *Boyd* and *Strouthos* (both cited above). It was contended that these decisions support the EAT's decision. However we agree with the submission that other cases are of limited assistance given that every determination will fall to be made on the particular facts and that sensible people will be entitled to differ over the correct outcome in respect of the reasonableness test.

[41] In any event in important respects *Boyd* is materially different on its facts. The employee decided not to tell the whole story of the matter under investigation in order to protect his colleagues. If he had been told that he might face dismissal, or if the serious deliberate conduct which ultimately led to his dismissal had been set out in the charge against him, he would have told the truth. The procedure adopted was unfair because it deprived him of the opportunity to present a defence to the matter which persuaded the employer to dismiss him. In this regard the case was similar to *Strouthos* in that there was a breach of a "fundamental principle of a fair disciplinary procedure", namely that the employee should know the case against him, see Lord Kingarth in *Boyd* at paragraph 34. When the full circumstances of the present case are taken into account, we do not consider that the absence of a mention of reputational risk in the letter falls into this category.

[42] The EAT suggested that the concern as to reputational risk lacked any evidential basis, or at least not such as would justify dismissal. The latter point was a matter for the ET, but in any event we consider that the matter was self-evident and hardly required detailed elaboration, not least since it was ancillary to the child protection considerations.

[43] In summary we are unable to identify any flaw in the ET's analysis and reasoning on this issue. As Lord Kingarth said in *Boyd* at paragraphs 28-29, the primary question is whether the tribunal, when addressing what is a question of fact, misdirected itself or made a decision which no reasonable tribunal could have made. We answer that in the negative. That the EAT took a different view did not entitle it to interfere.

Disposal

[44] For the above reasons the appeal is upheld and the EAT's decision recalled. The ET's order that the claim of unfair dismissal is dismissed will be restored.