

Appeal No. UKEAT/0257/16/LA

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 18 July 2017

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

LEICESTER CITY COUNCIL

APPELLANT

MR S SANSOME

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MS DEE MASTERS
(of Counsel)
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For the Respondent

MR SIMON SANSOME
(The Respondent in Person)

SUMMARY

UNFAIR DISMISSAL - Constructive dismissal

1. The Employment Tribunal erred in concluding that the Claimant's suspension was a knee jerk reaction and unjustified. Suspension followed a full investigation into IT misuse by the Claimant that concluded there was a case to answer. Further, the findings that led the Employment Tribunal to conclude that suspension was unjustified were unsupported by the evidence, and the Employment Tribunal's analysis was flawed.

2. In the circumstances, the Employment Tribunal's conclusion that there was a breach of the implied term of trust and confidence on this basis (that entitled the Claimant to resign claiming constructive dismissal) could not stand and was remitted to a fresh Tribunal.

A **THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)**

B 1. This is an appeal from a Judgment of the Leicester Employment Tribunal, comprised of Employment Judge Ahmed, Mr Khan and Ms Tidd, promulgated on 29 June 2016 following a three-day hearing in May that year. I refer to the parties as they were below.

C 2. The Respondent challenges the conclusion of the Tribunal that the Claimant was unfairly constructively dismissed on the basis of the finding that his suspension pending a disciplinary investigation was both a knee jerk reaction and unjustified and was therefore a breach of the implied term of trust and confidence entitling him to resign claiming constructive dismissal.

D 3. The appeal is resisted by the Claimant who appears in person. He has made moderate, focussed submissions both in writing before the hearing and orally in response to the appeal, for which I am grateful. I have, as requested, made reasonable accommodations in respect of his disability during the course of the appeal hearing.

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F **The Factual Background**

G 4. The Claimant was employed by the Respondent as a Care Management Officer. I understand from him and accept that he was the longest serving officer in his team with a very good work record and no previous disciplinary sanctions or suspensions. In June 2014, complaints were made about his use of the Respondent's computer system to access the internet in respect of matters that were not job related. That investigation was ongoing when quite separately and sadly, he developed a trapped nerve in his spine in August 2014, for which he received both outpatient and subsequently inpatient treatment in hospital for a period of

A approximately four months, following which he was confined to a wheelchair. He continues to
suffer from disabilities connected with that problem. He did not return to work after August
B 2014 at any time and his absence during that period was supported by GP notes and an
Occupational Health report that initially indicated that he was not fit to work or to return to
work.

C 5. In the meanwhile, the investigation into IT misuse continued and led to an internal
report being commissioned in November 2014 into the email traffic and the contents of the hard
drive of a particular machine to which the Claimant had access. The report, known as a
Corporate Counter Fraud Report, prepared by a member of that team, Denise Hickling, became
D available after 12 December 2014. It revealed that in the period between May 2014 and August
2014 (when the Claimant ceased work as a result of his medical condition) he was by far the
highest user of the internet. He was sending emails to other personal email addresses related to
E him and to at least one other colleague employed by the Respondent; and attached to some of
those emails were scripts containing inappropriate content. Some of those scripts were saved to
his hard drive. The Counter Fraud Report listed a series of appendices which exemplified the
personal use of the Respondent's IT system, and emails containing inappropriate content,
F together with screenshots that showed the documents saved on the hard drive. One of the
scripts referred to in the Report is a script called "Talking Dirty" which had a number of
versions and had been sent by email on four separate occasions.

G 6. The Report referred to the Respondent's "ICT Acceptable Use Policy" which stated that
users must not use Council ICT equipment for personal or non-Council business use unless
H specifically permitted. It warned users that misuse of Council equipment might result in the
application of the disciplinary process. The Report also referred to the instruction given to

A employees that personal email exchanges should be through a personal web based email service
and not through the employee's Council email account, which was reserved solely for Council
B business and not for personal use. The Report concluded by stating "In view of the breaches of
Council Policy I recommend that you consider disciplinary action and would be grateful if you
could advise me of the outcome of your enquiries in due course".

C 7. From mid-December 2014 and during the early part of 2015, the two aspects concerning
the Claimant's future relationship with the Respondent were addressed in parallel. The first
aspect was the Claimant's rehabilitation and possible return to work, which was under
consideration by the Occupational Health department. The second aspect concerned what
D ought to be done about the discovery of the Claimant's use of the internet and computer system
in the way described in the Counter Fraud Report.

E 8. At the same time as consideration was being given to those aspects, the Claimant's
manager, Ms Manning, left on secondment to another role with the Respondent and, as a
consequence, had no involvement with either process at that time. She left around November
2014 and was replaced by Lyn Knights on a temporary basis. Lyn Knights was the acting
F Locality General Manager in the Claimant's department and acted up in the role of manager
during Ms Manning's absence. It was Ms Knights who dealt with those two processes during
the period November 2014 to April 2015.

G 9. Ms Knights was advised by the HR Manager, Nicky Ward. Nicky Ward gave evidence
to the Tribunal but Ms Knights did not. Nicky Ward described receiving the Counter Fraud
Report some time after 17 December 2014. She discussed what action could and should be
H taken, having reviewed the report with Lyn Knights. Nicky Ward advised that a disciplinary

A investigation should be commenced but that ultimately the decision whether or not to do so was
for Lyn Knights as the responsible manager.

B 10. At paragraph 32 of her witness statement, Nicky Ward said the following:

C “32. As part of my advice regarding the disciplinary process, I wanted to look at options to avoid suspending the Claimant during the disciplinary investigation. This including considering whether action could be taken to restrict the Claimant’s IT access whilst the investigation was ongoing which would be deemed as a disciplinary transfer [160-164]. Following further discussion with management, Lyn Knights made the decision that it simply was not possible to restrict the Claimant’s IT access and still allow him to perform his role for the Council during the disciplinary investigation. Lyn was adamant that given the information in the Counter Fraud report she did not want to give the Claimant access to the Council’s IT system whether remotely from home or in the office. Lyn decided at this time to progress the disciplinary investigation and she had decided that the Claimant should be suspended. I advised Lyn that an Occupational Health report should be obtained into the Claimant’s health to determine when he might be fit to return to work and to see if he would be fit to engage in any formal process.”

D Accordingly, although Lyn Knights concluded that disciplinary action should be taken in
respect of the IT matters identified in the Counter Fraud Report and also that suspension was
necessary, the decision to suspend was not actioned by her at that time because the Claimant
E was off sick. She and Nicky Ward together considered that it was necessary to obtain an
Occupational Health report to determine whether, and if so, when the Claimant might be fit to
return to work and fit to engage in a disciplinary process.

F 11. Ms Manning returned from her secondment role during the second week of April 2015
(see paragraph 14 of her witness statement). She was at that stage provided with a copy of the
Counter Fraud Report and the Occupational Health report that was by then available. At
G paragraphs 15 to 19 of her witness statement, she explained first that she regarded the
allegations as serious and as justifying disciplinary action. Secondly, she considered that it was
inappropriate for the Claimant to have access to the Respondent’s systems (see paragraph 19).
H It appears from her witness statement that this led her to consider whether and when the
Claimant might return to work. She explained at paragraph 25 and further at paragraph 41 that

A if the Claimant was not fit to return to work, there would be no need to suspend him because the
Respondent would have achieved the necessary separation between him and the Respondent's
IT systems and facilities without the need to do so. However, if he was fit to return to work,
B she concluded that it would be necessary to suspend him in order to achieve that separation,
which she regarded as necessary.

C 12. The result of her thinking was that together with Nicky Ward, she attended at the
Claimant's home on 14 May. Before me, the Claimant is critical of the Respondent's handling
of that meeting. His criticism is justified by the Tribunal's findings about it, which reflect that
the Tribunal was critical of what occurred. Nevertheless, and notwithstanding those criticisms,
D the Tribunal was satisfied that the notes of the meeting made by the Respondent represented an
accurate record of what was discussed at the Claimant's home. The Tribunal was satisfied that
the Claimant was given the opportunity of postponing the meeting in order to discuss matters
E with his trade union representative, but did not wish to do so. The Tribunal also accepted that
Ms Manning was upset to see the Claimant's condition.

F 13. The Employment Tribunal found that she brought up the contents of the Occupational
Health report and explained that the Claimant had a right to obtain a second opinion. The
Claimant was surprised as to why he would wish to seek a second opinion and having discussed
the matter, accepted that he did not meet the criteria for ill-health retirement and did not wish to
G obtain a second report. He indicated, as the Tribunal found, that he wished to return to work
and was looking forward to do so, albeit initially working from home. Although before me he
sought to suggest that he was not then certified fit to return to work immediately, the Tribunal
H made no findings about that.

A 14. The Tribunal continued at paragraph 25 as follows:

“25. Ms Manning must have anticipated that the Claimant might not agree with the possibility of ill-health retirement and instead wished to return to work at some point. In anticipation she had prepared two letters in advance which were then handed to the Claimant at the meeting. The first was a notice of a disciplinary investigation. The second was a letter of suspension.”

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C I observe that Ms Manning’s witness statement explained clearly her rationale for having those prepared letters with her and in particular, the fact that she did not think it fair to raise the Claimant’s expectations by allowing him to return to work, only then to be suspended because of the disciplinary investigation (see paragraphs 32 and 33 and 41). However, the Tribunal made no reference whatever to that explanation or to those paragraphs of her witness statement and appears to have been surprised that she had anticipated these matters.

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E 15. The suspension letter gave details of the allegations being made against the Claimant. Although four items were identified, the principal issues of concern for the Council were allegations 3 and 4; namely, the breach of the Council’s ICT Acceptable Use Policy by transmission of inappropriate material containing sexual content, and breach of the code of conduct by saving such material on the H-drive.

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G 16. Thereafter, a disciplinary hearing was fixed for 5 June. The Claimant did not attend the hearing. His health had deteriorated and there had been a further report from Occupational Health which deemed him unfit to return to work. His suspension was accordingly lifted and he was put back on sickness absence. It appears that the Claimant was under the misapprehension that the lifting of his suspension and being put back on to sickness absence brought an end to the requirement for him to attend a disciplinary hearing. However, on 22 June, Ms Manning spoke to him by telephone and explained that the disciplinary process would in fact proceed.

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A 17. Subsequently, by email dated 27 July 2015, the Claimant resigned with effect from 24
August 2015. He gave no reason for the resignation in that email and his witness statement,
prepared for the purposes of the Full Merits Hearing, set out his reasons as quoted at paragraph
B 33, in the following terms:

“I felt that to keep my work reputation intact I had to resign so that I could still get a job if
and when needed as I needed a reference from Leicester City Council. It was only after
resigning that I learned if I asked for a reference from the City Council it would state that I
was under investigation when resigning. I had been suspended, taken off of suspension and
then suspended again, it was just so obvious that I was going to be pushed out, I felt I had no
choice other than to resign.”

C 18. The Claimant issued his claim in the Employment Tribunal on 25 November 2015,
complaining of unfair constructive dismissal and unlawful disability discrimination. His claim
D for unfair constructive dismissal was successful on the basis I have already identified. The
complaint of unlawful disability discrimination was dismissed and there is no appeal from that
latter decision.

E **The Employment Tribunal’s Judgment**

F 19. Against that summary of the factual background and findings made by the Tribunal, the
complaint of unfair constructive dismissal was considered and in particular the Employment
Tribunal considered whether the Claimant’s suspension was conduct calculated or likely
seriously to damage or destroy the trust and confidence inherent in the employment
relationship. As to that, the Tribunal found that neither Ms Manning nor Lyn Knights
G explained the rationale for suspension. That suggested to the Tribunal that the suspension here
was “entirely [a] “knee jerk reaction” ” rather than a management decision (see paragraph 60).

H 20. The Tribunal then addressed the question whether the suspension was justified. There
were six strands to the reasoning of the Tribunal that led to the conclusion that this was an
unjustified suspension in addition to being a knee jerk reaction:

A (i) At paragraph 48, the Tribunal considered the fact that the material was intended
for publication rather than for sexual gratification and only sent to a single colleague,
B who was in fact assisting the Claimant by checking the text and making suggestions
prior to such publication, was a factor that mitigated the concerns the Respondent had in
relation to the discovery of the material on his hard drive.

(ii) The Tribunal concluded at paragraphs 49 and 55 that suspension did not occur
until 14 May 2015, some five months after the Counter Fraud Report, and this
C significant delay was regarded as highly relevant.

(iii) At paragraph 60, the Tribunal concluded the delay was inordinate.

(iv) There was no satisfactory explanation for the delay provided by Lyn Knights.

D (v) There was no satisfactory explanation for the delay provided by Helen Manning.

(vi) The Tribunal dealt with alternatives to suspension and appears to have concluded
that there were viable alternatives that were not considered (see paragraphs 58 and 59).
Those alternatives were, first, restricting the Claimant's access to IT systems and,
E secondly, requiring him to undertake to cease writing his novel during working hours on
the Respondent's computer systems.

F 21. Having considered those matters at paragraph 63, the Tribunal concluded that the
suspension was indeed unjustified and in all those circumstances, it amounted to a breach of the
implied term of trust and confidence. The Tribunal was satisfied that although there may have
G been a number of reasons for resignation, so long as it was satisfied that the breach of the
implied term constituted a reason, and it was so satisfied, that was sufficient. The Tribunal
said, "Put simply, absent the suspension the Claimant would not have resigned. In the
H circumstances we are satisfied that the Claimant was constructively dismissed" (see paragraph
64).

A **The Appeal**

22. The Respondent appeals from the decision that the Claimant was subjected to an unjustified suspension that breached the implied term of trust and confidence. There are two principal grounds of challenge. First, the Respondent challenges the conclusion that suspension was a knee jerk reaction and, secondly, it challenges the conclusion at paragraph 63 that the suspension was unjustified. There are a number of separate grounds of appeal directed at challenging the second point but they overlap and I treat them as forming part of the second ground of appeal.

The interplay between a decision to suspend and the implied term of trust and confidence

23. It is well established, and indeed the ACAS Code expressly recognises, that there may be instances where suspension by an employer of an employee with pay is necessary while an investigation is carried out. An example given by ACAS is in cases of gross misconduct. The Code states that suspension with pay should only be imposed after careful consideration and should be reviewed to ensure that it is not unnecessarily protracted. It should be made clear that suspension is not an assumption of guilt and is not considered a disciplinary sanction, but is a neutral act.

24. In **Crawford v Suffolk Mental Health Partnership NHS Trust** [2012] IRLR 402, in a footnote to the judgment, Elias LJ raised a concern about what appeared to him to be the almost automatic response of many employers to allegations of the kind made in that case (namely, complaints of mistreatment by patients against nurse employees). The almost automatic response to which he referred was to suspend the employee concerned and forbid them from contacting anyone so soon as a complaint is made and irrespective of the likelihood of that complaint being established. He observed that suspension should not be a knee jerk reaction

A and that it would be a breach of the duty of trust and confidence towards the employee if it is.
Elias LJ identified some of the problems of automatic suspension, including that it frequently
B caused the employee to feel belittled and demoralised by the total exclusion from work and the
enforced removal from work colleagues, many of whom may be friends. He also referred to the
psychological damage that could cause. Further, even if the individual is subsequently cleared,
C suspicions can linger and the suspension might add credence to them.

25. Elias LJ continued at paragraph 72 as follows:

“72. I am not suggesting that the decision to suspend in this case was a knee jerk reaction. The evidence about it, such as we have, suggests that there was some consideration given to that issue. I do, however, find it difficult to believe that the relevant body could have thought that there was any real risk of treatment of this kind being repeated, given that it had resulted in these charges. Moreover, I would expect the committee to have paid close attention to the unblemished service of the relevant staff when assessing future risk; and perhaps they did.”

D 26. What constitutes reasonable and proper cause for suspension pending a conduct
investigation was considered by the Court of Appeal in **Gogay v Hertfordshire County**
E **Council** [2000] IRLR 703. The following points emerge from the judgment of Hale LJ (as she
then was) with whom the full court agreed:

(i) The mere fact of an investigation taking place does not inevitably mean there
F must be a suspension.

(ii) Employers should give careful consideration to whether suspension is necessary
and justified. This includes consideration of the strength of the allegations and whether
G it is appropriate in the interests of both the employer and the employee, and indeed
potentially others, to separate the employee from his or her usual place of work.

(iii) If separation is appropriate, before concluding that suspension is necessary,
H consideration should be given to how separation might be achieved without suspension,
including whether a transfer to different duties or some other means of effecting
separation can be arranged that might avoid suspension.

A 27. Those, in summary, are the principles to be applied in considering the two grounds of appeal. I turn to consider them now.

B 28. Ground 1 argues that the Tribunal mischaracterised the Claimant's suspension as a knee jerk reaction in circumstances where the unchallenged evidence demonstrated that this was a considered decision that occurred at the end of an investigation that concluded that the Claimant should face disciplinary charges amounting to potential gross misconduct.

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D 29. The Tribunal dealt with the evidence in relation to suspension and whether or not this was a knee jerk reaction at paragraphs 56, 57 and 58. It concluded that the original decision to suspend was made by Lyn Knights and inherited by Ms Manning. The Tribunal appears to have concluded that Ms Manning implemented the decision made by Ms Knights without knowing what the reason for suspension was. In particular, the Tribunal referred to the hand over notes which Ms Knights produced and which were seen by Ms Manning but held that they did not explain the rationale for why suspension was necessary instead of considering other possible options (see paragraph 57). The Tribunal went on to say that Ms Manning (in her witness statement) had not explained why she agreed with the decision to suspend. The

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F Tribunal made reference to paragraphs 16 and 17 of her witness statement, but observed that those paragraphs explained why disciplinary action was necessary, but that was a different matter.

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H 30. Furthermore, although the Tribunal thought that Ms Ward had some insight into the reasoning of Lyn Knights in this regard and gave her credit for exploring options other than suspension, it concluded that it was not clear nonetheless why Lyn Knights took the decision to suspend when there were reasonable alternatives available, which were never explored,

A including instructing the Claimant to cease writing his novel during working hours on the Respondent's computer systems.

B 31. Ms Masters submits without any challenge from the Claimant, so I accept, that the unchallenged evidence before the Tribunal in relation to the decision to suspend is in fact as follows:

C (a) The original decision to suspend was made by Lyn Knights. She was advised by Ms Ward, including as Ms Ward described at paragraph 32 (set out above). Ms Knights did not action the decision to suspend because the Claimant was absent with ill-health and not therefore at work accessing the IT systems and facilities. Instead, Ms Knights decided that a report should be obtained from the Occupational Health department and that decision was actioned by her.

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E (b) Having returned to her substantive post in April 2015 Ms Manning said expressly, (at paragraph 16) that she was concerned that she should make her own decision whether disciplinary action should be taken against the Claimant and explained

F that she looked at the matter afresh from the previous manager. It is clear from her evidence that she did not simply "inherit" a decision of the previous manager that she implemented. At paragraph 17 Ms Manning concluded that disciplinary action should

G be taken against the Claimant. She explained her awareness of the fact that he was on ill-health absence but the Occupational Health report she was provided with made clear that he would soon be in a position to return to work, albeit working from home for an

H initial period of two months (see paragraph 18).

A (c) At paragraph 19 (not referred to at all by the Tribunal) she said:

“19. Plainly given the nature of the allegations levelled at the Claimant it simply was not appropriate to provide the Claimant with access to the Council’s IT system to work from home.”

B (d) At paragraphs 25, 27, 29 and 30 to 34, she explained as I have summarised above her thinking in relation to the interplay between suspension and the Claimant’s illness and absence from work.

C (e) Ms Manning described the meeting on 14 May and the discussion with the Claimant in relation to the Occupational Health report. She explained to the Claimant, once he made clear that he wished to return and did not wish to obtain a second
D Occupational Health report, the decision to suspend. She explained that she regarded it as unfair to raise his expectations about returning to work only then to suspend him
E pending disciplinary investigation and that the suspension was a neutral act and did not in any way prejudice the outcome of the investigation. Furthermore, at paragraph 39, she explained that because he would have returned to work at that time had it not been
F for the suspension, he would be put back on to full pay from 14 May 2015 so that this decision ought not to prejudice his position.

(f) At paragraph 41 she said this:

“41. I found the meeting very difficult and I found it hard to inform the Claimant that he was suspended, particularly because he was so positive about returning to work. However I was firmly of the view that it would have been unfair to the Claimant to allow him to return to work and possibly come into the office only to be told at that point that he was suspended. I took the decision that it was therefore reasonable to suspend the Claimant at the meeting on 14 May 2015.”

H 32. The question accordingly is whether in light of that evidence the Tribunal was entitled to conclude that both Ms Manning and Ms Knights failed to explain the rationale for

A suspension, suggesting that this was entirely a knee jerk reaction (like that to which Elias LJ referred in Crawford).

B 33. It seems to me that there is force in the arguments advanced by Ms Masters. This was not a suspension decision taken immediately upon allegations being made. Rather, there was a detailed investigation by an independent manager that resulted in the Counter Fraud Report. The Report showed that the allegations were carefully investigated and that they had substance. **C** The independent manager recommended a disciplinary investigation. Moreover, there was no dispute before the Tribunal that the Claimant had indeed been creating scripts on the Respondent's IT systems and saving them to the hard drive and forwarding them to a work **D** colleague. Irrespective of the purpose of that activity, it revealed a *prima facie* breach of the Respondent's policies and systems.

E 34. At the time of receiving the Report, the evidence shows that Lyn Knights concluded that suspension was necessary in order to restrict or prevent the Claimant from accessing the Respondent's IT systems, that had on the face of it been breached seriously by him. However, given his absence and the uncertainty as to whether he would be returning to work, Lyn Knights **F** did not action that decision. That was not a matter of being compassionate, as the Tribunal appears to have thought. Rather it was a conclusion that suspension although justified was not necessary at that time. It was not necessary because there was no need to achieve a separation **G** between the Claimant and the IT systems at that time since his sickness absence had achieved that separation.

H 35. Thereafter, on her return from secondment, Ms Manning took a similar approach, having considered the matter independently of Lyn Knights, as she explained in her witness

A statement. She too considered that if the Claimant was fit to return to work, it would be
necessary to suspend him because it was impossible for him to carry out his work for the
Respondent while being restricted or prevented from accessing the Respondent's IT systems.
B The fact that use of the IT systems was central to his ability to discharge his role was not in
dispute before the Tribunal, as the notes of evidence demonstrate. Although on appeal the
Claimant sought to suggest that he could operate without using the IT systems, that was not his
case or his evidence before the Employment Tribunal and I cannot go behind the evidence that
C he in fact gave.

D 36. Although the Tribunal referred to a possible alternative to suspension as being to require
the Claimant to give an undertaking not to abuse the system, it is common ground between the
parties that this was not ventilated at all during the course of the hearing. The Claimant
candidly accepts that no questions were asked of him or Ms Manning about the possibility of
him giving an undertaking not to use the systems for unauthorised purposes, as discussed by the
E Tribunal. The failure to ventilate this issue in the course of the hearing may explain why there
is no consideration by the Tribunal, whatever, of the question whether the Respondent acted
unreasonably in deciding that this was not a viable alternative or whether, if not acting
F unreasonably, whether in those circumstances, suspension was a reasonable option in this case,
notwithstanding that alternative option.

G 37. It seems to me in those circumstances that the undisputed evidence shows that this
suspension decision was far from a knee jerk reaction. It was taken after a careful and full
investigation as to the strength of the allegation that had been made. The investigation
concluded that there was substance to the allegations and that they warranted a disciplinary
H investigation. There was, contrary to the Tribunal's finding, a reasoned explanation for

A suspension, which was not actioned until the point at which the Claimant indicated his intention to return to work and the Occupational Health report supported that intention, so that the question of separating him from the Respondent's IT systems became relevant.

B 38. It seems to me that the Tribunal have in the circumstances mischaracterised the suspension as entirely a knee jerk reaction and reached a conclusion that was unsupported by the evidence. Ground 1 accordingly succeeds.

C 39. Ground 2 challenges the conclusion that suspension was unjustified. So far as concerns the first reason relied on by the Tribunal as mitigation for the seriousness of the allegations made against the Claimant (see paragraph 48), although the documents in question are in script form, as the Claimant emphasises before me, the Respondent did not know at the time that the scripts were intended for publication and had nothing whatever to do with sexual gratification. It is well established that whether or not suspension is justified is to be judged on the basis of the information available to the employer of the time of its decision. It seems to me that the Tribunal was not entitled in those circumstances to judge the suspension decision by reference to material that only emerged subsequently in the course of the Tribunal hearing and was not available to the Respondent at the time.

D 40. In relation to delay, the Tribunal appears to have misunderstood the Respondent's case and to some extent the Respondent's evidence. The Tribunal's criticism of the absence of Lyn Knights' evidence at the hearing might have been significant had Helen Manning simply actioned Lyn Knights' decision. However, the undisputed evidence shows that she did not. As Helen Manning made clear in her witness statement, which was not apparently challenged, she re-took that decision. Furthermore, the Tribunal accepted that Nicky Ward had some insight

A into the reasoning of Lyn Knights, and Nicky Ward gave evidence both about the decision and about the fact that the decision to suspend was not actioned pending obtaining an Occupational Health report that dealt with the question whether, and if so, when the Claimant might return to work.

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41. Moreover, the Respondent did not contend that suspension was not actioned for compassionate reasons upon receipt of the Counter Fraud Report. Rather, the fact that the Claimant was off sick and not working meant that suspension was not necessary at that time, even if a decision to suspend was justified. The separation that the Respondent considered necessary to ensure that the Claimant could not access the Respondent's IT systems was achieved by that absence. It was only when his return to work, whether at home or at the Respondent's offices, was imminent that suspension became necessary from the Respondent's perspective. This feature of the case is overlooked by the Judgment.

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42. The Claimant was not prejudiced by the delay and it is difficult to understand why in those circumstances, absent a misunderstanding, the Tribunal considered the delay to be inordinate, unexplained and unjustified in light of the undisputed evidence. The Claimant resists that conclusion. He submits that it would have been fairer to suspend him in December 2014, irrespective of his absence for reasons of ill-health. That is what the procedure required and he submits that the Respondent should have followed the procedure irrespective of his absence. I do not accept his submission. To suspend in December 2014 in circumstances where he was absent with ill-health would have amounted, in my view, to the blind following of procedure and to a knee jerk reaction. It seems to me that the approach actually adopted by the Respondent was more considered and fairer in that regard.

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A 43. Finally, so far as alternatives to suspension are concerned, preventing the Claimant from
accessing the Respondent's IT facilities while still doing his job was not feasible, as the
B evidence demonstrated. In the circumstances, it was not open to the Tribunal to conclude that
his job could be performed even if he had no access to the Respondent's IT systems. The
Claimant's suggestion on appeal that he could have operated on paper alone is flatly
C contradicted by the evidence he (and others) gave to the Tribunal. As to the further alternative
identified by the Tribunal at paragraph 59, namely, simply asking the Claimant to stop writing
his pornographic script at work, before relying on this point, it was incumbent on the Tribunal,
as a matter of natural justice, to explore it with the Respondent's witnesses to determine
D whether it was a viable means of avoiding suspension. Had the point been explored with Helen
Manning she could have given evidence as to whether this was viable or not and, if viable, it
could have been considered. If not viable, she could have explained why that was so and why,
in her view, suspension was the right course and the necessary course in this case. However,
E the alternative option posited at paragraph 59 was not explored by the Tribunal, either with
Helen Manning or with the Claimant or the Respondent's counsel and it seems to me in those
circumstances that it was not open to the Tribunal to rely on it.

F 44. For all these overlapping reasons, it seems to me that it was not open to the Employment
Tribunal on the unchallenged evidence given by the Respondent to conclude that this
suspension was unjustified. The underlying reasons relied on by the Tribunal are not supported
G by the evidence and the Tribunal's analysis is accordingly flawed. Ground 2 accordingly
succeeds, and in the circumstances the finding that there was a breach of the implied term of
trust and confidence cannot stand.

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A Disposal

45. Ms Masters realistically accepts that this is not a case where only one answer is possible so that the Appeal Tribunal can substitute its own view for that of the Tribunal in relation to this issue. The matter will accordingly have to return to the Tribunal to reconsider the narrow question whether suspension on 14 May was a breach of the implied term of trust and confidence entitling the Claimant to resign.

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46. The parties do not agree about the nature of the remission. Ms Masters, for the Respondent, contends that I should remit to a new Tribunal to take this decision afresh. The Tribunal reached strong and detailed conclusions, all of which are flawed, she submits, and she contends that it will be difficult for the Tribunal to look afresh at this matter. On the other hand, the Claimant emphasises the difficulty for him in having to go through these matters again and he points to the health consequences if this matter has to return to a fresh Tribunal. He submits that the original Tribunal should be directed to reconsider these matters and that there is no need to go to a fresh Tribunal.

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47. I see the force of both submissions. I am sympathetic to the plight of the Claimant in this case. However, ultimately, I have concluded that it will be necessary to hear further evidence on the question of suspension in any event. That being the case, and in light of the firm views reached by the Tribunal on what is, in my judgment, an unsupported basis that contradicts the unchallenged evidence, I have concluded that it would not be appropriate to remit to the same Tribunal. The fresh hearing is likely to have a narrow compass and should be focussed on the question of suspension only. It should be a short hearing. The Tribunal will have to receive fresh evidence and submissions but it will be a matter for its own case management decision as to how that is achieved.

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A Conclusion

48. Accordingly, the appeal is allowed. The finding that the Claimant was unfairly constructively dismissed on the basis of a breach of the implied term of trust and confidence by reason of an unjustified suspension is set aside. That issue is remitted to a fresh Tribunal to be reconsidered in light of fresh evidence and submissions.

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49. That leaves only one final matter and that is to record my thanks both to Ms Masters and to the Claimant for the helpful way in which this appeal has been argued. I appreciate that it is not the result that the Claimant, Mr Sansome, had hoped for, but am grateful for his helpful submissions.

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