EMPLOYMENT TRIBUNALS

Claimant	Mr E
Represented by	Ms Victoria Brown (counsel)
Respondents	F NHS Trust
Represented by	Mr Ben Jones (counsel)
Before:	**Employment Judge Cheetham QC**

Full Merits Hearing held on 8 October & 6 November 2020 at London South Employment Tribunal by Cloud Video Platform

JUDGMENT

1. The Claimant was unfairly dismissed.

2. The case will be listed for a 1 day remedy hearing (by CVP), unless the parties are able to agree compensation. The case is therefore stayed for 1 month from the date this Judgment is sent to the parties to allow time for any discussions, after which the parties should write a joint letter with dates to avoid for the period 1 April to 30 June 2021.

REASONS

1. *This has been a remote hearing, which the parties have not objected to. The form of remote hearing was: V – Cloud Video Platform. A face to face hearing was not held because it was not practicable and the issues could equally be resolved using the CVP. The documents that I was referred to are those contained in the Tribunal case file, as well as the hearing bundle, witness statements and respective written submissions.*

2. This claim for unfair dismissal was received by the employment tribunal on 26 April 2019.

3. On 23 June 2020, pursuant to a request from the Claimant, EJ Ferguson made a restricted reporting order and an anonymity order pursuant to Rule 50. She did not agree to the request that the hearing should be held in private.

4. There was an agreed hearing bundle running to 562 pages. The Tribunal heard evidence from the Claimant and, for the Respondent, from Emma Porter (Deputy Director of Forensic Services), who was the dismissing officer.

5. The case was originally listed for 1 day, but it was necessary to add a second day. On that second day, when the Claimant gave evidence, there were some technical issues with the Claimant's connection, but I was satisfied that – despite a number of interruptions - he was able to hear and respond to questions.

Findings of fact

6. The Claimant was employed as a Team Administrator by the Respondent from 5 May 2009. His job description set out the "Job Purpose", which was, "*to provide comprehensive and proactive administrative and secretarial support for the Lambeth Mental Health in Learning Disability Team*". Under "Communications and Working Relationships" were listed, amongst others, "*Service Users, Carers and groups representing them*".

7. In evidence, the Claimant said (and this was not challenged) that he did not have face-to-face contact with service users, but spoke to them on the phone. He said that he had access to patient data and could therefore see patient information.

8. On 14 June 2017, the Claimant's daughter, who was then 8 years old, was taken to her GP by the Claimant, as she had a vaginal discharge. Tests were taken and she was diagnosed as having contracted vaginal gonorrhoea. The Claimant and his wife were both tested on 21 June and (on 28 June) the Claimant was advised that he had tested positive for gonorrhoea, subsequently confirmed as gonorrhoea in his throat.

9. The Claimant was arrested on 28 June, but released on bail while the police conducted their investigation. As a condition of bail, he was not allowed to stay at the family home. Meanwhile, the Claimant's GP had referred the matter to Lambeth Borough Council on 19 June. In parallel to the police investigation, the Council also conducted its own safeguarding investigation.

10. The Respondent suspended the Claimant from work pending the investigations on or about 17 July. On 24 August 2017, the Claimant was "released under investigation" by the police, which meant he was no longer on police bail. On 18 October, DC Jonathan Guy (Child Abuse Investigation Team) emailed the Council and the Respondent to say, "*We have exhausted all other enquiries in relation to this investigation and have closed our report as of today*".

11. The next day, the Respondent's Head of Nursing, Quality and Assurance responded to say that it might be necessary to review the terms of the Claimant's suspension, but she asked whether the local authority remained concerned and whether child protection actions were ongoing.

12. There was also email correspondence on 19 October between various people within the Respondent, which included reference to the Claimant needing an enhanced DBS check. However, it was pointed that administrative staff did not need to have enhanced DBS checks.

13. On 5 December 2017, an expert opinion was obtained from Professor Kailash Mohanty. This followed a minuted action at a child protection meeting on 9 November, which stated: "*An expert is to be appointed to analyse the samples for the sexually transmitted disease for whether they are the same for the subject and child, and comment on the most likely source, cause and mode of infection*".

14. After setting out the factual background and some information about the Claimant, Professor Mohanty provided an "Interpretation of observations". These included:

    "1. Gonorrhoea is a sexually transmitted infection. There is no other way it can be transmitted.
    …
    4. Gonorrhoea does not spread by kissing, hugging, sharing bath towels, swimming pools, toilet seats or sharing cups, cutleries drinking glasses etc.
    5. It can not spread accidentally by washing the bottom of children with water and hand.
    …
    7. It is claimed [the Claimant] had had one night stand and on the following day he took a shower and spat in the shower. The gonorrhoea may gone [sic] his daughter. This scenario is impossible.
    8. It is also claimed that [the child] used her father's towels, which is an unusual claim made by the defendants. This is again impossible."

15. In answer to the question: "*Is it possible that [the child] contracted gonorrhoea other than sexual contact?*", Professor Mohanty wrote "*No. It is only sexually transmitted. There is no other way it can be transmitted.*"

16. On 19 January 2018, Professor Mohanty was asked a series of questions on behalf of the local authority to clarify his opinion, specifically about how the child might have been infected. In reply he now said that fomite transmission was also possible (in other words, via an inanimate object). He also said: "*It is a fact that father has gonorrhoea in his mouth especially in the throat. He can only transmit GC if spits to the vaginal orifice of [the child] or he puts his finger deep inside his throat and then touches the vagina of [the child]. This is very rare form of transmission in my experience.*"

17. Meanwhile, the Claimant remained suspended and his suspension was reconfirmed on 10 November 2017 and then on 15 March 2018.

18. On 25 April 2018, the social worker involved in the case emailed to say that the assessments were inconclusive and there was insufficient evidence to say whether the Claimant did or did not sexually abuse his daughter. She referred to having two expert reports, which were in conflict. This was a reference to Professor Mohanty's report and one from Dr Judith Earnshaw, dated 16 March 2018. Dr Earnshaw is a psychotherapist, so not medically qualified to advise on the transmission of gonorrhoea. She was asked to provide a "Child Sexual Abuse Risk Assessment".

19. Dr Earnshaw set out the background to the case and referred to her interview with the Claimant. Her opinion was that the Claimant's account of events was largely incompatible with Professor Mohanty's, which was unsurprising given that the Claimant denied sexually abusing his daughter. She addressed the Claimant's theories as to how his daughter had come to be infected with gonorrhoea and considered his personal history in detail. She expressed concerns about his credibility at various points. She then gave her opinion on the risk, saying that sexual abuse could not be ruled out, but, "*In my view accidental infection can also not be ruled out and I consider it to be the more likely cause of the complaint*". This conclusion was plainly at odds with the medical opinion of Professor Mohanty.

20. On 27 April 2018, there was a telephone conference between the local authority and David Weir, the Respondent's Clinical Services Lead. The notes include: "*[the Claimant] is a band 4 admin worker who has no access to patients but does have access to ePJS*".

21. The Claimant was allowed to return to the family home on 4 May. At some point he also resumed his duties as a Special Constable. On 9 October 2018, the local authority wrote to the Claimant to say the case had been closed.

22. On 23 October 2018, an enhanced DBS Certificate was issued (despite this not being necessary for administrative staff). It recorded that, due to insufficient evidence, the police had taken no further action against the Claimant. The Certificate also wrongly described the Claimant as a "Child and Adult Workforce Healthcare" worker. Someone occupying that role would require an enhanced DBS check.

23. David Weir, the Respondent's Clinical Services Lead, emailed the local authority designated officer on 26 October 2018. He wrote:

> *"We are in the process of terminating [the Claimant's] contract with the Trust on the basis of what we feel is our duty of care towards service users.*

Clarifying this position with our legal team but the Trust at a senior level are willing to take any potential penalty following any legal challenge to this decision that [the Claimant] may bring."

24. It is unclear whether, by this stage, the Respondent had started any formal process that might lead to the termination of the Claimant's employment, but - on any reading - this email suggests that Mr Weir saw that process as heading in one direction only. However, Ms Porter said in evidence that she had not seen that letter before reaching the decision to dismiss, which I accept. Less convincingly, she tried to suggest that this email did not give the appearance of pre-determination.

25. Mr Weir carried out an investigation and his report is dated 12 November 2018 (updated 27 November). It stated that the investigation was undertaken in accordance with the Respondent's disciplinary policy and that the investigator had not felt it necessary to interview anyone, as the incident was not directly work related, "*although the outcome may directly impact on [the Claimant's] capacity to continue to work within the Trust*".

26. The conclusion does no more than set out a brief summary of what had occurred up to the local authority deciding not to take the matter further. The recommendation was that a panel should consider whether the Claimant should be allowed to continue to work as an administrator for the Respondent. Therefore, this report did not set out any particular allegations against the Claimant, nor the particular reason(s) why his employment might be terminated, beyond the undisputed narrative of events.

27. On 14 November 2018, the Claimant was invited to a disciplinary hearing. the letter stated that, "*As you know the case has been dropped against you due to lack of evidence and the Trust required you to undergo an enhanced DBS check before returning to work. The DBS check returned information that is of concern to the Trust*." That therefore appears to be why he was being invited to a disciplinary hearing, which – he was told - might lead to his dismissal.

28. The hearing took place on 22 November 2018 before Ms Porter and Sally Storey (Associate Director of HR). Ms Porter was the decision maker and this was her first disciplinary hearing. The Claimant was accompanied by his trade union representative. As the Claimant had not been sent all of the relevant documents and also because his representative queried the DBS certificate, the hearing was adjourned.

29. The hearing was reconvened on 12 December and the Claimant was able to challenge the management case, which was presented by Mr Weir. At one point, there was this exchange:

"Lucy [the Claimant's representative] asked if David [Weir] considered it was a safeguarding issue. David said in his view it wasn't a safeguarding issue as far as [the Claimant] was concerned. It was a police matter.

> *…*
>
> *Lucy asked if there were safeguarding concerns on the part of the trust, and David said yes in view of the allegations.*
>
> *Lucy asked specifically if David applied the safeguarding policy?*
>
> *D said that the issue was driven by [the Claimant's] admission of his arrest and the investigations into the sexual abuse of his child. David's was a management investigation so the safeguarding policy did not guide his investigations specifically."*

30. The outcome letter was sent on 20 December and concluded that the Claimant should be dismissed. After setting out what had been discussed at the hearing, it stated:

    "… the panel concluded that sufficient evidence had been presented for it to reach a conclusion that your continued employment with the Trust may present an unacceptable risk to vulnerable people within the Trust's care. As you will appreciate, the Trust has a duty to protect its patients from the risk of abuse and improper treatment. Your position gives you access to vulnerable people, and in the light of the information presented to us we are not prepared to place you in such a position of trust."

31. Therefore, the reason for the Claimant's dismissal was the risk his presence might create for vulnerable service users, which was a dismissal for "some other substantial reason" (although the letter did not use those words). As Ms Porter agreed in evidence, the letter does not set out any analysis of what that risk actually was, nor does it say – for instance – that there had been a breakdown in trust and confidence.

32. In evidence, Ms Porter said that, "*the risk was the fact that the Claimant as an administrator would be patient facing and have contact with children*". She also referred to the café on site and the proximity of a nursery. In fact, the hearing notes would suggest that no information was presented to the panel about the Claimant's access to patients or otherwise vulnerable people. Equally, that allegation was never put to the Claimant for his response and, as noted above, had formed no part of the investigation. I also note that there was never any evidence that the Claimant, as an administrator, would be "patient facing".

33. In evidence, Ms Porter also appeared to be in some disagreement with Mr Weir, who had said at the hearing that the safeguarding policy did not guide his investigation. In her witness statement, she said, "*I reviewed the Trust's Safeguarding policy and considered that it had been followed, although it may not have been explicitly stated that the safeguarding policy was being considered and referred to*" (§32). She repeated this in cross-examination.

34. My finding is that the policy (which Ms Porter was taken to in evidence) was followed in part, consciously or otherwise. The Respondent did respond to

the safeguarding issues raised by the Claimant's arrest and the local authority's investigation and some of the steps in the policy were certainly taken. However, there was clearly confusion over the DBS check, which features in the policy and which was wrongly relied upon in this case. Also, the "Post Investigation Review", which includes feeding back "outcomes" to the employee, did not occur.

35. In her witness statement, Ms Porter said:

> "*I also considered the risk of reputational damage to the Trust if the matter became widely known. [The Claimant] had already been telling a number of his colleagues about his daughter's infection and the fact of the police/LA investigation and so there was a concern on how this information could impact on the public's view of the Trust*" (§41).

36. However, reputational damage was not a reason for dismissal or, at least, not a principal reason, as Mr Jones accepted in his submissions.

37. The Claimant appealed that decision (7 January 2019) on grounds that included: (1) if this was a safeguarding issue, the Respondent had not followed its policies properly; (2) the Claimant had never been told what specific breach or offence he had committed. The management response to the appeal stated (amongst other things), "*The decision was based on the level of risk faced by the Trust, rather than the breach of a specific policy*".

38. The appeal hearing took place on 11 April before Kristin Dominy, Chief Operating Officer, and Michael Kelly, Deputy Director of HR, although the Tribunal did not hear evidence from either. The hearing notes suggest that this was a more thorough hearing, although much of the discussion seems to have been fairly circular, with much emphasis upon which policy had or had not been followed.

39. The appeal was dismissed and the outcome letter (26 April) stated that, "*it was clearly a management decision to dismiss you which had been informed by safeguarding professionals within the Trust*". It acknowledged that, "*the letter of policy was not explicitly stated although the steps taken and the spirit of the policy were followed*". It referred to the Claimant being dismissed for "*some other substantial reason*".

<u>The Law</u>

40. Under the Employment Rights Act 1996 s.98(1):

> *(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.

41. Therefore, in this case, the Respondent is required to show only that the substantial reason for dismissal was a potentially fair one. Once the reason has been established, it is then up to the tribunal to decide whether the employer acted reasonably under s.98(4) in dismissing for that reason.

42. The Court of Appeal provided important guidance in ***Leach v The Office of Communications (Ofcom)*** [2012] IRLR 839. In that case, the claimant was dismissed after the employer received information that he posed an ongoing risk to children, which had led to a breakdown in the relationship of trust and confidence".

43. The case as a whole is relevant (although it concerned what was expressly described as a breakdown in trust and confidence), but it is helpful to set out the following passage:

37. … In cases of acting on untested information (or where the employee has been acquitted on the very facts relied on) the appeal tribunal said, at para 27:

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

38. The judgment continued, at para 28:

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

39. The appeal tribunal added that an employer would not be acting reasonably for the purpose of section 98(4) of the 1996 Act if he took an uncritical view of the information disclosed to him: see para 29. The employer was entitled to insist on a sufficient degree of formality and

specificity about disclosure before contemplating any action against the employee on the basis of it, to raise questions about its reliability and to seek credible reassurance that all relevant information has been taken into account: see para 29.

44. At paragraph 53, Mummery LJ said:

> *The circumstances of dismissal differ from case to case. In order to decide the reason for dismissal and whether it is substantial and sufficient to justify dismissal the ET has to examine all the relevant circumstances. That is what the ET did with regard to the nature of the respondent's organisation, the claimant's role in it, the nature and source of the allegations and the efforts made by the respondent to obtain clarification and confirmation, the responses of the claimant, and what alternative courses of action were reasonably open to the respondent.*

45. I was also referred to the unreported case of ***K v L*** UKEATS/0014/18 and there was some discussion as to whether this case was consistent with ***Leach***. In ***K v L***, the complaint in the dismissal letter was based on misconduct and gave no notice that reputational damage was a potential ground of dismissal. The EAT held that, in such a circumstance, the employer was bound to make a decision on whether the misconduct had been established and, had it done so, it was bound to conclude that misconduct had not been established.

46. ***Leach*** was considered at some length in ***K v L***, and I note the following passage in particular:

> *I am unwilling to accept however that an employee can be dismissed on the basis of a matter that is absent from the complaint but is referred to in an Investigatory Report. While the Investigatory report may be used to interpret the Letter of Complaint, it cannot be used to supply a wholly separate basis for dismissal. As the case of* ***Leach v The Office of Communications*** *[2012] ICR 1269; [2012] I.R.L.R. 839* **(***discussed in detail below) shows, reputational damage secondary to misconduct is regarded as a separate ground of dismissal and raises a set of considerations that are connected to but distinct from dismissal based on misconduct. I consider that the complaint must set out any potential ground of dismissal upon which reliance may be placed. (Lord Summers, §32)*

47. I should add that I do not see a conflict between the two decisions, because there was a different basis for the dismissal in ***K v L***, as the EAT explained.

48. I was also referred in submissions to ***Edward William Harper v National Coal Board*** [1980] IRLR 260; ***Jefferson (Commercial LLP v Westgate EAT 0128/12 Lund v St Edmund's School*** UKEAT/0514/12*;* ***Strouthos v London Underground ltd*** [2004] IRLR 636, CA; ***A v B*** [2003] IRLR 405; ***Z v A*** UKEAT/0203/13; ***Lafferty v Nuffield Health*** UKEATS/0006/19; ***P v Nottinghamshire County Council*** [1992] ICR 706.

Submissions

49. Both counsel provided written submissions, which they developed orally. For the Respondent, Mr Jones' submissions centred upon the argument that the Claimant was dismissed because his continued employment was deemed to present an unacceptable risk in circumstances where:

    (a) there was substantial and credible expert evidence indicating that he had sexually abused his young daughter;

    (b) there was no alternative credible explanation for his daughter having contracted the STI that she and the Claimant both contracted; and

    (c) the Claimant worked in a role and at a location where he would necessarily have contact with, and access to, the records of vulnerable patients, along with being exposed to other members of the public who used facilities on that site.

50. Mr Jones relied on ***Leach*** in particular and its guidance where it is difficult for an employer to make findings about the alleged misconduct. In this case, he said, the employer had lost trust and confidence in the Claimant because of the actual risk he posed. The Claimant's role gave him access to patient records and data. As to the process followed, it was "tolerably clear" to the Claimant what case he had to answer and, even if there was any doubt, this was cured at appeal.

51. Ms Brown's central submission was that it was not enough to say there was a risk of harm, the Respondent needed to reach a decision based upon the balance of probabilities. That required, she said, a positive finding regarding the misconduct. In her written submissions, she said it was plain that the Claimant was dismissed for misconduct, but her oral submissions had a different emphasis. Referring to ***Leach***, she said the risk of harm was not a substantial reason. The Claimant had limited patient contact and the evidence – such as it was – pointed away from risk. In any event, the risk was never put to the Claimant.

Discussion and conclusion

52. This was a difficult case, turning upon sensitive issues. It is no part of this judgment to make any finding as to whether the Claimant did or did not sexually abuse his daughter and that is also not something that the Respondent ever sought to establish.

53. I agree with Mr Jones that the Respondent was entitled to rely upon the findings of the investigations that had taken place into the likelihood of whether or not the Claimant had sexually abused his daughter. However, I read those findings as inconclusive, so the Respondent was in the position of knowing only that it remained a possibility that he had. There was

conflicting expert opinion as to causation and the evidence was insufficient for either the police or the local authority to take further action.

54. However, the question of whether, given that possibility, the Claimant remained a threat to service users was a matter that fell squarely to the Respondent. As that was what led to the Claimant's dismissal, it required both the investigator and the dismissing officer to look carefully at the Claimant's job and whether he actually had such contact or potential contact so as to pose any risk. That does not appear to have been done in Mr Weir's investigation and it was certainly not done in the disciplinary hearing (in which the word "risk" does not appear in the hearing notes), nor the appeal hearing, although there was some general discussion about safeguarding in that latter hearing.

55. Therefore, I take a slightly different position to Ms Brown. I do not think it was necessary for the Respondent to establish the likelihood of whether the alleged sexual abuse had occurred, but rather the Respondent had to decide whether, on the evidence available, there was actually such a potential risk that the Claimant could no longer continue working. In other words, rather than make a positive finding regarding the misconduct, the Respondent needed to make a positive (but informed) finding on the risk.

56. It was also incumbent on the Respondent to let the Claimant know what allegation he faced – i.e. that he was a risk to patient safety – in order to let him respond to that allegation. I do not agree with Mr Jones that it was tolerably clear to the Claimant what charge he faced. He was not given that information in the invitation to the disciplinary hearing, nor even at the start of that hearing, and he never had an opportunity to answer the charge.

57. Clearly there will be cases where an appeal can "cure" any earlier defects, but I disagree that this is one of them. First, there was still no proper analysis of the risk the Claimant posed, even at that stage. Secondly and in any event, the failures at the investigation, invitation to the hearing and the disciplinary hearing itself stages were more than "defects".

58. In conclusion, the reason for the Claimant's dismissal, namely the risk his presence might cause to service users, was a potentially fair reason that amounted to "some other substantial reason".

59. However, the dismissal was unfair for a number of reasons and I set out the reasons in line with the guidance in ***Leach***.

    (i) The nature of the Respondent's organisation was certainly such that they were entitled to take a careful and protective approach towards their service users, given that these included many vulnerable patients.

    (ii) The Claimant's role in that organisation did not bring him into face-to-face contact with those service users. It follows that any risk would

have had to arise from his telephone contact with service users and/or his access to patient records.

(iii) The Respondent was entitled to rely upon the nature and source of the information that, taken as a whole, suggested there was a chance that the Claimant had infected his daughter with gonorrhoea. However, he was not considered such a risk that the either the police or the local authority felt justified in taking matters any further and the Claimant had returned home and resumed his duties as a Special Constable.

(iv) The investigation did not look into the actual risk that the Claimant's presence might create at work, for example, by speaking to the Claimant or his managers to find out exactly what he did on a day-to-day basis.

(v) That is probably because the investigation had a different focus, as reflected in the letter inviting the Claimant to the disciplinary hearing, which referred only to the enhanced DBS check having raised matters of concern. In addition, the investigator (if not Ms Porter) was - in his own words - in the process of terminating the Claimant's contract.

(vi) The Claimant was never given the opportunity to respond to the actual allegation that led to his dismissal, namely that his presence created a risk to service users. He did not know before the hearing that was the charge and he did not get asked to respond to the charge during the hearing, nor was it considered in any detail in the appeal.

(vii) Ms Porter, in basing her decision upon this perceived risk, did so without having anywhere near sufficient evidence for her to know whether there was actually such a patient risk, including any evidence from the Claimant himself. It has to be feasible that the Claimant could have given sufficient explanation and assurance to satisfy any concerns.

(viii) There was also no consideration, as far as I can see, of what steps might have been taken to reduce any perceived risk, for example, by changing some of the Claimant's tasks.

(ix) This is not a case where it could be said that the appeal "cured" any previous shortcomings, not least because that hearing also failed to consider in any detail whether the Claimant presented an actual risk.

(x) In all the circumstances, the Respondent did not act reasonably in dismissing the Claimant for "some other substantial reason", namely the risk his presence might create for vulnerable service users, and the dismissal was therefore unfair.

60. Mr Jones argued in the alternative that, even if any procedural defect had not arisen, the Respondent would have dismissed the Claimant in any event. However, I disagree because that presupposes that the Claimant was always going to be found a risk to service users.

61. The case therefore needs to be listed for a 1 day remedy hearing (by CVP), unless the parties are able to agree compensation. I am therefore going to stay the case for 1 month from the date this Judgment is sent to the parties to allow time for any discussions and would then ask the parties to write a joint letter with dates to avoid for the period 1 April to 30 June 2021.

Employment Judge S Cheetham QC
6 December 2020