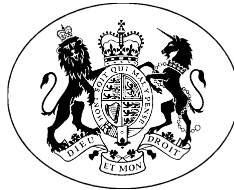

EMPLOYMENT TRIBUNALS

Claimant:	**Mr D Bosher**	
Respondent:	**EUI Ltd**	
Heard at:	**Cardiff**	**On: 29 & 30 July 2019**
Before:	**Employment Judge Harfield (sitting alone)**	

Representation:
Claimant: Mr Pollitt (Counsel)
Respondent: Mr Morris (Counsel)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that:

(a) the claimant's complaint of unfair dismissal is well founded and succeeds;

(b) the claimant's complaint of wrongful dismissal is well founded and succeeds.

REASONS

Introduction

1. By way of a claim form presented on 11 December 2017 the claimant brought complaints of unfair dismissal and wrongful dismissal. By way of a response form dated 12 April 2018 the respondent denies the claims.

2. At a case management preliminary hearing on 22 August 2018 the claimant was permitted to amend his claim to add a further claim of breach of contract regarding the forfeiture of 692 shares the claimant owned in the Admiral Group Plc. By way of an amended response dated 11 September 2018 the respondent denies any breach of contract asserting that under the terms and conditions of share allocation the shares were properly forfeited as the claimant was a "bad leaver", having been dismissed for gross misconduct.

3. The final hearing took place before me on 29 and 30 July 2019. I heard evidence from the claimant and from Steve Williams, John McSherry and Mark Gabriel for the respondent. I received oral submissions from both parties' representatives and written submissions from the claimant. Judgment was reserved.

Findings of fact

The parties

4. I set out below the background and, where there are disputes of fact that are relevant to the issues I have to decide, my findings of fact. The respondent is part of the Admiral Group, providing financial and insurance services. It is a substantial employer in the South Wales region. The claimant was employed by the respondent from 13 June 2011 until his dismissal on 22 August 2017. At the time of his dismissal the claimant worked as a claims validation co-ordinator in the household team which involved screening potentially fraudulent claims, deciding whether investigations were required and appointing investigators. He also ran a caseload of higher value claims which involved speaking to policyholders, amongst others. Because of the nature of his role the claimant was given higher level access to social media in work so that he could check social media profiles and undertake other internet searches as part of the claims screening. Until the events in question the claimant had a clean disciplinary record and he was well regarded in his work. An example of a commendation (copied to Mr McSherry) is at [28a].

Arrest and search

5. On the morning of 30 March 2017 the police attended at the claimant's home with a warrant to search his home for devices. The police informed the claimant they had information which suggested there were images of an indecent nature in the property. The claimant co-operated with the search. The police took possession of the claimant's mobile phone, tablet, ipad, laptop and some memory cards which needed to be forensically assessed by the police. The claimant was arrested on suspicion of being in possession of indecent images and taken to the police station. A duty solicitor was appointed. The duty solicitor advised the claimant to give a no comment interview and let the police put their cards on the table. The claimant texted his line manager, CF, to tell him he was with the police and was unable to attend work.

6. The claimant was released on bail that evening. Bail conditions were imposed not to have unsupervised contact with any child under the age of 18, not to reside overnight in any property with any person under the age of 18, and not to use any internet enabled device unless it was capable of displaying the browsing history and the history was not to be deleted [21 – 23]. The claimant was told that he had to answer bail on 12 July but that the police investigations may take some time as the company behind the warrant were based in the USA.

Meeting of 3 April 2017

7. The claimant spoke with CF, the next morning to tell him what happened. On 3 April the claimant met with JWJ, AM and CF. The notes are at [24 – 26]. The claimant told them what had happened and the bail conditions that had been imposed. The claimant was asked questions including about the grounds for arrest. The claimant said that he understood there was a warrant from America as the company was based there and it was usually a sweep of people that are looked

at but he did not actually not know if he was a number of people approached. He said the alleged offence date was quite broad from July 2016 to December 2016 but that he did not have much detail as with a no comment interview he had not been able to ask the police officers any questions. He said he was asked questions about online storage and there was one question about his Dropbox account so he was speculating that it was his Dropbox account the police were looking at. He explained the advice the duty solicitor had given. He was asked to bring in a copy of the bail sheet and warrant. The claimant was not suspended and no restrictions were placed on him in work.

8. The claimant then attended a series of investigation meetings with the respondent which I summarise in brief terms below, largely by reference to the page numbers in the bundle. I should be clear, however, that the claimant does not agree that the content of all of the meetings notes is accurate and he was not sent copies contemporaneously to approve or comment upon prior to them forming part of the package of documents given to him with the invitation to the subsequent disciplinary hearing. They are however a summary from the respondent's perspective.

5 April – 11 July 2017

9. The claimant attended a follow up meeting with LS and CF on 5 April 2017 [27]. He did not have anything new to report.

10. On 7 April 2017 SW recommended to Mr McSherry that the claimant receive a pay rise having reviewed the claimant's performance [27a].

11. On 24 April 2017 the respondent's IT department forwarded a blocked abusive email that the claimant's former partner had attempted to send to the claimant. The claimant also notified CF there was a blocked email. The claimant met with LS and CF. The former partner's email ID was blocked by the respondent and the claimant was offered support. He stated the only update he had was that sometimes the investigations could take about 7 months so the bail date might be extended. The claimant remained in work with no restrictions other than those in his bail conditions.

Post Charge Meeting

12. On 12 July 2017 the claimant was charged by the police that on 30 March 2017 he had in his "possession an indecent photograph, namely two category A images." The same bail conditions continued to be imposed [29 – 31].

13. The claimant spoke with CF and CF updated HF. CF's email (which was copied to Mr Williams and Mr McSherry) [31a] stated:

> "From what I can gather the Police have found links to two indecent images on the phone following interrogation, rather than actual indecent images on the phone. The enquiries with DropBox continue and could do for another 12 months or so. D is unclear what evidence the police have, and this is due to be provided to his legal representative prior to his appearance in Magistrates Court."

14. LS and Mr Williams met the claimant on 13 July 2017 [32]. The claimant continued to co-operate with the respondent's enquiries. He said that the police still had his phone due to the Drop Box app on it and that he had been told investigations could take up to 18 months due to the nature of Drop Box investigations. He said that he had also found out the police investigation started due to his internet provider EE and that the investigation was part of an Operation called something like Operation netscape/net gear.

15. The claimant explained that he had not seen details of the two pictures and that he had not been expecting to be charged. The notes record:

> "He explained that the images must have been saved onto the gallery and there is a web link to drop box. He has the links in folders and there would be 1000s of images. He mentioned he was charged with two indecent images depicting children with no more detail."

The notes confirm that the advice would be to possibly plead guilty. He had a duty solicitor at the police station and also one at court. He explained that his uncle was a barrister so he was looking to talk to him to get more advice.

16. The notes record "DB was concerned about his role. LS explained that we have a convictions policy but we also consider reputational damage but there are lots of points to consider. LS explained that we appreciate this is hard to go over the questions again but we need to investigate this so this is the investigation stage." The claimant was not suspended and no restrictions were placed on him in work.

Second Post Charge Meeting

17. On 19 July 2017 the claimant met again with Mr Williams and LS. LS explained that a more senior member of staff said further investigations were required. It was a longer meeting with the notes at [33 -35]. I will not repeat the content here though I have taken the full content into account. There is also a dispute as to their accuracy with the claimant denying telling the respondent that he was not surprised that the police had found such images in his Cloud or Dropbox. He states that what he said was that he was surprised any pornography was found on his phone as he did not download things to the device and that he viewed legal adult pornography using apps such as Dropbox.

18. I note that the claimant explained in this meeting that was the second duty solicitor, on the day of the charge that had offered the advice about potentially pleading guilty (picking up from the prior discussion on the 13 July), but that the claimant did not know if that solicitor knew his case. The claimant had not confirmed the solicitors he would be using and Mr Williams recommended getting some legal advice and offered to permit the claimant to speak to his uncle in work time. The claimant remained in work and not suspended. No restrictions were placed on him other than he was warned about the importance of his bail conditions and Mr Williams suggested that the claimant be careful in the lifts as they were not covered by CCTV (in case he ended up in a lift with someone under 18). Mr Williams states in his witness statement that they were content to give the claimant time to obtain some legal advice.

3 August 2017 Meeting

19. The claimant updated the respondent that he had appointed solicitors on the 2nd August. A further meeting was then held with Mr Williams and LS on 3 August 2017. The notes are at [36 – 39]. Again, I will not repeat the full content here but I have taken them fully into account. The claimant after expressing some concerns from his solicitors about answering questions, did answer the respondent's questions. The notes record the claimant allegedly stating:

> "His Solicitors have advised him to plead guilty based on the information provided. They told him and DB confirmed he was of sound mind to make a decision about viewing and possession of these types of image. The fact of the matter is the prosecution have evidence that these images were in DB's possession…"

The claimant disputes that this is an accurate summary of what he said. He states that he told those present that the information he had received from his previous duty solicitor was that if there were images on his device then it would be better to plead guilty. He states that at this point in time his new solicitors had not given him advice on how to plead, and that the minutes do not accurately reflect this. The claimant also disputes that he admitted there were images of Category A type in his possession and that they were in his Dropbox account. He states that what he said was that he had not seen child pornography but that he was aware of there being distasteful material show, for example, sado-masochism that he had accidentally seen but not knowingly looked at or possessed or downloaded. The notes record the claimant explaining that his solicitors had advised that they would not get to see the images in question and that they would only be seen by a barrister.

20. After an adjournment, Mr Williams advised the claimant that he would be recommending the case go forward to a disciplinary hearing. The claimant questioned why the respondent would do this as the information he had given them had not changed, that he had been honest and open with the respondent and he did not see how it would affect his position in work. The notes say:

> "SW responded that this does affect his position and brings into question our trust in him as a person and questions his decision making and judgement, these are things we need from all employees. SW also mentioned that due to his role working in a fraud environment the impact this court case will have. SW clarified it is relevant to his role and this is why we have taken this into consideration. "

The claimant still was not suspended or subject to restrictions in work.

21. The claimant states that at the end of the meeting he was given the chance to resign with a reference that did not mention the disciplinary investigation. Mr Williams disputes this stating, amongst other things, that he or LS did not have the power to much such an offer, it is not in line with the respondent's policies, it would be improper to make such an offer, and if it were made it would be recorded in the minutes. On balance, I find it likely that there was some discussion about the

potential for the claimant to resign and the likely content of a reference. It is not that unusual a practice for such discussions to take place and go without being minuted. But I do not consider that if it did happen it was improper or an indication that the outcome of the disciplinary process had been pre-determined. I consider it is, however, an indication that Mr Williams had reached the view that the claimant appeared to be in some difficulties on the question of possession. That said there were then further developments.

"No Plea" on 11 August 2017

22. On 14 August CF emailed Mr Williams with an update [39d] to say that at court on 11 August 2017 the claimant had entered a "no plea" rather than guilty because the evidence and report provided on the morning of the hearing confirmed the images were on an SD card and that the phone taken by the police did not have an SD card. CF also stated that concerns had been raised by the claimant's solicitors about the veracity of the report as it did not contain much detail and that the solicitors were writing to the CPS to query this and whether experts had been used to interrogate the data held on the phone. There was a pre trial hearing date of 8 September 2017. CF also stated "If CPS do not respond to the individual's solicitor by the pre trial hearing, there is a possibility the case could be thrown out."

23. On 15 August Mr Williams completed an investigation findings summary sheet [40 – 41]. He says in his statement that he waited until then to complete it as he knew the claimant had a court date coming up and he did not feel it proper to go ahead with the next step until after that court date, even though he had already decided to make a recommendation to proceed to a disciplinary hearing.

24. The summary sheet states that initially, following the claimant's arrest and bail, the respondent was willing to wait until the charge date before deciding whether they should take any further action in relation to the allegations. It states that after the claimant was charged they gave him the opportunity to get legal advice and to view the two images. It states that after the final meeting on 3 August 2017 they were satisfied they had asked appropriate questions and allowed the claimant time to defend himself and the recommendation was to go to a disciplinary. The summary sheet references the claimant's court attendance on 11 August 2017 where he submitted "no plea" and that the claimant's solicitor was contesting aspects of the CPS report. It concludes:

> "Following our extensive investigation and coupled with the more recent outcome from DB's court appearance, we have reasonable belief that the allegations may be true, as DB has never categorically denied the allegations and it now appears that his solicitor are relying on technical points in order for the case to be thrown out, rather than submitting a plea of "not guilty"."

Invitation to Disciplinary Hearing

25. On 17 August 2017 the claimant was provided with an invitation to attend a disciplinary hearing on 22 August 2017 [42]. It had with it a pack of documents the respondent was intending to rely upon. The allegation of gross misconduct was framed as:

> "Serious misconduct, namely being charged with the alleged offence of possession of two category A images. Following our investigation, we have reasonable belief that these allegations may [be] true."
>
> …If the allegations are believed to be true, this could be considered Gross Misconduct and could result in your dismissal."

Request for postponement

26. On receipt of the invitation to the disciplinary hearing, the claimant states he told LS and CF that he had an important meeting with his lawyers that same day starting at 4:45pm (22 August) and asked for the disciplinary hearing to be postponed. He says the meeting was an important one as it was the first time he got to meet his barrister and obtain their specialist advice on the meaning of possession. The request for postponement made its way to Mr Williams as he sent an email found at [42a] in which he confirms speaking to the claimant and stated that as the claimant had not requested to book leave on that date it should go ahead. Mr Williams refers to the claimant having plenty of time to attend both. Mr Williams also states "I have explained that if he is unable to attend we could consider another meeting on the Wednesday but this would be conducted by another HOD (TBC). Daley would prefer we go ahead with the meeting and that John McSherry conducts the disciplinary."

27. Mr McSherry was due to be away from the office on holiday. It is clear from the content of the email that Mr Williams was prepared to move the disciplinary hearing but only by a couple of days which would mean that Mr McSherry could not hear it. There was clearly no offer to wait until Mr McSherry's return from holiday. The claimant states he rejected the proposal of a move to the Wednesday because he was given the impression that it may be helpful for Mr McSherry to hear his case as Mr McSherry had some knowledge of it and of the claimant's positive qualities. I accept it is likely that there was some discussion as to the potential benefits of Mr McSherry conducting the disciplinary albeit the choice between proceeding on the 22 August or moving it to the Wednesday with an unknown other head of department was the claimant's choice. He was not given the choice of a longer postponement and I do not consider, from the tone of Mr Williams' email that if the claimant had asked for such he would have been granted it. The claimant chose to proceed on the 22 August with Mr McSherry.

28. The respondent disputes knowing that the claimant's meeting with his lawyers was important. Their pleading denies knowing at all at the time that the meeting was due to take place; and the late disclosure of the email at [42a] caused them to change their position. They point out that if the claimant really thought it was important to meet with his lawyers first then he could have taken the Wednesday hearing or indeed at the start of the hearing, when offered an adjournment because his companion was not available, he could have used that option as an indirect way to get the postponement he says he was seeking, or he could have asked Mr McSherry afresh.

29. I consider it likely that the claimant was not as clear at the time as he now is after the event as to the importance of the forthcoming meeting with his lawyers. As it

turned out he met his barrister for the first time and received advice to plead "not guilty" but at the time the evidential enquiries remained outstanding and he was already in receipt of some advice about how knowledge may be relevant to the question of possession as he discussed it with Mr McSherry at the disciplinary hearing. But likewise I also consider that Mr Williams had closed his mind as to the implications of the development with the "no plea" and the claimant's forthcoming meeting with his lawyer. As set out above, I find that by the 3 August Mr Williams was of the view that the claimant was in difficulty on the issue of possession. This coloured his response to the further information he was given by CF on 14 August which he categorised as being "technical points" to get the case thrown out rather than submitting a plea of "not guilty" and his stance that he considered he had reasonable belief the allegations may be true. I consider it was therefore likely that Mr Williams' mindset meant he did not enquire what the meeting was about and the short postponement offered was because he considered it from the perspective of whether it was fair to put the claimant through two meetings in one day. I also consider it unlikely that if the claimant had explained he was meeting with his barrister to obtain advice about the plea, that Mr Williams' position was unlikely to have changed in any event.

30. The claimant could have taken the other options the respondent identifies to postpone the disciplinary meeting, however, I do not consider it is likely that Mr McSherry would have granted a postponement on the basis of awaiting the lawyer's meeting. That the claimant did not take one of these routes is, in my view, a reflection of the stress he was under and he was not thinking clearly about the disciplinary proceedings and making the most logical of decisions in that regard. This is evidenced by the fact that the claimant did not take the pack of documents provided with the invitation to the disciplinary hearing away with him to prepare in detail for the disciplinary hearing during the period 18 – 21 August 2018. Notwithstanding the claimant was in London for the weekend for social reasons, I find that he could have found the time to prepare better for the disciplinary hearing. On 22 August his manager, CF appreciated that the claimant was not well prepared and gave the claimant half an hour away from work to familiarise himself with the documents. In my judgment it was also not the claimant's general style to challenge his superiors such as Mr Williams and Mr McSherry and again that affected the discussions he had with them about a postponement.

Disciplinary Hearing

31. On 22 August 2017 the claimant attended the disciplinary hearing. He was summarily dismissed by Mr McSherry for gross misconduct. The minutes are at [45 – 50]. Again I will not summarise them in detail here but I have taken the full content in to account and I refer to them further in my decision below. The conclusion in the meeting minutes is:

> "We have had a think about everything you've said and we believe it is GMC. We have reasonable belief the allegations are true. Due to the reputational damage, duty of care to our staff who are under the age of eighteen and the breach of trust we have decided to dismiss with immediate effect.

32. The dismissal letter [59 -60] states:

> "The reason for your dismissal is due to your serious misconduct, specifically Being charged with the alleged offence of possession of two category A images; which following our investigation and disciplinary hearing we reasonably believe are true.
>
> This is considered to be gross misconduct and as such you have been summarily dismissed. This means there is no payment due in lieu of notice."

33. The disciplinary summary sheet at [43] states the reason for the decision were "reputational damage, duty of care to under 18s and breach of trust." The claimant complains that at the disciplinary hearing evidence was put to him that had not been disclosed in advance or in written form which was information from a former police officer that the images would have been described to the claimant [48]. It is argued that was in breach of the Acas Code. I do not, however, consider that this was evidence that was material to the conclusions reached by Mr McSherry.

34. On the afternoon of 22 August 2017 the claimant then met with his criminal lawyers. The barrister advised the claimant that to be guilty of the offence of possession the claimant had to have knowingly downloaded the images. The claimant was advised to enter a not guilty plea.

Appeal

35. On 8 September 2017 the claimant appealed against his dismissal [60 – 61]. The claimant stated in his appeal:

> "The summary states that my "solicitors are relying on technical points for the case to be thrown out, rather than submitting a plea of Not Guilty." This closing summary is wholly inaccurate. Not an hour after my dismissal hearing had finished, I had a meeting with my solicitor and defence barrister who advised that they will be entering a plea of Not Guilty based on the evidence available. My Not Guilty plea has now been submitted to the court and a trial date has been set for 6 December 2017."

36. On 3 October 2017 the claimant emailed RW [64] to state that his lawyers had advised him that given the pending criminal trial on 6 December 2017 it was not appropriate for the respondent to expect the claimant to attend any appeal hearing prior to the outcome of the criminal case. He said: "If I were to participate in the appeal, this may prejudice the criminal proceedings." The claimant therefore asked for the appeal hearing to be postponed until after the outcome of the criminal trial. RW responded [63] to state that the request would not be granted saying:

> "The decision made at your disciplinary hearing had no bearing on the outcome of a trial. In addition the burden of proof is completely different. The Disciplining Manager had to establish reasonable belief to reach an outcome whereas a criminal trial establishes belief beyond reasonable doubt."

37. The claimant responded on 11 October [62 – 63] to state he had discussed things further with his lawyers stating again he was concerned that having the appeal hearing prior to the criminal trial may prejudice his position. He asked again, pointing out there were no financial implications to the respondent. It was refused again in an email of the same date [62]

38. The claimant asked again on 23 October [69 – 70] saying he remained unwilling to attend an appeal hearing prior to the outcome of his criminal trial on 6 December 2017 and he was concerned his attendance at an appeal hearing could prejudice the outcome of the criminal trial. He said again:

> "There is no prejudice to Admiral in delaying the appeal hearing until after the outcome of my criminal trial. For example, I have no entitlement to any pay or benefits at present from Admiral. Additionally my criminal case is only a short time away, so the delay is a small one."

39. The claimant made clear that he was committed and willing to attend an appeal if it took place after the outcome of the criminal trial. The request was again refused for the same reasons [68].

40. The appeal hearing went ahead in the claimant's absence. On 16 November 2017 Mr Mark Gabriel upheld the decision to dismiss the claimant. The minutes show that he held a telephone discussion with RW in HR [75]. The points discussed include that, in their opinion:

    - Throughout the disciplinary meeting the claimant did not clarify what his plea was or advise of the imminent meeting with his solicitor knowing the plea situation may change;
    - The claimant should have updated the disciplinary panel and asked for an adjournment so that he could attend and update them;
    - a trial date did not have any bearing on the disciplining panel's decision and therefore should not have a bearing on the appeal process.

41. The appeal outcome letter is at [76 -78] drafted by RW and amended and approved by Mr Gabriel. It made similar points. It said that a finding possession of Category A images was not the sole consideration and reputational damage, duty of care to staff under the age of 18 and breach of trust were also reasons. It also said:

> "I agree with your point about you making clear during the disciplinary hearing that your plea would be based on the advice of your legal team. However, you do not deny having possession of the images at any point during this meeting and also state during the hearing "There must be evidence if they've charged me" I am satisfied that it was made clear that the role of the Disciplining Manager in that meeting was to establish "reasonable belief in possession of category A images"

42. To complete the timeline of events on 10 April 2018 the CPS formally offered no evidence and the was acquitted of the alleged offences [83]. The claimant explained in evidence that followed a period of exchanges between his lawyers and the CPS and the forensic evidence that his solicitors obtained.

The Respondent's Policies

43. The respondent's policies and procedures are contained within "the Big Book" which contains the Disciplinary and Appeals Procedure set out at [8 – 14].

44. The disciplinary policy says:

> "Gross misconduct, gross negligence and/or gross incompetence is any action or omission that is serious enough to be interpreted as a serious breach of your contract of employment. It includes any action or omission which is discreditable, dishonourable or detrimental to the best interests of the Company or which causes a serious breakdown of Admiral Group's trust in you.
>
> In cases of gross misconduct, gross negligence and/or gross incompetence, summary dismissal is appropriate i.e. dismissal without notice or payment in lieu of notice, despite the fact that no previous warnings have been given.
>
> The following list includes examples of behaviour, which are normally regarded as gross misconduct, gross negligence and/or gross incompetence:
>
> …
> - Seriously damaging the reputation of the employer…
> - A criminal offence affecting duties or status, whether or not committed in the course of employment…
>
> This list is not intended to be exhaustive."

45. The Convictions Policy required the claimant to inform the respondent of his arrest and any police interview or court appearance. The policy states that the nature of the incident will be invest and that the respondent may decide to perform a full investigation of the incident. It states:

> "We will review each case on its own merits and do not rush decisions. Examples of what we may do include:
>
> - Following full investigation we may decide to hold a disciplinary hearing because we have reasonable belief there may be a case to answer. We do not always have to wait for the criminal proceedings to take place. It may result in your dismissal.
> - We may decide, or be instructed by police, to wait for the criminal proceedings to take place where we cannot satisfy ourselves there is a case to answer. We will make a decision on further action following the court case. It may result in your dismissal.
>
> - We may decide the case has little or no bearing on your employment and you can continue your employment normally."

The legal principles / the issues to be decided

The legislation

46. Section 94 ERA gives an employee the right not to be unfairly dismissed by their employer. Section 98 ERA provides, in so far as it is applicable:

> "(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.
>
> (2) A reason falls within this subsection if it--
> …
> (b) relates to the conduct of the employee,
>
> (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.

47. Under section 98(1)(a) of ERA it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden of showing the reason is on the respondent.

Conduct dismissals

48. In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in British Home Stores v Burchell [1980] ICR 303. In particular, the employer must show that the employer believed that the employee was guilty of the conduct. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances.

49. In considering the fairness of the dismissal, the tribunal must have regard to the guidance set out in the case of Iceland Frozen Foods v Jones [1982] IRLR 439. The starting point should be the wording of section 98(4) of ERA. Applying that section, the tribunal must consider the reasonableness of the employer's conduct; not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

50. The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.) Such an analysis also applies to the assessment of any other procedure or substantive aspects of the decision to dismiss an employee for misconduct reason.

51. I was also referred to and have taken account of the decision in Strouthos v London Underground Limited where Pill LJ commented that in criminal or disciplinary proceedings the charge against an employee should be precisely framed and that evidence should be confined to the particulars given in the charge. It was said:

> "However, it does appear to me to be a basic to legal procedures, whether criminal or disciplinary, that a defendant or employee should be found guilty, if he is found guilty at all, only of a charge which is put to him. What has been considered in the cases is the general approach required in proceedings such as these. It is to be emphasised that it is wished to keep proceedings as informal as possible, but that does not, in my judgment, destroy the basic proposition that a defendant should only be found guilty if the offence with which he has been charged… It does appear to me quite basic that care must be taken with the framing of a disciplinary charge and the circumstances in which it is permissible to go beyond that charge in a decision to take disciplinary action are very limited. There may, of course, be provision, as there is in other tribunals, both formal and informal, to permit amendment of a charge, provided the principles in the cases are respected. Where care has clearly been taken to frame a charge formally and put it formally to an employee, in my judgment the normal result must be that it is only matters charged which can form the basis for a dismissal."

Concurrent criminal investigations or proceedings

52. The commission of a criminal offence outside of the claimant's employment can be sufficient grounds for a fair dismissal, depending on the circumstances, and in particular, whether there is any, and if so what, connection between the offence and the employee's work, or whether the fact of the offence is in some way incompatible with the continued employment of the employee. This is highly fact sensitive.

53. Whether it is reasonable for any employer to wait for the outcome of criminal proceedings, or whether they can progress disciplinary proceedings without waiting is also a fact sensitive issue. For example, in Harris v Courage (Eastern) Ltd [1981] IRLR 153 the Employment Appeal Tribunal said:

> "It does not seem to the majority of this Tribunal that there is a hard and fast rule that, once a man has been charged, an employer cannot dismiss him for an alleged theft if the employee is advised to say nothing until the trial in the criminal proceedings. There may be cases where fairness requires that the employer should wait. In the judgment of the majority members of this Tribunal, all the circumstances have to be looked at. It is essential that the employer should afford the employee the opportunity of giving his explanation and he should be made to realise that that the employer is contemplating dismissal on the basis of the matters which are explained to the employee. If the employee chooses not to give a statement at that stage, it seems to the majority that the reasonable employer is entitled to consider whether the material which he has is strong enough to justify his dismissal without waiting. If there are doubts, then no doubt it would be fair to wait. On the other hand, if the evidence produced is, in the absence of an explanation, sufficiently indicative of guilt, then the employer may be entitled to act."

54. I also bear in mind the decision of A v B [2003] IRLR405 in which the Employment Appeal Tribunal reminded tribunals that in determining whether an employer has carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and the potential effect upon the employee. It was said:

> "Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."

55. I have also reminded myself of the decision of South West Trains v McDonnell [2003] EAT/0052/03/RH and in particular:

> "Whilst not only unfair it is incumbent on an employer conducting an investigation followed by a disciplinary hearing both to seek out and take into account information which is exculpatory as well as information which points towards guilt, it does not follow that an investigation is unfair overall because individual components of an investigation might have been dealt with differently, or where arguably unfair. Whilst, of course, an individual component on the facts of a particular case may vitiate the whole process the question which the Tribunal hearing a claim for unfair dismissal has to

ask itself is: in all the circumstances was the investigation as a whole unfair?"

Findings of Gross Misconduct

56. A finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Generally to be gross misconduct the misconduct should so undermine trust and confidence that the employer should no longer be required to retain the employee in employment. Thus, in the context of section 98(4) it is for the tribunal to consider:

(a) Was the employer acting within the band of reasonable responses in choosing to categorise the misconduct as gross misconduct; and

(b) Was the employer acting within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, matters such as the employee's length of service and disciplinary record are relevant as is his attitude towards his conduct.

The Acas Code of Practice on Disciplinary and Grievance Procedures

57. Any provision of a relevant ACAS Code of Practice which appears to the tribunal may be relevant to any question arising in the proceedings shall be taken into account in determining that question (Section 207, Trade Union and Labour Relations (Consolidation) Act 1992).

58. The ACAS Code of Practice on Disciplinary and Grievance Procedures provides that:

> "31. If an employee is charged with, or convicted of a criminal office this is not normally in itself reason for disciplinary action. Consideration needs to be given to what effect the charge or conviction has on the employee's suitability to do the job and their relationship with their employer, work colleagues and customers."

The Code applies equally to dismissal where the reason is an SOSR reason if the employer used its disciplinary procedures to effect the dismissal.

59. The non statutory Acas Guide states:

> "An employee should not be dismissed or otherwise disciplined solely because he or she has been charged with or convicted of a criminal offence. The question to be asked in such cases is whether the employee's conduct or conviction merits action because of its employment implications.
>
> Where it is thought the conduct warrants disciplinary action the following guidance should be borne in mind:

- The employer should investigate the facts as far as possible, come to a view about them and consider whether the conduct is sufficiently serious to warrant instituting the disciplinary procedure;

- Where the conduct requires prompt attention the employer need not await the outcome of the prosecution before taking fair and reasonable action…"

60. The Acas Code also says:

> "If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. The notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting…"

Submissions

61. I received oral submissions from the respondent and written and oral submissions from the claimant which I have taken into account when reaching my conclusions below.

Discussion and Conclusions

62. Applying the legal principles outlined above to the relevant findings of fact made, I reach the following conclusions to determine the issues in the case.

The reason for the dismissal?

63. The first issue is whether the respondent has shown a reason or a principal reason for the dismissal. If so, has the respondent shown that it is a reason which relates to the conduct of the employee? Alternatively, has the respondent shown that the reason/ principal reason is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held?

64. "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee" (Abernethy v Mott Hay and Anderson [1974] ICR 323).

65. The claimant submits the reason for dismissal is unclear. The formal disciplinary allegation and consequential formal finding made against the claimant, were even on the respondent's own admission, not well drafted. The allegation at [42] is:

> "Serious misconduct, namely being charged with the alleged offence of possession of two category A images. Following the investigation, we have reasonable belief that these allegations may be true."

The dismissal letter uses the similar wording of at [59]:

> "Being charged with the alleged offence of possession of two category A images; which following our investigation and disciplinary hearing we reasonably believe are true."

66. The dismissal hearing minutes at [49] record Mr McSherry stating:

> "We have a reasonable belief that the allegations are true. Due to reputational damage, duty of care to our staff who are under the age of eighteen and the breach of trust we have decided to dismiss with immediate effect."

67. The disciplinary summary sheet at [43] gives reasons for the decision that do not mention any belief that any allegations against the claimant are true, instead simply citing "reputational damage, duty of care to under 18s, breach of trust." However, on the question of "what is the evidence" it says "charged with 2 indecent images." The suggests a focus upon the fact the claimant had simply been *charged* by the police.

68. The contemporaneous documents are therefore unclear for two reasons. First, the wording used in the dismissal letter is unclear. It could be interpreted as meaning that the disciplinary finding was simply that the claimant had been *charged* (in a criminal law sense) with the alleged offence of possession of two category A images (with the respondent having a reasonable belief that it was true that the claimant had been criminally charged with those offences.) Or it could mean that the disciplinary finding was that the respondent had a reasonable belief that the claimant had *committed* the offence of possession of two category A images. In a nutshell was the claimant dismissed because he was charged by the police, or was it because there was a reasonable belief that the allegation behind the charge of possession of 2 category A images was true? Second, what role, if any, did "reputational damage, duty of care to under 18s and breach of trust" play in the reason for dismissing the claimant?

69. On the first issue, the claimant's evidence was that he did not try to unpick any particular meaning at the relevant time. Mr Williams, who approved the wording of the disciplinary allegation gave confused and conflicting evidence on the point. He said initially that he was not accusing the claimant of being guilty of an offence but also said it was not just the fact that the claimant had been charged by the police. Later in his evidence again he said "it's the alleged offence. Its being charged with the alleged offence."

70. Mr McSherry, who made the decision to dismiss the claimant, says in his written witness statement:

> "19. My decision was not based on whether or not he was charged or found guilty of the *criminal* offence of possession. My decision was based on whether we had a reasonable belief he had conducted himself in a way that had given rise to a charge; namely that Category A images had either been downloaded onto his phone or into his files held in Cloud storage. Either way, I concluded he had access to those images and concluded that on balance he was in possession of those images.

> 20. Mr Bosher also confirmed that he was still uncertain as to how he would plead at the criminal trial. This indecision about a plea appeared to me to be in relation to what evidence the Crown Prosecution Service ("CPS") held to support the criminal offence, rather than Mr Bosher disputing that he had downloaded Category A images of children. Mr Bosher told me that he thought the CPS must have had evidence if they'd charged him and was unable to state categorically that he was pleading Not Guilty. Rather, at that point in time there was a risk there was sufficient evidence against him to lead him to plead guilty…
>
> 27. I informed Mr Bosher that we believed there was gross misconduct in this case. I stated that, on the information, provided, and following discussions during the disciplinary meeting, there was a reasonable belief that Mr Bosher had been in possession of Category A images. I informed Mr Bosher that due to the risk of reputational damage, the Respondent's duty of care to employees under the age of 18 and the breach of trust, he would be dismissed with immediate effect."

71. Mr McSherry was further questioned in cross examination; in particular on the question of whether his belief lay in the claimant being charged or whether it lay in a belief of possession of the images in question. I found at time his answers difficult to follow and he said it was "somewhere in between" the two interpretations of the wording. However, he also went on to say that in oral evidence it was his reasonable belief that the claimant looked at and potentially downloaded these images.

72. Mr McSherry also stated in evidence that there was potential reputational damage to the respondent if the criminal case against the claimant went to a public hearing, irrespective of whether or not the claimant was actually dismissed. He further stated that he believed that the claimant had accessed pornographic material in the knowledge that it could contain category A images and that this was reckless behaviour as if there was a 10% or 20% chance that the material contained category A images then the claimant was knowingly accepting that risk. He said that he considered there was a breach of trust as the claimant was engaged in a sensitive role which can involve looking at the family members of policy holders who are children. In his statement he says "Mr Bosher accepted that he would have access to customer's policies, credit checks, social media pages and other information available on the internet. It was my view that this was a cause for further concern."

73. Having given the matter careful consideration, and having considered the contemporaneous documents and Mr McSherry's written and oral evidence (in full) in my judgment the facts and beliefs held by Mr McSherry that caused him to dismiss the claimant were multifactorial in that:

    (a) He considered he had sufficient information before him to form a reasonable belief that the claimant was in possession of the 2 Category A images that were the subject of the criminal proceedings whether on the claimant's phone or held somewhere else such as cloud storage.

Mr McSherry in his written witness statement talks in more general terms of the claimant being exposed in general to Category A images and that he was not concerned with the criminal test of possession. I reject these contentions as a matter of fact. Given the way in which the dismissal letter is drafted, which Mr McSherry approved, it must have related to the 2 distinct Category A images in respect of which the claimant had been criminally charged.

(b) He considered that the claimant had displayed reckless behaviour and poor judgment. He considered that, on his understanding, the manner in which the claimant accessed legal pornography by reviewing folders of images/ videos meant the claimant had come across thumbnails which could contain illegal material and the claimant had carried on with such viewing of legal pornographic material knowing that risk was there and not reported the suspicious material.

(c) He did not want the respondent to face what he saw as potential reputational damage if it were seen to be still employing the claimant and the criminal charges against the claimant went to a public criminal trial, irrespective of whether the claimant was ultimately convicted or not. This included a concern for potential reputation harm if the claimant's wider pornography habits became known including, in Mr McSherry's view of the claimant having continued to expose himself to the risk of coming across illegal material. This concern for potential reputational harm included a fear of public criticism that the respondent was employing the claimant who was facing these allegations and in the wider evidential picture that might come out in a workplace where some under 18s worked.

I do not consider that Mr McSherry actually thought the claimant posed a risk to under 18s in work. He knew full well that the claimant had been working without issue or restrictions other than the need to comply with the bail conditions. It did, however, as just stated, feed into his concerns about the risk of reputational damage.

(d) Mr McSherry also held concerns, based on the above beliefs, whether it was suitable for the claimant to continue to work in his role that included dealing with and accessing sensitive information.

74. A reason which "relates to the conduct of the employee" is expressed in the legislation in general terms. The reason does not have to amount to gross misconduct. It does, however, have to relate to the particular employee and it imports a notion of personal culpability.

75. Belief that the claimant was in possession of the 2 particular category A images is clearly related to the conduct of the claimant. Accessing legal pornography in an employee's private life would not be conduct for these purposes. I accept, however, that a belief the claimant had engaged in reckless behaviour or poor judgment that led to a real risk he would knowingly be exposed to illegal images or that he had not reported suspicious potentially illegal material can amount to "conduct" in the wider sense of section 98(2)(b), even if it would not be criminal conduct in itself.

76. A concern about potential reputational harm if the case went to trial is not "conduct" on the part of the claimant nor is a concern about the claimant's suitability to remain in his post. Looking at it in the round, however, I accept that the respondent has shown that the *principal* reason for dismissal was conduct. I return to the non-conduct reasons further below when assessing the overall fairness of the dismissal under section 98(4).

<u>Section 98(4) – the reasonableness of the dismissal</u>

77. I consider that under section 98(4) the dismissal of the claimant was unfair. I have reached this conclusion because of combination of several reasons. In reaching this conclusion and in setting out my reasons below I have reminded myself again that in answering the questions posed by section 98(4) I must not substitute my view for what should have been done. Instead, I have to consider whether the procedure followed fell within the range of reasonable responses and whether the sanction of summary dismissal was within the range of reasonable responses open to a reasonable employer.

The investigation

78. I look first at the sufficiency of the investigation. There was a failure to obtain from the claimant an agreed version of the records of the investigation meetings. The respondent states it is not their policy to do so. However, here we have a case in which there was a serious criminal allegation and the information on which the respondent based their decision came almost entirely from the claimant. The information came from a series of interviews in which the picture (due to the claimant's situation developing over time) was changing. In these particular circumstances, I consider that any reasonable employer would have taken steps to get the claimant's approval of, or points of dispute on, the minutes at the relevant time. I accept the claimant had the opportunity to review them before the disciplinary hearing and provide his observations. I agree with the respondent that the claimant's lack of time to prepare for his disciplinary hearing was largely due to the decisions he personally made not to allow himself time to review the material. However, it was not in my view sufficient or within the range of the conduct of a reasonable employer to only provide them in the run up to the disciplinary hearing. These were minutes that dated back to April 2017 and a reasonable employer would have obtained contemporaneous approval from the claimant in the very particular circumstances of this case. This is a factor pointing towards unfairness.

The framing of the charges

79. It is well established by authority, as set out above, that disciplinary charges, particularly of serious misconduct, should be clear and precise. Further, that an employee should only be found guilty of the charge which is put to him. The Acas Code makes clear the information should be set out in a written notification sent before the disciplinary hearing. I have already addressed above the deficiencies in the drafting of the disciplinary charges laid against the claimant in relation to the meaning of "Serious misconduct, namely being charged with the alleged offence of possession of two category A images. Following the investigation, we have reasonable belief that these allegations may be true." Any reasonable employer would have set it out more clearly.

80. Secondly, the remainder of the charges were not set out in the letter inviting the claimant to the disciplinary hearing. The allegation of wider reckless behaviour or lack of judgment was not set out there. Not was the allegation about alleged reputational harm or the allegation about the claimant's fitness to continue in his role. The importance of laying out the disciplinary charges in writing is so the employee can understand and address the allegations they are facing and prepare for the hearing. It is not sufficient to say that these are matters which were discussed with the claimant at investigation meetings. An investigatory conversation and a disciplinary charge that may lead to summary dismissal are two very different things. The claimant had no way of knowing these were actual allegations he was being asked to answer in the sense he faced dismissal on the points. The claimant here was at very real risk of answering questions in the disciplinary hearing that appeared to be addressing the charge of possession of the two Category A images in a way that could potentially implicate him in relation to the respondent's views about his wider conduct. He should have been able to understand the implications of this. Any reasonable employer bearing in mind the seriousness of the claimant's situation would have set out the allegations more clearly and more fully. This is an important factor pointing towards unfairness.

Reasonable belief in the guilt of the claimant based on reasonable grounds having carried out a reasonable investigation?

81. I have found that alleged gross misconduct was the principal reason for the dismissal. The principles of British Home Stores Ltd v Burchell (as summarised above) are therefore engaged. This involves, in part, looking at what evidence was before Mr McSherry when he made the decision to dismiss.

Possession of 2 Category A images

82. On 14 August 2017 CF had emailed SW with the update that the claimant had entered a "no plea" rather than guilty and that this was because of evidential developments. First, because evidence provided on the morning of the hearing appeared to suggest the images were on an SD card and the claimant's case was his phone did not have an SD card. Second, the claimant's solicitors had expressed concerns about the thoroughness of the report provided by the CPS/ police and they were writing to the CPS. CF stated that the claimant had a pre trial hearing on 8 September 2017 and that "If the CPS do not respond to the individuals solicitor by the pre trial hearing, there is a possibility the case could be thrown out."

83. In his investigation findings- summary sheet Mr Williams said of this development that the claimant "had never categorically denied the allegations and it now appears that his solicitor are relying on technical points in order for the case to be thrown out, rather than submitting a plea of "not guilty." At the disciplinary hearing the claimant told Mr McSherry that his solicitors were not relying on technical points. He also said:

> "Also it doesn't say where on the device the images were found, I don't download anything on my phone. I thought the images were in the cloud but they're not they're actually on the device."

> "Possession depends on whether you have knowledge of it or not. The CPS summary isn't clear whether it is easily accessible. If its buried in a deleted folder it could be argued its not possession."
>
> …
>
> "Solicitors initial recommendation was to plead guilty but then after viewing the evidence he said I cant with a clear conscience tell you to now plead guilty. The trial will close if CPS doesn't get the information on time."
>
> …
>
> "The notes from the hi tech crime guy said searches were done on Samsung smart phone, it doesn't say what category and also images found in memory of SD card. My Galaxy S6 doesn't have an SD card; the definition is a removable flash memory. It doesn't say where in the phone, whether it needs someone to look further, or how it got there. It said it contains non indecent images of my children. I should have the answer when it comes back. It may [be] deep in the memory of the phone. I'm lead to believe the term possession refers to an item being in your possession e.g. if you're wearing your friends jeans and they have cocaine in the pockets. It would depend whether you knew you had the item in your possession."
>
> …
>
> "It could be malware I don't know, the case is now in the crown court so it would be the barrister who could view the images."

84. Mr McSherry asked the claimant why he had not pleaded not guilty and the notes say that the claimant said:

> "This was the solicitors advice. The CPS charging me means that they have reasonable belief. Now there's a question over whether it is possession. They couldn't charge with possession if it was just a link. Its not on a drop box account so I'm unsure if they're alongside thousands of adult images. There must be evidence if they've charged me. If I pleaded not guilty but was found guilty there would be a much harsher sentence. However I will probably be found guilty anyway. I would have a third of a reduction in sentence if I was to plead guilty. I would probably be looking at community service for a sentence. "
>
> …
>
> "The solicitor's advice at first was that it is just the content on there not whether or not there was intention or knowledge. I've never been in trouble with the police before so I wasn't sure. The sentence could be worse if I pleaded guilty. I still don't know how it got on there."
>
> …

> "The definition of possession changed, and I don't want to lie. I've got strong morals and abide by the law. I wouldn't feel comfortable lying. If they describe the images and it doesn't sound like the images I've seen I will say that."
>
> …
>
> "I don't know what I will plead and what the outcome would be. I'm just going on solicitor's advice. I wouldn't waste tax payers money on a trial if there's a lot of evidence stacked against me. I'll probably plead guilty and it will probably result in community service or a fine. Otherwise I could get anything up to ten years…"

85. I should add that the claimant disputes that the minutes are entirely accurate saying that he did not say he would probably plead guilty but said that he would act on the advice of his barrister, who he had not yet met with. He states he telephoned his solicitor at the meeting in the presence of Mr McSherry and HF to tell them that he would be late for the barrister's meeting.

86. In my judgment, looking at the meeting notes and having heard from the claimant and from Mr McSherry I find that the gist of what the claimant told Mr McSherry was that:

    - he had been told that the images had been found on his phone (the device) but not where on the phone they were found, how they got there, or how accessible the images were. There were outstanding evidential queries with the CPS in that regard;
    - the claimant did not download images to his phone;
    - there must be some evidence of the images being on the phone for the CPS to have charged him and that the earlier solicitor's advice had been this was sufficient to amount to possession. However, the definition of possession he had been given had changed and he now understood that the CPS would have to establish knowledge the images were there;
    - given the outstanding evidential enquiries there was a genuine outstanding question as to whether possession would be established;
    - his new solicitors had advised him to enter "no plea" pending the further information;
    - the claimant would ultimately have to reach a decision when the outstanding questions were answered. On legal advice he had not pleaded "not guilty" at that time because it best preserved his position on sentence in a worst case scenario;
    - it was also possible the trial could close if the CPS did not respond in time.

87. That the claimant gave such an account, and that possession was a live issue and known to be is supported by the summary sheet at [43] which says under "Employee's explanation/ Any new evidence: No knowledge they were there – didn't intentionally download."

88. Other than the claimant's own account Mr McSherry had no other evidence of substance before him other than the charge sheet. In my judgment any reasonable employer would have understood that the claimant was not at that time conceding that he was in possession of the two Category A images in question. The claimant was waiting to receive more evidence and more legal advice. If so, there was no other evidence of substance pointing the other way. This was the latest position and the latest legal advice. The respondent's witnesses said they worked on the basis of accepting the claimant's account and that it was reasonable of the claimant to seek and to follow legal advice. I therefore do not find that Mr McSherry's belief that the claimant was in possession of the 2 Category A images was a reasonable belief based upon a reasonable investigation.

89. I have taken into account Mr McSherry's belief that the images may have been somewhere other than on the phone. However, irrespective of what the claimant may have said previously, he was at that time faced with the claimant telling him the CPS were now stating that the images were on the phone (and not, for example in the cloud or Dropbox or a link). The only evidence came from the claimant and it is clear that the picture changed as the claimant's situation developed and he was given more information. I therefore do not find that Mr McSherry's belief the claimant possessed the two Category A images somewhere other than the phone was a reasonable belief based upon a reasonable investigation at the point of time of dismissal.

90. I acknowledge that the burden of proof differs between the disciplinary situation and the criminal prosecution. The respondent did not have to be satisfied beyond reasonable doubt that the claimant was in possession of the two Category A images. However, the respondent had no evidence of substance to proceed on other than the claimant's own account. The burden of proof does not alter the evidential picture. For the reasons already given above there was not sufficient information on which any reasonable employer could form a view of guilt based on the balance of probabilities.

91. It follows from the above that in relation to the charge of possession of two Category A images that in my judgment any reasonable employer would have waited for the outcome of the CPS enquiries and the claimant receiving further legal advice before making a decision on dismissal in respect of the related disciplinary charge. All of the respondent's witnesses agreed in evidence that it was reasonable on the part of the claimant to seek and to follow legal advice. There was no urgent need to reach a decision at that time. The claimant was in work, performing well, without restrictions and there was nothing to sensibly suggest that was likely to change. This was an allegation of serious criminal behaviour and potential evidence was outstanding that could point towards the claimant's innocence (or not).

Reckless behaviour/ lack of judgment

92. On this point, according to the disciplinary hearing minutes, Mr McSherry had the following exchanges with the claimant:

> "DB - I meant to say I know this type of thing goes on, but I never download legal adult content to my phone just the cloud. I never looked at these things (category A images), the images are numbered so you would only look at the top handful, see if you're interested and then copy/save the

whole folder to the device. My account maxed out at 100 GB, most of this was adult content.

JM – This was a reckless thing to do; did you know there were explicit things in these folders?

DB – Yes, there's been things related to animals. I'm aware that eight to nine out of things of that nature wouldn't be in there but it is risky. I only have myself to blame, I didn't see the risk at the time and haven't taken steps to say this is wrong or report it. There is a helpline, I saw similar images the year before after [X] was born and I called the helpline then to report the images. Their advice was just to delete it and not do anything else with it. I then come across more images like this and become desensitised to this; I wasn't looking for things of this nature. The links are to someone else's account.

…

JM – you save you've reviewed images.

SB – Yes I've come across them but I didn't knowingly download them. If there's something not right I just delete it.

JM- so you're not reporting them anymore? Reviewing indicates there's an element of control.

DB – everything I'm referring to is legal adult content. Images we're talking about only equate to a small amount. Its more so with videos you can see two adults but not what type of porn it is.

JM- So you would review content knowing it may be of a category A nature?

DM – You would look at the thumbnail first and skip past it if there's no thumbnail. Not acknowledging it is recklessness. I've also seen masochism, people being shot, hung up on hooks etc. So it desensitises you. I just had my own child which is difficult.

JM – You're still downloading things to your account which no one has access to and is registered to you?

DM- Yes no one has access to my phone or account…"

….

JM – So you have access to customers social media profiles. You mentioned you understood why it would be GMC

DB – No its how Steve words things, I ended up biting when he said I would continue in the role when they had my charge sheet. I asked how it is only now affecting now role. I understood I had open sanctions, I wasn't suspended so would continue until the court date. It then changed to a

disciplinary. Where it says "affect his judgement etc" I've been trusted to review financial details, and social media profiles. If my judgement was affected I shouldn't have been allowed to work.

JM - The info gradually came out and we had to make a decision at some point, even today more information has come to light…

Do you think you're fit to carry out your role given this information?

DB – I've never looked at illegal sites they're all legal

JM – But you have seen category A images and done nothing about it. Given the access of information you have in your role, do you think you can remain in Admiral?

DB – I've never searched for this type of content, I can understand why not in this role but don't see why I couldn't be employed in Admiral. I do a good job and never had any trust issues previously. Chris said I've done things properly. I would like to think with a reduction in sanction there is a role. I understand we employ under eighteen's. I'm not a predator it was just a stupid mistake.

JM- We're not suggesting that although part of your bail conditions were that you couldn't be around under eighteen's. If we allowed you to continue working in Admiral and you plead guilty could you see how this could cause reputational damage?"

….

HF … DB asked if there was anything else he could do, advised if he wanted to contact us after the sentence he could however there would still be a trust issue regardless of the role, so its unlikely we would consider an application. However this is something he could do."

93. The last statement by HF was made after the claimant had been told of the decision to dismiss. In his witness statement Mr McSherry confirms that he is in agreement with the sentiment expressed by HF. Mr McSherry also refers to the claimant admitting that he had viewed Category A images, that the claimant had accessed files containing pornography in full knowledge they could contain Category A images. He states:

> "I also took into account that he had put himself in a position of risk accessing and possessing such images; his view was that 8 or 9 times out of 10 there wouldn't be such images in the files he downloaded. This presented a 10-20% risk there would be such images in the files he downloaded which was unacceptable particularly taking into account the volume of pornography had admitted accessing. He admitted that was a risk reputationally to the business."

94. I am satisfied that Mr McSherry had information before him on which he could reasonably take the view that the claimant had exercised poor judgement in his

private life in continuing his viewing of legal pornography in such a manner that exposed the claimant to the risk of coming across illegal images. Whether the claimant was fairly dismissed, however, has to be assessed under section 98(4) as a whole, including whether the sanction was within the range of reasonable responses open to a reasonable employer.

Sanction

95. I turn therefore to the sanction imposed. I am mindful here that in terms of the conduct behind the alleged reckless behaviour/poor judgment that it is conduct in the claimant's private life and conduct in respect of which (other than the two images that led to the criminal proceedings) there was no evidence before the respondent that the claimant had engaged in unlawful activity. The respondent knew he had been subject to an extensive forensic police investigation and that at the time the criminal charge was only in respect of two specific images. I am also mindful of the emphasis in the Acas Code of the importance of considering the effect the alleged conduct outside of work has on the employee's suitability to do the job and their relationship with their employer, work colleagues and customers.

96. It cannot be the case, in my judgment, that it is reasonable for an employer in every situation to consider that a claims validation coordinator is unfit to perform their job because they have exercised poor judgment in their private life. To fall within the range of reasonable responses the employer has to be in the position of, in effect, having no choice other than dismiss because of the impact of the conduct on the employee's suitability to do the job or the relationship with their employer, work colleagues or customers (with that assessment itself being within the reasonable range). The respondent here says it had no confidence in the claimant's integrity to fulfil a role in the fraud team that involved undertaking work such as finding evidence and clues and assessing improper activity. They refer to the claimant's access to social media which could include pictures of children. They term this a breakdown in or a breach of trust.

97. But this is a claimant who had not been suspended and who had not been subject to restrictions or sanctions in work (other than in relation to contact with under 18s due to the bail conditions, but which in turn had caused no difficulties other than the advice given to the claimant about the lifts). The respondent had not reduced the claimant's higher level of access to the internet and social media. There is no evidence, since the events first came to light, of the claimant's performance in work being affected or any suggestion that he had conducted himself *in work* inappropriately, recklessly or in a way that lacked judgment. The respondent had been monitoring the claimant's activity in work (see the references to blue coat reports in the timeline at [79] in April 2017 and 19 July 2017) with no adult or suspicious content or concerning images being found. There is no evidence of difficulties working with customers or colleagues. In these circumstances, I do not find that the respondent's witnesses demonstrated in real terms a practical reason why the claimant could not continue in his role. I do not consider that any reasonable employer would have summarily dismissed on that basis.

98. Further, I do not consider that in reality full consideration was given to alternatives to dismissal such as finding the claimant an alternative role or reducing the degree of access that the claimant had to social media and the internet (which was set at a level

above most members of staff). If the respondent had the concerns they have identified with the claimant's post then a reasonable employer would have considered such alternatives. The respondent is a large employer and the claimant (these issues aside) was well regarded and had excellent transferable skills. The fact that this was not properly considered is shown by HF's comment, approved by Mr McSherry, that there would be a trust issue regardless of role. I also factor in that dismissal for an alleged lack of judgment and a consequential in ability to fulfil a role in the respondent's business were not within the formal charge put to the claimant in the written invitation to the disciplinary hearing or indeed the dismissal letter. That it did not feature there also suggests it played a lesser role in the respondent's reasoning than their conclusions about the two Category A images. This all points against summary dismissal for this particular conduct reason as being within the range of reasonable responses open to a reasonable employer. But I do have to add into the mix the respondent's further reason of the risk of reputational harm.

Risk of reputational harm

99. Mr McSherry clearly perceived that there was a potential reputational impact for Admiral if they continued to employ the claimant and his case proceeded to a public hearing, irrespective of whether or not the claimant was convicted. In particular, I consider it is likely he was fearful of adverse publicity not only that the claimant had been charged and was being prosecuted/potentially taken to trial for possession of two Category A images of children, but also of adverse publicity for Admiral about the claimant's practice of viewing/ accumulating legal pornography and the associated risk that the claimant had adopted of potentially being exposed to or unlawful images but had carried on regardless. In my judgment, this played a part (albeit not the principal reason) in Mr McSherry's decision to dismiss the claimant. The fact that the claimant had been charged, that he had entered "no plea", and could be heading to trial and therefore there was a risk that the information could come out at a trial or some other public hearing all played a part in Mr McSherry's decision.

100. This is not a conduct reason but in assessing fairness I must also take into account any other substantial reason that may be admixed to the principal reason (see for example Royal Veterinary College v Yerbury [2005] UKEAT02020/05). If anything this is a reason that would potentially fall within "Some other substantial reason justifying the dismissal of an employee holding the claimant's position" ("SOSR").

101. In Leach v Office of Communications [2012] ICR 1269 the Court of Appeal emphasised the mutual duty of trust and confidence, whilst being an obligation at the heart of the employment relationship, 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 will differ from case to case. It is important to bear in mind that for a SOSR dismissal the reason has to be a substantial one and sufficient to justify dismissal of an employee holding the position which the claimant held (in addition to the test of fairness under section 98(4).

102. In relation to the criminal charge and the ongoing prosecution, in my judgment a fear of public opprobrium and reputational harm cannot be presumed on the basis of a presumed extreme or scaremongering reaction in the press or public. The public have to be credited with an understanding that a prosecution does not equate to a

conviction and that an individual has a right to defend themselves without being automatically dismissed. It otherwise becomes a presumption of guilt without an ability for the claimant to defend himself.

103. In relation to the fear of public opprobrium and reputational harm because the claimant's wider legal pornography habits could come to light including his potential to exposure to other Category A or unlawful material, I accept that some of the public could view the claimant's habits as unsavoury or inappropriate. On the other hand, there was no evidence of *criminal* wrongdoing and it was activity that the claimant engaged in, in his personal home life.

104. Furthermore, even with the "no plea" situation, the claimant was waiting for further information from the CPS and further legal advice. As was acknowledged by Mr Gabriel at the appeal, the claimant had been clear that he was waiting for more legal advice before deciding ultimately what to do. Mr Gabriel even said in the appeal outcome letter that at the point of the claimant's disciplinary he did not know if he would even be facing a trial. There was no reason to suppose at that particular point in time that the claimant was dismissed that any of this information (including the claimant's wider pornography habits) were going to be suddenly exposed. In my judgment, a reasonable employer would have waited for further developments to unfold rather than dismissing at that time. They would have waited until they could assess whether a public hearing was actually likely to take place at which that information would be "outed" and then fully assess what, if any, reputational harm they considered was likely to be caused.

105. I also take into account the lack of evidence as to what harm the public could perceive to be caused by the claimant continuing in his role or another role within the respondent. His job did not involve working with children. Whilst the evidence was Mr McSherry knew of a handful of under 18s being employed by the respondent this was something for which protections were in place and which could be communicated to anyone concerned. Whilst the claimant had access to social media and the internet these were not access rights that allowed him to go beyond publicly available information on the internet (such as open Facebook profile pictures). He was dealing with household claims. His work was being monitored and could continue to be.

106. Any reasonable employer would have undertaken a balancing exercise of these kinds of factors that I have identified against any concerns about the risk to the respondent's reputation. To assess only one side of that equation otherwise risks making a knee jerk reaction. There is no evidence that the respondent did that kind of assessment. Any reasonable employer would also have genuinely considered options such as redeployment, reducing the claimant's responsibilities or suspending the claimant pending developments in the criminal proceedings, or indeed if any action was needed at all. I would also again repeat that risk of reputational harm is not a formal charge that was put to the claimant in the invitation to the disciplinary meeting or indeed in the formal dismissal letter.

107. On balance, I do not find that any reasonable employer would consider the risk of reputational harm to be a substantial reason justifying the dismissal of a claims validation co-ordinator at that time. Moreover, even if this reason is admixed with the conduct reason and they are considered together cumulatively, for the reasons

already set out above I do not find that the sanction of summary dismissal was within the range of reasonable responses open to a reasonable employer at that time.

The appeal

108. I also do not find that the appeal was fairly handled. I accept that Mr Gabriel may not have understood the claimant's specific concern about attending an appeal hearing whilst his criminal case was outstanding (that his solicitors had advised his account to the appeal could become disclosable in the criminal proceedings and potentially prejudicial). It was never directly put to him (or HR) in those terms by the claimant or the claimant's criminal solicitors.

109. However, Mr Gabriel clearly knew that the claimant had entered a plea of not guilty and there was an issue as to whether the charge of possession was going to be made out. For the reasons already set out above I find that any reasonable employer would have postponed the appeal hearing at that time pending developments in the criminal proceedings. The respondent was not paying the claimant. There was no real disadvantage to them in holding open the appeal. This is also not a case in which it can be said that a fairly conduct appeal has cured unfairness in the earlier procedure.

Conclusions on unfair dismissal

110. For all these reasons, when viewed objectively, dismissal was not in this case in the range of reasonable responses. Having regard to the reason(s) shown by the respondent, and taking into account their size and administrative resources, the respondent did not act reasonably in treating the reason(s) as a sufficient reason for dismissing the claimant.

Polkey

111. Under Section 123 of the Employment Rights Act 1996: "the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer." The seminal case on Section 123 is Polkey v AE Dayton Services Ltd [1988] ICR 142. There are two aspects to this assessment.

112. One is the extent to which the circumstances can be reconstructed such that, had a fair procedure been adopted, it is possible to assess the chances that the outcome would have been the same. I note that this principle applies not only to cases where there is a clear procedural unfairness but what used to be called a substantive unfairness also. However, whilst a tribunal may well be able to speculate as to what would have happened had a mere procedural lapse or omission taken place, it becomes more difficult and therefore less likely that the tribunal can do so if what went wrong was more fundamental and went to the heart of the process followed by the respondent.

113. I have noted the guidance in Software 2000 Limited v Andrews 2007 ICR825/EAT. I further note that a deduction can be made both for contributory conduct and Polkey but when assessing those contributions the fact that a contribution has already been

made or will be made under one heading may well affect the amount of the deduction to be applied under the other heading. I note that in cases involving allegations of misconduct a Polkey assessment is likely to be more difficult that in a redundancy dismissal case and that a misconduct case will likely involve a greater degree of speculation which might mean the exercise is too speculative. I have to consider not a hypothetical fair employer, but the actions of the employer who is before me, on the assumption that the employer would this time have acted fairly. Could the employer have fairly dismissed and, if so, what were the chances that it would have done so?

114. There is, secondly, a wider application of the just and equitable principle insofar as the evidence in any given case shows there was a prospect of the employment coming to an end in any event at a later date.

115. In this case, I am satisfied the employment would have continued for such a sufficient period into the future for that to have no effect on the claimant's future loss. The issues in this case aside, the claimant was performing well and was a valued member of staff who appeared to be forging a career with the respondent. My focus is therefore on the first aspect of the test.

116. Here I consider the situation too speculative for a Polkey reduction to apply. I have decided that the decision to dismiss fell outside the band of a reasonable response at the time it was made and therefore a fair dismissal would not have followed at that time even in the absence of an unreasonable procedure. To assess whether this employer could have fairly dismissed is to speculative in the circumstances.

Contributory fault

117. Section 122(2) of the Employment Rights act says:

> "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

118. Section 123(6) supplements section 123(1) (set out above in relation to Polkey) to say:

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

119. For the basic award there is no requirement for a causative relationship between the conduct and the dismissal. The compensatory award does require a causal connection.

120. The employee's conduct need only be a factor in the dismissal; it need not be the direct and sole cause.

121. In Steen v ASP Packaging Ltd [2014] ICR 56 the Employment Appeal Tribunal suggested the following should be assessed:

(a) What is the conduct which is said to give rise to possible contributory fault?

(b) Is that conduct blameworthy? The tribunal has to assess as a matter of fact what the employee actually did or failed to do (not what the employer believed).

(c) Did any such blameworthy conduct cause or contribute to the dismissal to any extent (this is only relevant to the compensatory award)?

(d) If so, to what extent should the award be reduced and to what extent is it just and equitable to reduce it? Here the EAT noted that "A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basis award, but it does not have to do so."

122. In Nelson v BBC No 2 [1980] ICR 110 it was said:

> "It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But is also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."

123. I cannot find that the respondent has established on the balance of probabilities that the claimant was in possession of the two Category A images that led to the criminal charge. I accept that in collating a lawful collection of adult pornography the claimant engaged in Dropbox activity over a period of time that left him occasionally at risk of being exposed to unlawful material and that he continued with such practices and did not report the material he considered may potentially be unlawful. I am satisfied that whilst viewing or collating legal adult pornography alone would not be culpable conduct because of the latter aspects it is overall culpable conduct. It arises as a considered choice of the claimant and it is conduct that is ill advised.

124. Did that conduct cause or contribute to the dismissal? That question only relates to any reduction to the compensatory award under section 123. I do not know and it has not been established on the balance of probabilities how the two images became present on the claimant's phone and therefore I cannot say that the claimant's arrest and charge happened because of the way in which the claimant viewed pornography. However, the conduct contributed to the dismissal in the sense that it was a factor

that came to light after the claimant's arrest during the investigation process and one that Mr McSherry, in dismissing the claimant, took into account. That causative link and the circumstances as a whole do not, in my judgment, lead to a substantial reduction as there were other factors contributing to the dismissal, including Mr McSherry's settled conclusion that the claimant was in possession of the 2 category A images in question (which was the only allegation specifically mentioned in the invitation to the disciplinary hearing and the letter confirming the claimant's dismissal and in my view was the most significant factor in the decision to dismiss). In all the circumstances I have decided it is just and equitable to make a reduction to both the basic award and the compensatory award to the extent of 25%.

125. I do not find that the claimant was guilty of conduct that was evasive or lacked clarity or was non-committal or detracting. I considered that in giving evidence he did admit his shortcomings albeit he did at times downplay the potential risks associated with his viewing of legal pornography. That is not something however that I consider it would be just and equitable to further reduce the basic award or the compensatory award and I do not consider that it contributed to the claimant's dismissal.

Acas Code

126. I am satisfied that it is just and equitable to make a further adjustment to the claimant's award under s207A of the Trade Union and Labour Relations (Consolidation) Act 1992 in respect of the failure to comply with the Acas Code. I am satisfied there was a failure to comply with the requirement to set all the allegations out in writing in advance of the disciplinary hearing. However, there were other parts of the procedure that did comply with the Acas Code and the overriding justice and equity of this situation does not call for anything approaching the maximum increase. I find that an increase of 10% is appropriate.

Wrongful dismissal

127. The claimant was summarily dismissed. The dismissal is therefore prima facie in breach of the contractual term as to notice unless the dismissal was in itself a response to the claimant's own repudiation of the contract. The burden of proof therefore falls on to the respondent to show that there was a repudiatory breach of contract by the claimant prior to the date of dismissal in order to avoid liability for what would otherwise be a breach of contract.

128. The necessary conduct entitling the employer to dismiss summarily is usually restricted to conduct said to amount to gross misconduct. The classic statement of what constitutes gross misconduct is in Neary v Dean of Westminster [1999] IRLR 288 that the conduct:

> "must so undermine the trust and confidence that is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment."

129. It is therefore a matter for me to assess whether the allegations against the claimant are made out in fact on the balance of probabilities. If they are made out I have to assess whether their nature and gravity is such as to fall within the ambit and meaning of gross misconduct.

130. I am not satisfied that the respondent has established on the balance of probabilities that the claimant was in possession of two unlawful Category A images. I accept the claimant engaged in some reckless behaviour as set out above in relation to his viewing and collating habits but I do not find that the nature or gravity of that is such that it amounted to gross misconduct or otherwise so undermined trust and confidence that the respondent should no longer be required to retain the claimant in their employment. The respondent's concerns for reputational harm should criminal proceedings progress to a public hearing is not conduct by the clamant that would undermine trust and confidence; it is simply a consequence of the criminal charge being brought. Therefore I am not satisfied that the claimant was in repudiatory breach of contract in that regard.

131. The claimant's wrongful dismissal breach of contract claim therefore succeeds. I understand it is accepted by the respondent that in such circumstances the respondent also acted in breach of contract by treating the claimant as a "bad leaver" in relation to his shares and I therefore also find this accordingly.

Directions for Remedy hearing

132. The parties considered that if I made findings on the above issues then they are likely to be able to engage in discussions about the financial compensation due to the claimant. I will therefore list this matter for a telephone case management hearing before me on the first open date after 28 days in order to allow the parties time for discussions before making case management orders on remedy. The parties may also write in prior to the telephone hearing if they are able to agree directions to get ready for a remedy hearing. If the agreed directions are acceptable then the telephone hearing can be vacated.

Employment Judge Harfield
Dated: 29 October 2019

JUDGMENT SENT TO THE PARTIES ON

……2 November 2019………………….

……………………………………………….
FOR THE SECRETARY OF
EMPLOYMENT TRIBUNALS