

Appeal No. UKEATS/0006/19/SS

EMPLOYMENT APPEAL TRIBUNAL
52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On: 15 August 2019
At: 10:30am

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

MRS G SMITH

MR P PAGLIARI

ALLAN LAFFERTY

APPELLANT

NUFFIELD HEALTH

RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant

Mr Alastair Hardman
(Advocate)
Instructed by
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For the Respondent

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SUMMARY

TOPIC: UNFAIR DISMISSAL

The Claimant worked as hospital porter. His duties included transporting anaesthetised patients to and from theatre. He was charged with assault to injury with intention to rape. The Respondent, having considered the matter, decided that the risk to its reputation of continuing to employ the Claimant where he had access to vulnerable patient was too great, particularly where charities are subject to greater scrutiny in relation to such matters. The Claimant was dismissed. The Employment Tribunal held that the dismissal was fair.

Held, dismissing the appeal, that the Tribunal had not erred in concluding that the dismissal fell within the band of reasonable responses. The Respondent's belief that there would be a risk to reputation was genuinely held, it had conducted such investigation as was reasonable in the circumstances and the Tribunal was entitled to come to the conclusion that it did.

THE HONOURABLE MR JUSTICE CHOUDHURY

1. We shall refer to the parties as they were below. The Claimant appealed against the judgment of the Glasgow Employment Tribunal (“the Tribunal”), Employment Judge Ian Atack presiding, dismissing his claim that he was unfairly dismissed by the Respondent. The appeal raises the difficult issue of whether an employer acts reasonably in dismissing an employee who has been charged with a criminal offence of a type that has the potential to cause the employer reputational damage. We have found this quite a difficult case.

Background

2. The Respondent is an independent sector health care organisation. It is a registered not-for-profit charity that owns and operates a number of hospitals throughout the United Kingdom, including the hospital in Glasgow where the Claimant worked. We were told that it has around 16,000 employees.

3. The Claimant commenced employment with the Respondent in about 1996. He worked in the Respondent’s Glasgow Hospital as an HSSU co-ordinator and theatre porter. His duties included transporting anaesthetised patients to and from operating theatres in the hospital. Throughout his employment the Claimant had an unblemished disciplinary record.

4. On 17 February 2018, the Claimant was arrested by the police and charged with assault to injury with intention to rape. He appeared in court and was released on bail. Soon thereafter, the Claimant informed the Hospital Director, Julie Campbell and the Theatre Manager, of the fact and the circumstances of his arrest. The police informed the hospital directly of the Claimant’s arrest.

5. On 22 February 2018, the Claimant was suspended on full pay pending his investigation.

6. An investigatory meeting was held on 7 March 2018. During that meeting, the Claimant showed Miss Campbell his bail report, which contained the details of the charges against the Claimant, and gave his version of events. He denied the charges. He also showed Miss Campbell a copy of the police report on the incident. Following the meeting, Miss Campbell prepared an investigation report. She concluded that due to the potential reputational damage the charge against the Claimant might cause to the Respondent it was her recommendation that a further meeting be held with the Claimant to discuss his on-going employment. He was therefore invited

to attend the meeting on 9 March 2018 with Mr Matthew Lamb, a Manager at the Hospital with considerable experience. Mr Lamb's questions at the meeting were focused on the potential reputational damage to the Respondent rather than whether or not the Claimant was guilty of the charges themselves. In fact, Mr Lamb made it clear to the Claimant that he was not making a judgment on his guilt or innocence. Mr Lamb noted that the Claimant was unable to give any information as to when his trial might take place. Mr Lamb considered that there were only two options open to him, namely to suspend the Claimant on full pay or to dismiss. He did not consider, given the nature of the charges, that it would be appropriate to allow the Claimant to return to work until his trial had taken place. Mr Lamb considered that if the Claimant were to be found guilty of the charges against him that would cause reputational damage to the Respondent. He was also aware that other charities had recently had problems regarding inappropriate behaviour which had impacted upon their reputation.

7. The Claimant, as we have said, was unable to provide any information as to when his trial might take place. Any period of suspension on full pay would therefore be open ended. Mr Lamb did not consider that an open-ended period of suspension on full pay was an option open to him as that would not amount to a proper use of charitable funds.

8. Based on these matters, Mr Lamb decided that he would dismiss the Claimant on notice because of the potential reputational risk to the Respondent. In coming to that decision, Mr Lamb took account of the fact that the Claimant had a long and unblemished record with the Respondent but considered that the risk of potential reputational damage outweighed that factor. He also took into account the fact that the charity commission had recently issued a release to charities reminding them to be concerned about the risk of reputational damage.

9. The Claimant appealed against his dismissal. The appeal was heard by Mr John Lofthouse, another experienced Senior Manager on 6 April 2018. There had been no change to the Claimant's position by the time of the appeal hearing in that no date for trial had yet been fixed and the Claimant remained on bail. The Claimant complained that his dismissal was unfair given that he had not actually been convicted. Mr Lofthouse, having considered the facts, concluded that there was a potential for reputational damage to the Respondent. He felt that this would occur when the case came to court and might attract publicity. He considered that the potential for reputational damage was considerable if the Claimant were to be found guilty particularly as the Claimant was employed in a hospital where all the patients could be regarded as being vulnerable. The area in which the Claimant worked was where patients were at their most vulnerable. Mr Lofthouse was concerned was that if the Claimant was found guilty it might be felt that the

Respondent had not been fulfilling its duty of care to its patients if it had continued to employ a person facing such charges. He took into account the fact that the Respondent is a charity and that the public has high expectations of such organizations in relation to their duties to protect beneficiaries. Mr Lofthouse decided to uphold the decision to dismiss. He did consider the potential injustice to the Claimant in the event that he was acquitted or that the charges against him were dropped. Mr Lofthouse advised the Claimant that in that event, he would be reinstated with the Respondent on the same terms and conditions and with his continuity of employment preserved. However, the Claimant would not receive pay for the period during which he had not been employed.

10. The Claimant's post was held open in the interim by the Respondent although the work was covered by temporary staff.

The Tribunal's Decision

11. The Tribunal was satisfied that the Respondent's concerns about potential reputational damage were not frivolous or trivial but were sincerely held. The Tribunal was also satisfied that the Respondent had shown that the reason for dismissal was that they considered that should he ultimately be found guilty of the charges against him there was a genuine risk of potential damage to its reputation. On that basis, the Tribunal concluded that the reason was a potentially fair reason as being some other substantial reason for dismissal of a kind such as to justify dismissal. The Tribunal then went on to consider whether it was fair to dismiss for that reason within the meaning of s.94 of the **Employment Rights Act 1996 ("the 1996 Act")**. The Tribunal bore in mind that the Claimant had vigorously denied the charges against him and that he was innocent until those charges were proven. The Tribunal said as follows:

"90. The next question was whether the dismissal of the claimant was within the range of reasonable responses open to a reasonable employer in the circumstances of the case.

91. Both parties referred to the case of *Leach v The Office of Communications* (above). In that case Mummery J cited with approval at paragraph 42, the judgement of the EAT in that case which stated "We are acutely aware, as was the Tribunal, that to justify the claimant's dismissal on the basis of reputational risk in the absence of any established misconduct may involve a grave injustice to him. But it is essential to bear in mind that under section 98 the central question is what it was reasonable for the employer, in the relevant circumstances to do."

92. That makes it clear that the legal point is that the question is not whether the employee has suffered injustice, but whether the employer has behaved reasonably in the circumstances.

93. Mr McCusker referred to the case of *Z v A* (above) where the EAT held an Employment Tribunal's decision that a school caretaker's dismissal, after allegations were made against him of historical sex abuse, was not for some other substantial reason and nor was it fair. That case related to a dismissal due to a loss of trust and confidence and turns upon its own circumstances. At paragraph 24 of that case the EAT referred to paragraph 53 of *Leach* where it was stated "*The circumstances of dismissal differ from case to case. In order to decide the reason for dismissal and whether it is substantial and sufficient to justify dismissal the ET has to examine all the relevant circumstances.*"

94. In this case there was no knee jerk reaction by the respondent to the information given to them by the claimant and by the police. They sought clarification from the claimant as to what happened and when his trial might take place or whether the charges were likely to be dropped. It was only after the initial investigatory meeting that the respondent decided that there should be a further meeting to consider the question of the claimant's future employment due to potential reputational damage.

95. The question to be considered is whether the dismissal of the claimant was within the range of reasonable responses open to a reasonable employer. In the case of *British Leyland v Swift* [1981] IRLR 91 Lord Denning stated "*The correct test is: Was it reasonable for the employer to dismiss? If no reasonable employer would have dismissed him, then the dismissal is unfair. But if a reasonable employer might reasonably have dismissed, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view*" That test was applied in *Iceland Frozen Foods v Jones* (above).

96. It was suggested in submissions that the respondent could have kept the claimant in employment by removing the portering aspects of his duties from him. Unfortunately, that suggestion was not put to either of the respondent's witnesses and as a result they had no opportunity of commenting on whether or not that was a feasible solution. It is however clear from Mr Lofthouse's letter of 10th April that he did consider an alternative to dismissal namely suspension without pay but in his view the potential for serious reputational damage to the respondent posed too great a risk in the current climate where there was increased and close scrutiny of the charitable/not for profit sector and its employees.

97. I was very conscious that Mr Lafferty may well be innocent of the charges against him and that he will have suffered injustice by reason of dismissal. However, as noted above, the question is not whether he suffered injustice but whether the employer has behaved reasonably in the circumstances. In my judgement the respondent did act reasonably in dismissing the claimant because of potential reputational damage which could be caused to them should he be found guilty of the charges. As I have said I was satisfied that the concerns which they held about reputational damage were not fanciful or trivial but were genuine. I did not consider that it could properly be said that in this case no reasonable employer would have dismissed the claimant and accordingly the claim is dismissed."

12. The Claimant sought reconsideration of the judgment. This was refused on 18 December 2018. We should add that the Claimant was in fact acquitted at the trial which took place after the

Tribunal hearing. We were told today that the Claimant has been reinstated to his role in accordance with the terms of Mr Lofthouse's indication at the internal appeal stage.

The grounds of appeal

13. The Claimant raised two grounds of appeal although both are related to each other:
 - a. The first is that the Tribunal erred in that it had failed to consider whether the Respondent had undertaken as much investigation into the matter as was reasonable. In particular, it is said that the Respondent failed to make enquiries with the Crown about the potential outcomes, timescales, the evidence available make any inquiry or assessment of the actual risk posed by the Claimant.
 - b. The second ground of appeal is that the Tribunal failed to follow the authority of **Leach v The Office of Communications** [2012] IRLR 839 in concluding that the Respondent had acted reasonably in treating the risk of reputational damage as a sufficient reason to dismiss in all the circumstances. In particular, it is said that the Tribunal failed to assess for itself all the relevant circumstances including whether there was an objectively rational basis for considering that there was a risk of reputational damage. Furthermore, it is said that the Respondent did not consider fully or at all the reasonable alternatives to dismissal.
14. The Claimant is represented today by Mr Harden. Mr Harden refined those grounds to a certain extent in that he focused, first of all, on whether or not the Tribunal had correctly found that the Respondent had established some other substantial reason as a reason for dismissal.

Discussion and Conclusions

15. Section 98 of the **1996 Act** provides:

“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show–

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (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.

...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)–

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

16. The application of these well-known provisions in the context of a criminal allegation being made against an employee had been considered by the Court of Appeal in **Leach v Ofcom**. In that case, the claimant had been the subject of a disclosure by the Metropolitan Police Child Abuse Investigation Command ("CAIC") indicating that the claimant posed a potential threat or risk to children. This was based on information suggesting that he had visited brothels in Cambodia known to supply children and had allegedly posed as a doctor in order to gain access to children in Cambodia. The information supplied by the CAIC to the employer in that case was described as being just "the tip of the iceberg". That disclosure was not taken at face value in that the employer probed and questioned the CAIC about the information provided. The employer decided to dismiss the claimant taking the view that it had to accept the advice of the CAIC that the claimant continued to be a risk to children and that that amounted to a breach of trust and confidence which lies at the heart of the employment contract. The employment tribunal found that the employer's dismissal was fair. That decision was upheld by the EAT and the decision was in turn upheld by the Court of Appeal. Lord Justice Mummery, giving the lead judgment of the court, stated as follows:

"36. The EAT, having decided to dismiss the Claimant's appeal on the ground that no question of law arose from the ET's decision, said this towards the end of their judgment:-

"48. We have found this a worrying case. It is not our role, and we are in no position, to make a judgment as to whether the Claimant has committed offences against children. The Metropolitan Police clearly believe he has, and it would, or in any event, should, not have formed that belief without reliable information. But it is only fair to record that the Claimant has been (in effect) acquitted in the only proceedings brought against him; and he has....produced apparently powerful statements in support of his innocence. If he is indeed innocent, he has suffered a very grave injustice. But the risk of injustice is inherent in a system where the police are permitted to make apparently authoritative "disclosures" of the kind made here, unsupported by any finding of a

court; and it will no doubt be said that the risk is the price that has to be paid for achieving the protection of children. In any event, as we have already emphasised, the question for the Employment Tribunal was not, as such, whether the Claimant has suffered an injustice but whether the conduct of the respondent towards him was fair. If he was treated unfairly by CAIC, his remedy is against them."

37. In a number of passages in the "discussion" section of the excellent judgment prepared by Underhill J the EAT identified their concerns about breakdown in trust as the reason given by the Respondent for dismissing the Claimant. It did not find "the terminology of 'trust and confidence' particularly helpful" in pleading the Respondent's case: see [25]. In cases of acting on untested information (or where the employee has been acquitted on the very facts relied on) the EAT said:-

"27. ...It sticks in the throat that an employee may lose his job, or perhaps in practice any chance of obtaining further employment, on the basis of allegations which he has had no opportunity to challenge in any court of law-or may indeed have successfully challenged. On the other hand, it has to be recognised that there are cases where it is necessary for employers to be warned of facts which indicate that an employee (or potential employee) is a risk to children, even in the absence of any conviction. The courts have had to grapple in a number of cases with how the balance should be struck..."

38. The judgment continued : -

"28. In our judgment an employer who receives information from CAIC or a similar body, under an official disclosure regime, that an employee poses a risk to children must, in principle and subject to certain safeguards, be entitled to treat that information as reliable....In our view it is plain that an employer in such a case cannot be expected to carry out his own independent investigation in order to test the reliability of the information provided by a responsible public authority. He will typically have neither the expertise nor the resources to do so."

39. The EAT added that employer would not be acting reasonably for the purpose of s.98(4) of the 1996 Act if he took an uncritical view of the information disclosed to him: see [29]. The employer was entitled to insist on a sufficient degree of formality and specificity about disclosure before contemplating any action against the employee on the basis of it, to raise questions about its reliability and to seek credible reassurance that all relevant information has been taken into account: see [29]. On that aspect of the case the EAT concluded that the ET's finding that the Respondent had discharged its duty to make reasonable investigation by adopting "an appropriately critical approach" was unimpeachable.

40. The EAT then considered whether the Respondent had a sufficient reason for dismissal. It was on this point that the EAT commented on their concerns about "breakdown in trust" as a sufficient reason for dismissal. They pointed out that the conduct disclosed by the CAIC did not occur while the Claimant was at work or travelling for work of the Respondent and that his job did not involve his working with children in any way. In its reason for dismissal the Respondent had not relied on the need to protect children, but on the fact of the CAIC's disclosure as leading to a breakdown in trust and confidence and the ET accepted that case. The EAT commented:-

"31. ...We have already observed that we do not regard the language as helpful. We have observed a growing trend among parties to

employment litigation to regard the invocation of "loss of trust and confidence" as an automatic solvent of obligations: it is not. In the present case it is necessary to identify more particularly why CAIC's disclosure is said to have, in effect, made it impossible for the Respondent to continue to employ the Claimant.

32. Unfortunately this question is not explicitly considered by the Tribunal. The nearest that it comes to it is the finding in para.108 that dismissal was reasonable "given the nature of the Respondent's organisation, the nature of the allegations, and the nature of the Claimant's role." That is decidedly summary. But its brevity appears to reflect the way the case was argued before the Tribunal...."

41. In further discussion of the point the EAT concluded that it was adequately clear what the ET had in mind. The Respondent is a high profile public authority with responsibilities that covered some aspects of child protection. The Claimant's representative role took him abroad and, if he was a paedophile, there would be a concern that he could take advantage of foreign trips to engage in child sex abuse, which could cause the Respondent serious reputational damage if it received publicity and which would be exacerbated if it emerged that the Respondent had been warned by the responsible authorities about the Claimant's activities, but had taken no action.

42. In their conclusion on this crucial aspect of the case the EAT said:-

"33. The question thus is whether the risk of such reputational damage was a sufficient justification for the dismissal of an employee against whom nothing had in fact been proved. We do not find that question particularly comfortable. In a case of this kind, not only is it not established that the employee is in fact a danger to children, but, even if he is, the dismissal will not significantly reduce the risk of his offending (since opportunities for offending are not afforded by the employee's job), but is concerned solely with saving the employer's reputation. That is much less evidently justifiable. Nevertheless, after careful reflection, we have come to the conclusion that, in the circumstances of the present case, the Tribunal was entitled to regard the dismissal of the Claimant as justified. It was in our view legitimate for the Respondent, in its particular position, to be jealous of its public reputation. It was entitled to take the view that to continue to employ, in the position in question, a person who it had been officially notified was a child sex offender and a continuing risk to children, would-if he were subsequently exposed (which it was plainly reasonable to anticipate)-severely shake public confidence in it. We are acutely aware, as was the Tribunal, that to justify the Claimant's dismissal on the basis of reputational risk in the absence of any established misconduct may involve a grave injustice to him. But it is essential to bear in mind that under s.98 the central question is what it was reasonable for the employer, in the relevant circumstances to do. If the Claimant is in fact innocent, the injustice has been caused not by the employer but by those who have falsely accused him and by CAIC which has given credence to those accusations"

17. The Court of Appeal then went on to say that it could not improve upon the EAT's analysis in that case and agreed with its judgment, adding only the following points:

"52. First, the question for the ET was whether the Respondent's reason for dismissal of the Claimant was "some other substantial reason" within the meaning of s.98(1)(b) of the 1996 Act. Was it a reason which a reasonable employer could rely on to justify a dismissal as fair for the purposes of s.98(4)? That is essentially a question for the ET's assessment on the facts

found in the particular case. Its decision can only be appealed if a question of law arises from it. The Claimant is not entitled to re-argue the facts of the case in the hope that he can persuade this court to make a different assessment more favourable to him.

53. Secondly, the ET was entitled to conclude, on the facts of the case as found by it, that the reason for the Claimant's dismissal was a "substantial reason" within s.98(1)(b). The mutual duty of trust and confidence, as developed in the case law of recent years, is an obligation at the heart of the employment relationship. I would not wish to say anything to diminish its significance. It should, however, be said that it is not a convenient label to stick on any situation, in which the employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever a conduct reason is not available or appropriate. The circumstances of dismissal differ from case to case. In order to decide the reason for dismissal and whether it is substantial and sufficient to justify dismissal the ET has to examine all the relevant circumstances. That is what the ET did with regard to the nature of the Respondent's organisation, the Claimant's role in it, the nature and source of the allegations and the efforts made by the Respondent to obtain clarification and confirmation, the responses of the Claimant, and what alternative courses of action were reasonably open to the Respondent. The ET could have reasoned its decision on this point in more detail or at greater length, but I do not think that the decision is flawed for want of reasons, or by an error of law or by plain perversity.

54. Thirdly, because each case of fair or unfair dismissal depends almost entirely on its own particular facts, the authorities cited by the Claimant are rather unhelpful and certainly not conclusive of this case. ...”

18. As has been stated more recently by, Langstaff P in **Z v A** UKEAT/0203/13/SM, the decision in **Leach** clearly sets out the principles to be applied in cases involving allegations of criminal conduct that have not been proved. Each case will turn upon its own facts. We note that the circumstances in the present case are somewhat different from those in **Leach**. In the first place, the reliability of information about the Claimant's conduct is somewhat greater than it was in **Leach** as there had clearly been a decision on the part of the Crown in the Claimant's case to proceed with the prosecution. The extent to which the Respondent could go behind that decision is perhaps somewhat more limited than in other cases, where for example an investigative body makes limited disclosure to an employer about an employee's unproven conduct. That said, even where there is a decision to prosecute, an employer may not be acting reasonably if it simply took the fact of that decision at face value without at least some inquiry as to the circumstances. Secondly, unlike the position in **Leach**, the nature of the Claimant's job in the present case was such that it would have afforded him an opportunity to commit the kind of act with which he was charged. As the Tribunal pointed out, the Claimant is responsible for transporting anaesthetised patients to and from the theatre. Such patients are in a highly vulnerable position and are effectively under the Claimant's care during the period of transportation. Thirdly, the risk of reputational damage was, in the present case, to an organisation in the charitable sector, which was under particular scrutiny at the time as a result

of recent conduct exposed in that sector in relation to employees engaging in sexual offences. Reputational damage to a charity, particularly one with vulnerable beneficiaries, could be said to be more acute than that in relation to an organisation such as the one in **Leach**, which had a general duty of care towards children but whose functions did not specifically involve addressing children's needs.

19. Bearing those differences in mind, we turn to consider the Tribunal's approach to the questions which it had to consider. The first of those is whether the Respondent had established a potentially fair reason for the dismissal within the meaning of s.98(1)(b) of the **1996 Act**.

Submissions

20. As to that issue the Claimant, ably represented before us by Mr Hardman of Counsel, submits that the Tribunal failed to give effect to the full wording of s.98(1)(b) in that the some other substantial reason (SOSR) has to be such as to justify dismissal. Mr Hardman accepted that in this regard there was a correct self-direction on the part of the Tribunal but submits that that self-direction was not then applied in that the reason relied upon was one that was conditional upon there being an eventual conviction rather than being the reason that was effective at the time of dismissal. He pointed to what the Tribunal said in paragraphs 77 to 79 of the Judgment:

“77. All the evidence indicated that the claimant had been a long serving employee with an impeccable disciplinary record. There was no suggestion that the respondent wished to be rid of the claimant for any other reason. The respondent had indicated that in the event that the charges against the claimant were dropped or he was found not guilty after trial that he would be reinstated in his old position on the same terms and conditions. That is not the action of a respondent wishing to dispense with the services of an employee such as the claimant.

78. The first question I had to consider was whether the respondent's reason for dismissal of the claimant was “some other substantial reason” within the meaning of section 98 (1) (b) ERA. In short was it a reason which a reasonable employer could rely on to justify a dismissal as being potentially fair for the purposes of section 98 (4)?

79. I was satisfied that the respondent had shown that the reason for the dismissal of the claimant was because they considered that should he ultimately be found guilty of the charges against him there was a genuine risk of potential damage to their reputation. I considered that was a reason which a reasonable employer could rely upon to justify dismissal as fair.”

We do not accept that the fact that the Tribunal referred to the effect on reputation in the event of conviction in any way undermines the conclusion and this was a potentially fair reason for dismissal.

It is clear from paragraph 42 of **Leach** that the risk to reputational damage can provide a sufficient justification for dismissal notwithstanding the fact that criminal charges against an

employee are not proved. Of course, whether or not that risk does in fact justify a dismissal in a particular case will depend on the facts. The Tribunal considered, as it was required to do, the reason that was relied upon by the Respondent. The Respondent did not rely upon any immediate damage to reputation but what would happen if there was a conviction. That was not unreasonable given that it would be at the point of conviction, if that were to arise, that the damage to reputation would crystallise. The risk to reputation will arise from the fact that if there is a conviction the Respondent would be subject to criticism or may be subject to criticism for having exposed patients to a risk for the period between first learning about the charges and the date of the conviction.

In our judgment, the conclusion with the Respondent had established the risk to reputation as a potentially fair reason for dismissal was one that the Tribunal was entitled to reach. The Tribunal found that the identified risk was not was not trivial in the circumstances and that the Respondent sincerely believed there to be such risk. It also found that the managers making the judgment as to the risk to reputation were sufficiently experienced to be able to do so. As stated in paragraphs 52 to 53 of **Leach**, the question of whether the employer's reason for dismissal was some other substantial reason such as to justify dismissal was essentially a question for the Tribunal's assessment of the facts found in a particular case. Its decision can only be appealed if a question of law arises from it.

In **Z v A** at paragraph 24, the then President of the EAT (Langstaff J) said as follows in the light of that conclusion in the Court of appeal:

“Hence the Court of Appeal plainly contemplated that the assessment by the Tribunal of whether a disclosure or potential risk merited dismissal was one for its judgment. Its conclusion on that matter would be one of fact and as such unassailable on appeal unless it could be properly described as perverse or perhaps if it could be demonstrated that the Tribunal did not examine all the relevant circumstances and left a material one out of consideration”.

1. Mr Hardman, very fairly, does not contend that the Tribunal reached conclusions that were perverse. In the absence of any other identified error of law in relation to the Tribunal's approach to the reason for dismissal it seems that this ground of appeal must necessarily fail.

2. We turn therefore to the next question that this Tribunal had to consider, namely whether the Respondent had acted reasonably in treating that reason as a sufficient reason to dismiss having regard to equity and the general merits of the case. The principal point relied upon here by Mr Hardman was that there was an inadequate investigation. In the Claimant's skeleton argument, which was not prepared by Mr Hardman, reliance was placed on the case of **Securicor Guarding v Rouse** UKEAT/174/93. In that case, the employee was working as a Security Guard at the premises of one of the employer's clients. He was arrested and charged

with sexual offences against children. The employer considered that the manager of the client would not be prepared to have the employee remain on the premises and dismissed him. The tribunal found that dismissal to be fair. The EAT disagreed and considered that the Tribunal had failed to ask itself whether the employer had in fact carried out as much investigation into the matter as was reasonable and in particular had failed to ask the client himself how it wished the matter to be dealt with.

3. It seems to us that the decision in **Securicor** is of limited assistance to the Claimant here, and, to be fair to Mr Hardman, he did not seem to rely upon it. Whereas it is possible in that situation, where the risk to reputation was effectively confined to the opinion that a particular client might have of an individual working on its premises and where the work itself would not give rise to any continued opportunity to commit the very crimes with which the employee had been charged, for the employer to undertake some enquiries as to the client's position before deciding to dismiss, that is very far from the situation in the present case. The risk to reputation here was more acute in that the Respondent was responsible for and owed a duty of care to patients at its hospital and it was considered to be risk to reputation if an employee charged with an assault with intent to rape was permitted to remain in employment where he was in charge of vulnerable patients. The risk to reputation here did not depend on the view of a single client or an individual but with the public perception of the organisation and the risk that if it did not act it would be seen as failing to protect the interests of patients.

4. Mr Hardman submitted that the Respondent in this case had not carried out the sort of careful and conscientious investigation into the circumstances as could reasonably be expected where an employee is charged with serious offences. He highlights the requirement as set out in **Leach** for a reasonable employer not to take an uncritical approach or to accept at face value allegations that had been made even when made by a credible source. The particular steps he submitted ought to have been taken but were not included the following:

- (a) finding out more about the charge and not taking it at face value;
- (b) speaking to the Claimant's representatives and/or the Crown to find out more about the case and its progress;
- (c) assessing any information provided critically.

1. Mr Hardman submits that in the present case, there was little more than a bare allegation and that it was incumbent upon the Respondent to conduct some further investigation into the circumstances before it can be said that it had acted reasonably. It was submitted that the lack of investigation also goes to the question of the impact on reputation. It is not sufficient, submits

Mr Hardman, simply for the managers to assert an effect on reputation without some enquiry as to whether there was any reasonable basis for that view.

2. Attractively as those submissions were put by Mr Hardman, we find ourselves unable to accept them. The Tribunal found that there was a fair investigation by the Respondent and that there was no “knee jerk” reaction on its part. The finding that there was no knee jerk reaction indicates that the Tribunal did not consider that the fact of the allegations was simply taken at face value. In fact, as we have seen the Respondent took some steps to find out more about the charges from the Claimant himself. It also sought the bail report and the police report. It had regard to the fact that there had been a decision to proceed with a prosecution. It cannot be said in these circumstances that there was nothing more than a bare allegation or that there were no reasonable attempts to go behind the fact of the charge itself.

3. Mr Hardman’s argument that the investigation carried out by the Respondent was inadequate and that there ought to have been an investigation of the kind that could be expected where serious criminal misconduct is alleged seems to us to be misplaced. That is because the Claimant here was not dismissed because of a belief on the part of the Respondent that he was guilty of the offence for which he was charged, but because of the adverse effect that the fact of the charge could have on the Respondent’s reputation. The investigation in those circumstances will justifiably more limited. Some employers, particularly a large one such as the Respondent, might have done more in the way of an investigation, although it is difficult to pinpoint exactly what more could have been done in this case. Even with its resources, the Respondent was not in a position to investigate the actual incident itself to any substantial extent given that it was not alleged to have occurred in the workplace or in the course of employment.

4. As to the investigation into the risk to reputation, this has to some extent already been considered under the first ground. It could be said that it was self-evident that there would be some risk to reputation to continue to employ the Claimant in circumstances where he faced the charge of assault with attempt to rape and having regard to the nature of his work which put him in charge of vulnerable patients.

5. It would not be open to an employer, in our judgment, to dismiss an employee for reputational reasons just because an employee faces a criminal charge. There would need to be some relationship between the matters alleged and the potential for damage to reputation. Thus, if the criminal charge related to a serious driving offence that the employee worked in a role that did not involve any driving duties then it would be unlikely that continuing to employ that employee would have any adverse effect on reputation or at any rate nothing so serious that it would provide a sufficient reason to dismiss. The position is clearly otherwise where the

alleged offence is of a type that could be committed in the course of the employee's duties or which enables access to vulnerable persons. The risk to reputation, in particular arising out of the suggestion that the employer continued to place vulnerable persons at risk, is more obvious. However, even if those circumstances, there cannot be an assumption of risk without some consideration of the matter. It seems to us that the Respondent in the present case did give the matter due consideration. The Tribunal expressly found as follows:

“19(e) (Mr Lamb) did not consider given the nature of the charges that it would be appropriate to allow the Claimant to continue to work until his trial had taken place”.

6. Furthermore, at paragraph 79, the Tribunal said that it was satisfied that the Respondent had shown that the reason for dismissal of the Claimant was because they considered that should he ultimately be found guilty of the charges against him there was a genuine risk of damage to reputation.

7. It appears clear, therefore, from those and that other passages in the judgment, that the Respondent was drawing a direct link between the nature of the charges against the Claimant and the risk to reputation which arises from the potential risk to the vulnerable patients at its premises. It seems to us that the Tribunal was correct to consider that the Respondent had adequately explored the question of risk to reputation.

8. As to alternatives to dismissal, it seems to us that the Respondent did consider these and acted reasonably in the circumstances in rejecting them. Clearly, continuing to employ the Claimant in his role was not a reasonable option given the nature of the charges. The other alternatives would involve suspension. Suspension on full pay was not considered reasonable because of the Respondent's charitable status and the unnecessary expenditure that an open-ended suspension with pay would entail. It was significant that the Claimant was unable to say at the time of his dismissal or indeed by the stage of his appeal when the criminal trial would take place. Mr Harden submitted that further queries ought to have been made with the Crown and/or the police. It is unclear to us whether such queries would have been likely to elicit any more information than the Claimant was able to provide. In those circumstances the suspension on full pay would have been as the Tribunal said “open ended”. The Respondent stated, and the Tribunal accepted, that charitable status meant that suspension on full pay was not a reasonable option in the circumstances. It might be queried whether a large employer such as the Respondent would genuinely be financially troubled by suspension on full pay. However, it seems to us that given the Respondent's charitable status and the particular scrutiny which charities face in relation to such matters, the Tribunal was entitled to consider that the

Respondent's conclusion that suspension on full pay was not an option, was one that was within the band of reasonable responses.

9. In these circumstances, the remaining option was dismissal. The question for the Tribunal was whether that option fell outside the band of reasonable responses open to a reasonable employer. The Tribunal considered that it did not fall outside that band. In our judgment, that was a conclusion that the Tribunal was entitled to reach for the reasons it gave, and we see no basis for interfering with that conclusion.

10. For these reasons, and notwithstanding Mr Harden's attractive and forceful submissions, this appeal fails and is dismissed. Before leaving this judgment, we would wish to make one comment and that is this: given the fact of the Claimant's reinstatement, the issue in this appeal appears to revolve around the Claimant's pay for the period between dismissal and reinstatement. It was pointed out by His Honour David Richardson on the sif that this matter ought to have been capable of resolution without further litigation. We agree and we were somewhat surprised that this matter could not have been resolved without having to come to this court.