Appeal No. UKEAT/0120/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 16 October 2019
Judgment handed down on 10 January 2020

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

Q APPELLANT

SECRETARY OF STATE FOR JUSTICE RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR PAUL LIVINGSTON (of Counsel) Direct Public Access
For the Respondent	MS VICTORIA WEBB (of Counsel) Instructed by: Government Legal Department One Kemble Street London WC2B 4TS

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

HUMAN RIGHTS

The Claimant was employed in the Probation Service. Her daughter was placed on a child protection register, in circumstances where Social Services considered (though she vehemently disputed this allegation) that she presented a risk to her daughter. She was dismissed for deliberately failing to report the matter fully and promptly to the Respondent in circumstances where she was aware, following a previous episode and warning, that she was required to do so.

Held:

The Employment Tribunal had not made contradictory or non-**Meek-**compliant findings, about what the Respondent knew and when. It had properly considered the impact on the Claimant's Article 8 Convention rights. It correctly found that these were engaged. It also found that, having regard, among other things, to the nature of the Probation Service's work, and its relationship with Local Authorities as statutory partners, the decision to dismiss was not an unjustified or disproportionate infringement of the Claimant's Article 8 rights; and, that the dismissal was overall fair. It did not err in so finding.

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Introduction

1. This appeal is concerned, principally, with the impact of the employee's Article 8 Convention rights being engaged, in the context of a claim of unfair dismissal.

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2. I shall refer to the parties as they were in the Employment Tribunal, as Claimant and Respondent. This is the Claimant's appeal from a decision of the Employment Tribunal ("ET") (Employment Judge Webster and members who are, unfortunately, not named in the decision) dismissing her claim of unfair dismissal, following a Full Merits Hearing. The Tribunal also heard, and dismissed, claims of disability discrimination, but there is no live appeal in that respect.

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3. At the hearing before the ET the Claimant appeared in person. The Respondent was represented by Ms Webb of counsel. At the hearing of this appeal Mr Livingston of counsel appeared for the Claimant, and Ms Webb of counsel again for the Respondent.

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4. At the start of the hearing of this appeal, on my own initiative, but having first sought submissions from counsel, neither of whom opposed this course, I made anonymity and restricted reporting orders. I considered that necessary in order to safeguard the Article 8 rights of the Claimant's daughter. Because they share a surname, and it is relatively unusual, that has necessitated also anonymising the Claimant. However, the need to protect her daughter's Article 8 rights outweighed the impact of making such orders on the principle of open justice.

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The Tribunal's Decision

5. I start by summarising the salient facts found by the ET and other material parts of its decision, passing over the passages concerned exclusively with the disability discrimination claims. Some aspects are not set out by the ET in chronological order, and in my presentation of them, I have therefore reordered some of the findings, so that they are easier to follow.

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6. The Claimant was employed by the Respondent from 1994. Until November 2014 she was employed as a Probation Service Officer ("PSO").

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7. In 2014 there was an incident at the Claimant's home involving the Claimant, her then partner, and her daughter, who was then a teenager. It was alleged that the Claimant had been violent towards her daughter, something she has always vehemently denied. Social Services became involved and her daughter was placed on the Child Protection Register ("CPR").

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8. This matter was raised with the Respondent by Social Services. They told the Respondent that they had advised the Claimant that she should tell the Respondent, because of the safe-guarding implications raised by the Claimant's job (they knew what her job was); and that, when she did not do so, they then felt obliged to do so themselves. This led to a disciplinary process in which the Claimant was found guilty of gross misconduct by failing to inform the Respondent of the matter, and in particular of the allegations against her. However, although the finding was of gross misconduct, she was not dismissed, but received a final written warning and was demoted to the role of Case Administrator. An internal appeal against sanction was unsuccessful.

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9. At paragraph 25 the Tribunal referred to the contents of the decision letter as follows.

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"The outcome letter said that they found her guilty of gross misconduct in summary because:

(i) They found that the Local Authority Designated Officer ("LADO") or a social worker had told the claimant to tell her employer that her daughter had been placed on the Child Protection Register.

(ii) That her professional judgment as a Probation Service Officer had been called into question because she worked with vulnerable adults and other agencies which may involve social services safeguarding; and

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(iii) Her lack of acceptance that the onus was on her to inform her manager of the situation;

(iv) That her behaviour had potentially brought the respondent into disrepute by a partner agency."

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10. The Tribunal noted that there was an issue before it regarding whether the Claimant understood, at this time, the meaning of certain acronyms, in particular "LADO" standing for "Local Authority Designated Officer" and "CPP" standing for "Child Protection Plan". For reasons which it set out, it found that she did understand these terms.

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11. Moving on to events in 2015, the Tribunal's material findings were as follows.

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12. At a meeting on 26 February 2015 the Claimant informed the head of her National Probation Service Cluster, whom I will call Mr H, that her daughter was no longer on the CPR and no longer subject to a CPP (paragraph 46).

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13. On or around 14 March 2015 there was an altercation between the Claimant and her daughter. She emailed Mr H about this on 17 March 2015. The Tribunal cited the following passages from that email.

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"36. I have been visited by a police official and social worker today. I asked for a [sic] official letter and an agenda. They told me I had to let them in and that I had to speak with them. They asked me where my daughter was and that there had been an allegation against me…

I asked was I under arrest and was advised I wasn't. They just wanted background information.

They said they would contact me if they needed to interview me and I gave my mobile number over. They said they would interview my daughter. I am aware that xxxx and I had an altercation Saturday night …"

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14. On 2 April 2015 Mr H emailed in response. The Tribunal cited the following passage, in which he referred to her line manager, whom I am calling Mr S:

> ***"37. Thank you for your email. I am sorry to hear about the incident you described. Please keep me updated regarding developments.***
>
> ***Given that there is further involvement with agencies regarding yourself and xxxx I am of the view that [Mr S], your line manager, needs to be made aware of this and that you need to keep him aware of events. As your line manager I am of the view he should be made aware of your involvement with statutory agencies."***

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15. There were subsequent exchanges with Mr H about the Claimant's ongoing concerns regarding a third party having been given joint parental responsibility in relation to her daughter, and connected incidents. The Tribunal observed, at paragraph 38 that, in the course of an email of 29 May 2015:

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> **"38. …. She mentions that her daughter is on the at-risk register but does not give further detail on this. She continues to refuse to email Mr [S] about it stating that as he is a temporary member of staff she doesn't want him knowing her business."**

16. On 19 June 2015 the Claimant sent Mr H the email address of the Senior Social Worker concerned, and a copy of a report from Social Services. Referring to an internal disciplinary investigation subsequently conducted by an individual whom I will call Ms P, the Tribunal said (at paragraph 39):

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> **"…. As part of the investigation, Mr [H] told [Ms P] that this was the first time that he became aware of the fact that the daughter was on a Child Protection Plan due to the claimant's behaviour and that social services had deemed the claimant a risk as opposed to her partner."**

17. The Tribunal continued:

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> **"40. The Claimant gave various accounts of why she had not told Mr [H] or Mr [S] about the fact that social services were involved to this extent regarding the claimant's possible risk to the child as opposed to issues surrounding the access arrangements with the third party.**
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> **41. The claimant asserted at various points both before the tribunal and during the investigation and disciplinary process that:**
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> > **(i) She did tell Mr [H] verbally about the physical altercation between her and her daughter.**
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> > **(ii) That she had given permission to the LADO or someone from social services to speak to the respondent about any issues regarding her daughter and therefore assumed that they were aware.**

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(iii) That they did not need to know because as far as she was concerned it was an issue about her daughter and not about her.

(i) That there was not a significant change in circumstances because her daughter had been on the at risk register before and simply remained on it after this incident as opposed to being removed and put back again. Therefore in her view there was no material change that she needed to inform her employer of. She did not understand what a CPP was and did not appreciate that this was a significant change.

42. We find that she did not inform the respondent before 19 June 2016 that she was considered by Social Services to be the risk to her daughter. We do not think that she would say that LADO was responsible for telling them or that she did not need to if she had in fact told Mr [H] verbally.

43. In addition having read the emails in the bundle between the claimant and Mr [H] at this time it is clear that the focus of this correspondence (including the emails she forwards him between her and social services) is the granting of parental responsibility to the third party and his access to her daughter. There are references to her daughter being at risk in some of those emails but no reference to her being the alleged source of the risk.

44. We do not believe that she could reasonably assume that a LADO had informed the respondent of all the issues at this time. The Claimant could not give any detail as to when she told the LADO, nor when she signed a form allowing communications between the two organisations. We therefore do not consider that she has sufficiently evidenced this.

45. We do not find it plausible that the claimant genuinely believed that she was not under an obligation to tell her employer everything about the situation. We base this conclusion on the following:

(i) Her mitigation statement following the 2014 incident clearly states that she is now aware of what she needs to do in almost identical circumstances;

(ii). The fact that she had received a final written warning regarding the previous almost identical incident in 2014;

(iii). In her email dated 26 February to Mr [H] (p73) she puts as an action point:

> ***"[Claimant] to email [Mr H] any issues in relation to allegations made against [Claimant] and evidence to or not to the contrary. [Claimant] agreed."***

(iv). In questioning she accepted that the respondent's code of conduct (both old and new) was reasonable and she knew that it required her to have a high standard of integrity and personal conduct. In those circumstances she ought to have understood that any allegation that her behaviour fell short of those standards was something the employer ought to be aware of.

(v). There were several emails from Mr [H] to the claimant reminding her that she needed to keep him and Mr [S] up to date with any developments regarding her interactions with social services or other partner agencies.

(vi). We find on balance that she did know what a CPP was and that she knew of its significance and that it had arisen because of her behaviour.

46. We accept the evidence Mr [H] gave to Ms [P] (p71) during the investigation that in a meeting on 26 February with the claimant she told him that her daughter had been removed from the CP register and that her daughter was no longer subject to a CP plan. Whilst this meeting took place before the incident in March, it confirms that the respondent was not aware that the daughter was still 'at risk' and the claimant would have known that she had informed Mr [H] of that only a matter of weeks earlier. Further we find that she knew what a CPP was and would have known that the new CPP imposed after the incident in March was focussed on her relationship with her daughter not the third party.

47. It was not in dispute that the claimant did not engage with social services regarding the CPP. The claimant said that this was because she did not know what a CPP was and that she was under no legal obligation to engage with social services.

48. We have already found that she did know what a CPP was. It is not for us to determine whether there was a legal obligation to liaise with social services regarding the plan.

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Nonetheless we find that she was deliberately choosing not to engage with them and felt that this was one of the reasons she did not need to tell her employer about the situation. She did not feel that this was a valid area for social services to be requiring her to engage on and that her lack of engagement meant that she was not in contact with social services on this issued and therefore did not need to tell her employer about it.

49. We are aware that the claimant felt let down by social services regarding assignation of parental responsibility to someone else. However, we also find that as a result she felt it was legitimate to ignore their communications and expected the employer to agree with her approach."

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18. Further on, the Tribunal cited from section 98 **Employment Rights Act 1996** ("**ERA**"). Without citing any specific authority, it gave itself further self-directions that it was for the Respondent to show the conduct-related reason relied upon, and effectively covering the elements of the guidance in **British Home Stores v Burchell** [1978] IRLR 379, noting the neutral burden at the section 98(4) stage, and noting the application of the band of reasonable responses test to both process and sanction.

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19. Further on, the Tribunal, under the heading "Article 8 Human Rights Act 1998", set out the text of Article 8 of the Human Rights Convention, as shall I, at this point:

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"Right to respect for private and family life

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

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20. The Tribunal then stated, that, "in interpreting this right we have considered the case of **Pay v Lancashire Probation Service** ECtHR 32792/05."

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21. Earlier in its Reasons, at paragraph 11(c), the Tribunal had set out the Respondent's case as to the reason for dismissal, as follows.

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"The Respondent contends the reason for the Claimant's dismissal relates to her conduct, in relation to failing to inform her employer that her daughter had been made the subject of a child protection plan and the manner in which the Claimant was dealing with social services leading to reputational issues for the service because they are statutory partners and this was unprofessional conduct."

22. At paragraph 64 of the Reasons the Tribunal found that the reason for the Claimant's dismissal was "her gross misconduct", and not any of the other suggested reasons that she had advanced. Referring to the managers who had dismissed the Claimant following a disciplinary process, and refused her subsequent appeal against dismissal, the Tribunal said, at paragraph 65:

> **"Mr Kerr, and on appeal Ms Robinson, had a genuine belief that the claimant had acted in breach of the codes of conduct, that she had knowingly withheld information about her involvement with social services and that she had brought the service into disrepute. Their evidence was consistent and not materially challenged on this point by the claimant."**

23. The Tribunal went on to refer to the investigation carried out by Ms P. She had interviewed the relevant people, including people from Social Services, the Claimant, her line manager and his manager, and she had asked "what they knew when". Mr Kerr had also adjourned the disciplinary hearing to ensure that he had accurate information about the chronology of events, before he reached a decision.

24. The Tribunal considered the investigation process and report to be "thorough and reasonable". At paragraph 68 it continued:

> **"The investigation gave Mr Kerr clear information and he discussed it fully with the claimant that the claimant had:**
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> > **(i) Failed to update her managers about her involvement with social services regarding a serious incident with her daughter**
> >
> > **(ii) Failed to tell them that her daughter was deemed at risk from her by social services**
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> > **(iii) Failed to appreciate the significance of this on her ability to carry out her role**
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> > **(iv) Denied responsibility for telling them about it despite the fact that she clearly knew she ought to tell them."**

25. The Tribunal found that the Respondent had followed a fair procedure, including the Claimant being accompanied by her union representative, and having access to all information used by the Respondent, and an opportunity to comment on it. At the appeal stage Ms

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Robinson had interviewed the Claimant and reviewed all of the evidence used to make the original decision. The Claimant did not raise any concerns about the procedure that was followed by the Respondent, as such, in the Tribunal proceedings.

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26. At paragraphs 71 to 78 of its Reasons the Tribunal then said this:

> **"71. We find that it was within the band of reasonable responses for an employer in all the circumstances to dismiss the claimant. The claimant already had a final written warning for gross misconduct in almost identical circumstances. As a result of the disciplinary sanction we find that she was aware of her obligations to her employer to inform them should there be any further issues between her and a family member for which social services were involved.**
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> **72. The respondent is an integral part of the criminal justice system. Its codes of conduct and the codes that apply to the civil service make it clear that it has a higher expectation of its employees than perhaps those in other sectors. This is set out in their Code of Conduct,**
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> **'The role of the London Probation in the criminal justice system gives rise to the expectation of a high standard of integrity, personal conduct, probity and accountability in all its employees.'**
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> **It also states that this requirement covers**
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> **'conduct outside of work that is likely to adversely reflect upon the integrity or reputation of London Probation.'**
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> **73. Mr Kerr gave unchallenged evidence in his witness statement at paragraphs 3, 4 and 19. In addition to the code of conduct he raises the fact that the respondent is 'a statutory partner on Local Authority Safeguarding Children's Boards. The service is held accountable through the Section 11 audit on how we safeguard children, ensuring that front facing staff are fully trained and familiar with local processes for referring cases of concern. If a member of staff is subject to procedures pertaining to safeguarding of children it would cause professional embarrassment to the organisation and raise questions about the suitability of our staff to safeguard children.' This is also set out in the dismissal letter.**
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> **74. We find that is was reasonable for them to conclude that the claimant's failure to update them in circumstances where she knew she ought to was a breach of the code of conduct. We find that the respondent witnesses' evidence that the claimant's behaviour in of itself could amount to behaviour bringing them into disrepute not just because of the nature of the incident itself which involved a child but also because of the claimant's refusal to engage with social services in a constructive manner regarding the future safeguarding issues concerning her daughter.**
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> **75. We also consider that it was reasonable for them to conclude that her actions, despite her training, showed a lack of professional judgment regarding safeguarding issues which could have impacted on her work.**
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> **76. We therefore conclude that the respondent's decision to dismiss the claimant fell within the band of reasonable responses for an employer in all the circumstances. The claimant's claim for unfair dismissal fails.**
>
> **77. The respondent raised, at the end of the hearing, the issue of whether the claimant's Article 8 Human Rights Act rights were engaged. Having considered the case law, and in particular the case of <u>Pay v Lancashire Probation Service</u>, Article 8 sets out that individuals have the right to a private family life and that there should not be a disproportionate interference with the right to a private life. The tribunal considers that the claimant's rights under Article 8 were engaged in this situation in that her personal life at home including very private issues surrounding domestic violence, the welfare of her children and her interactions with social services were considered by her employer when dismissing her. These were not issues that were in the public domain.**
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78. However, the tribunal, in considering whether the claimant's dismissal was within the range of reasonable responses, has considered whether the respondent's interference with the claimant's private life was proportionate. We conclude that it was proportionate. As in Pay v Lancashire Probation Service, the respondent has demonstrated that the probation service is an integral part of the criminal justice system and therefore its employees can be held to account for relevant matters occurring in their private life. The respondent is required to work as a statutory partner with social services and to ensure that its staff behave in a way which is commensurate to their obligations to the public in terms of safeguarding the vulnerable and children. The information from the claimant's private life (that she was not cooperating with social services and that social services had judged that her daughter was at risk from the claimant's behaviour) was clearly capable of bringing the respondent into disrepute and if known to the public could undermine public confidence in the probation service. The respondent was therefore justified in considering these private matters when considering whether it could continue employing the claimant."

The Grounds of Appeal

27. At a hearing under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993**, at which the Claimant had the benefit of representation by counsel under the ELAAS scheme, two Grounds of Appeal were allowed by me to proceed to a full appeal hearing. Correcting a date error, they are as follows:

> **(1) That the Tribunal erred in its consideration of the impact of the Appellant's Article 8 rights when finding that it was proportionate (and hence within the band of reasonable responses) to have dismissed her for not informing the Respondent sooner than she did that she was accused of wrongful conduct by social services and that her daughter was once again on the CPR, having regard to the intensely private and sensitive nature of the subject matter, the finding that it was not in the public domain, and hence the implications for whether it could adversely affect the Respondent's reputation.**
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> **(2) The Tribunal made contradictory and/or non-Meek-complaint findings, that the Respondent was not told, or given sufficient detail of, these matters, until 19 June 2016, given its findings also about the content of the Appellant's emails sent in March and May 2015.**

28. It is convenient first to consider Ground 2.

Ground 2 - Arguments

29. Mr Livingston referred, in particular, to the Tribunal's findings at paragraph 42, that the Claimant "did not inform the Respondent before 19 June 2015 that she was considered to be the risk to her daughter", in paragraph 43 to emails between the Claimant and Mr H in which there was a reference to her daughter being at risk, but not to the Claimant being the source of that risk, and her email of 29 May 2015, referred to by the Tribunal at paragraph 38.

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30. These emails were also in my bundle, so I could see the full contents, which were before the Tribunal. Mr Livingston highlighted that the 29 May 2015 email contained the comment that the Claimant did not wish to be accused again of emotional or physical abuse, which she said was a false allegation, and that her daughter was now on the at-risk register. He also referred to the emails in which the Claimant resisted Mr H's indication that she needed to keep Mr S informed of the "ongoing involvement with social services, as far as it has an impact on your work", on the basis that it was a private matter. She also stated that she did not want everybody knowing about matters she set out, which concerned her daughter's health and the third party, adding: "I have no idea why my employers need know at all."

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31. Mr Livingston submitted that this material showed that the Respondent had been told by the Claimant on 17 March that there was an allegation *against her* in relation to her daughter, *and* told on 29 May that her daughter was on the at-risk register. Yet the Tribunal concluded that she did not inform the Respondent that she was considered to be the risk, until 19 June. These findings, he submitted, were "sufficiently contradictory" to make the Tribunal's conclusion at paragraph 42 either an error of law, and/or at least, not **Meek**-compliant (referring to **Meek v City of Birmingham District Council** [1987] IRLR 250).

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32. Ms Webb submitted that this was a detailed decision which enabled the Claimant to know why she had lost. It was **Meek**-compliant. The assertion that the findings were contradictory was mis-placed. There was clear evidence before the Tribunal that Social Services were in contact with the Claimant regarding her daughter being on a CPP in April 2017, and that they were trying to engage with the Claimant in relation to it; and that this had been a finding made in the disciplinary process. Ms Webb referred to material before the

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Tribunal (and in my bundle) relating to such communications, and the dismissal letter. She referred to the findings that it was not until 19 June 2015 that the Respondent appreciated both that the Claimant's daughter was on the CPR, *and* that it was because *she* was deemed to be a risk.

Ground 2 – Discussion and Conclusions

33. I think it is helpful to start by further considering what, precisely, was the conduct, of which the Tribunal found the Respondent to have considered the Claimant to be guilty, and by reason of which she was dismissed. The task is complicated by the fact that there are passages in which the Tribunal also sets out its own conclusions about her conduct and the reasons for it. Nevertheless, on a careful reading of its decision, the following emerges.

34. In paragraphs 38 – 40 the Tribunal found that the evidence Mr H gave to Ms P's investigation was that it was not until he got the Claimant's 19 June 2015 email that he, Mr H, appreciated that the *reason why* the Claimant's daughter was once again on a CPP was because social services deemed that *she* was a risk to her daughter (as opposed to the third party).

35. From paragraphs 65 and 68, in particular, it is clear that the Tribunal found that the picture that Mr Kerr formed, including as a result of his further investigations and discussion with the Claimant about the additional information that he gathered, was that the Claimant had failed to inform managers, *when she first knew it*, that the new CPP had been instituted because *she* had been deemed by Social Services to be a risk to her daughter. That was despite knowing clearly that she ought to tell her managers that.

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36. At paragraph 73 the Tribunal referred to Mr Kerr having cited, in his evidence, and in the dismissal letter, the provisions in the Respondent's Code of Conduct concerning its role as a statutory partner on Local Authorities' Safeguarding Children's Boards, and that if a member of staff was subject to procedures pertaining to safeguarding children, that would cause professional embarrassment and raise questions about the suitability of the Respondent's staff for such work.

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37. In paragraphs 74 and 75 the Tribunal cited the Respondent's witnesses' view that the incident itself carried reputational risk, as could the Claimant's refusal to engage with Social Services in a constructive manner regarding the CPP, and their view that she had shown a lack of professional judgment regarding safeguarding issues, which could have impacted on her work. These features are mentioned again in the course of paragraph 78.

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38. As I have noted, the Tribunal referred to the dismissal letter, a copy of which was in evidence before it. There was also a copy in my bundle. It set out that the Claimant's daughter had been placed on the CPR on 1 April 2015. At the initial disciplinary hearing, the Claimant had informed Mr Kerr that she was not aware of this until 19 June 2015, though evidence in the investigation report suggested that she was told this at the time. Mr Kerr had therefore adjourned the hearing and caused enquires to be made of the Local Authority. Those revealed that emails were sent to the Claimant on 2 and 7 April 2015 referring to her daughter having been placed on a CPP. Mr Kerr wrote: "This clearly throws into dispute that you were not aware of the Child Protection Plan until June 2015."

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39. The dismissal letter went on to refer to the Civil Service Code of Conduct and the Former London Probation Trust Code of Conduct, and stated: "The issue of your daughter

being placed on the Child Protection Plan is a conflict of interest, given the core values of this agency and its professional reputation with" the Local Authority. Mr Kerr referred to the previous "identical issue" in 2014 in which the disciplinary panel had "impressed upon you the importance of keeping your line manager informed of any further involvement with social services." He had taken account of the Claimant's long service when considering sanction.

40. In summary, the picture which emerges is that the Tribunal found that Mr Kerr dismissed the Claimant because he was of the view (upheld on appeal by Ms Robinson) that (a) the fact that the Claimant's daughter had been (again) placed on the CPR, *because the Claimant was considered to pose a risk to her*, created a potential conflict for her, and a reputational risk for the Respondent, having regarding to its involvement in safeguarding work with the Local Authority; (b) the Claimant knew of the CPP, and that it had been re-imposed because she was deemed such a risk, from early April 2015; (c) the Claimant knew that she should have reported this to her managers promptly, but deliberately did not do so; (d) although the fact that her daughter was again on the CPP was mentioned in the 29 May email, the salient fact that this was because the Claimant was deemed to be a risk did not become apparent to Mr H until 19 June; (e) this conduct was exacerbated by evidence that she was not sufficiently co-operating with Social Services in this regard, and the concern to which that gave rise, as to her professional judgment.

41. It is, in particular, clear, that the point which the Tribunal found was regarded as particularly significant by Mr Keen, was that it was not until he got the 19 June email and report that Mr H appreciated *both* that the Claimant's daughter was again on the CPR, *and* that it was because she was viewed as being a source of risk. It is this combination which was plainly regarded as particularly significant, because it was the *implication of the Claimant* in

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that formal Local Authority process (as well as concerns about her lack of co-operation with it) that was considered to give rise to the conflict for her, and the reputational risk to the Respondent.

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42. I do not agree that the Tribunal should have found that the underlying evidence was contradictory in this regard. The 17 March 2015 email preceded the Claimant learning that a new CPP had been instituted. She was told on 1 April that she needed to keep her line manager informed of developments. Her daughter being on the "at risk" register was not mentioned until the end of the 29 May email, which was, in substance, about her dealings with Social Services, and recent events, concerning the question of contact between the Claimant's daughter and the third party. The 1 June email from her referred to her daughter's condition being because of the third party, and questioned why the Respondent needed to know about such matters at all.

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43. Reading paragraph 42 of the Tribunal's Reasons in the context of the wider discussion of this sequence of communications of which the 19 June email formed a part, and its findings as to the reason for dismissal, it is clear that the reference, in that paragraph, to "*the* risk", is to the Claimant having been identified as the source of the risk which led to the imposition of the new CPP. Bearing in mind the evidence that the general theme of the 29 May and 1 June emails was to cast blame on the third party, I do not think the Tribunal's findings were contradictory.

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44. In particular, I do not think that this material should have pointed the Tribunal to the conclusion that Mr Keen's finding that Mr H did not appreciate before 19 June that the Claimant had been identified as the source of the risk which had given rise to the new CPP, was unsustainable on the basis that it was contradicted by the documentary evidence before Mr

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Keen. Further, the dismissal letter recorded that the Claimant had asserted in the disciplinary process that she had not herself been aware of the new CPP *until 19 June*; but Mr Keen concluded that the evidence he had gathered showed that she did know this in early April. The

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Tribunal therefore did not err in accepting that he genuinely concluded, drawing reasonably on the products of a reasonable investigation, that she had deliberately not shared this information when she first knew it, despite knowing that she was required to do so.

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45. For all of these reasons, I conclude that the Tribunal's decision was not non-**Meek-**compliant, nor did it otherwise involve an error of law, as alleged by Ground 2. This Ground of appeal therefore fails.

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Ground 1 – The Law

46. The arguments in relation to Ground 1 covered both the law and its application to the facts of this case, as found by the Tribunal. So, I will start with the law.

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47. Section 98 **Employment Rights Act 1996** (**ERA**) provides (in material part) as follows.

> **(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—**
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> > **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
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> > **(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.**
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> **(2) A reason falls within this subsection if it—**
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> > **(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
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> > **(b) relates to the conduct of the employee,**
> >
> > **(c) is that the employee was redundant, or**
> >
> > **(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**
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> **…..**

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(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.

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48. Sections 3 and 6 **Human Rights Act 1998** (**HRA**) provide (in material part) as follows:

3 Interpretation of legislation.

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(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

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(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

6 Acts of public authorities.

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

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(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

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(3) In this section "public authority" includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

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49. In the period of approaching twenty years since the **HRA** came into force, a number of authorities have considered the approach to be taken when in it is asserted, in the context of an unfair dismissal claim, that a relevant Convention right is engaged. A number of these deal only or mainly with fact-specific or narrow points, such as the scope of certain specific

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Convention rights, and when they might or might not be engaged. I shall focus on the authorities that concern the more general question of the approach to be taken in such cases.

50. In **Pay v Lancashire Probation Service** [2004] ICR 187, the employee was a probation officer. He was dismissed on the ground that activities that he engaged in outside of work, visiting certain clubs, and running a website purveying certain products, were incompatible with his role. An Employment Tribunal rejected his submission that his dismissal involved a breach of his Article 8 and 10 (freedom of expression) Convention rights, and found his dismissal fair.

51. The EAT held that, where the employer is a public authority, the Tribunal should interpret section 98(4) as requiring it, when deciding whether the employer acted reasonably or unreasonably, to do so "having regard to the applicant's Convention rights." Further, a public employer would not, for those purposes, be acting reasonably, if it had violated the employee's Convention rights. However, there had been no violation of the complainant's Article 8 rights, because the activities were in the public domain; and no violation of his Article 10 rights, because any interference with them by dismissal was necessary and justified. The finding that the dismissal was fair was therefore upheld.

52. The same case was considered by the European Court of Human Rights in **Pay v United Kingdom** [2009] IRLR 139. The Court proceeded on the assumption, without deciding, that Article 8 was engaged. At paragraphs 44 to 49 the Court said:

> **"44. An interference with the rights protected by that Article can be considered justified only if the conditions of its second paragraph are satisfied. Accordingly, the interference must be "in accordance with the law", have an aim which is legitimate under this paragraph and must be "necessary in a democratic society" for the aforesaid aim. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a pressing social need and, in particular, is proportionate to the legitimate aim pursued. It is for the national authorities to make the initial assessment of necessity, though the final evaluation as to whether the reasons cited for the interference are relevant and sufficient is one for this**

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Court. A margin of appreciation is left to contracting states in the context of this assessment, which varies according to the nature of the activities restricted and of the aims pursued by the restrictions (*Smith and Grady*, cited above, §§ 72 and 87-88). The nature of the activities in this context includes the extent to which they impinge on the public domain.

45. The applicant does not dispute that his dismissal was lawful. In addition, he appears to concede that it pursued a legitimate aim, namely the protection of the reputation of the LPS. However, he claims that the measure was disproportionate to that aim.

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46. The Court notes at the outset that the dismissal of a specialist public servant, such as the applicant, is a very severe measure, because of the effects on his reputation and on his chances of exercising the profession for which he has been trained and acquired skills and experience (see *Vogt*, cited above, § 60).

47. At the same time, the Court is mindful that an employee owes to his employer a duty of loyalty, reserve and discretion (*Guja v. Moldova* [GC], no. 14277/04, § 70, ECHR 2008). The applicant's job involved, *inter alia,* working closely with convicted sex offenders who had been released from prison, to ensure that they complied with the conditions of release and did not re-offend. As such, it was important that he maintained the respect of the offenders placed under his supervision and also the confidence of the public in general and victims of sex crime in particular.

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48. The applicant may be correct in thinking that consensual BDSM role-play, of the type depicted in the photographs on the BB website, is increasingly accepted and understood in mainstream British society. Indeed, the hallmarks of a "democratic society" include pluralism, tolerance and broadmindedness (*Smith and Grady,* cited above, § 87). Nonetheless, given the sensitive nature of the applicant's work with sex offenders, the Court does not consider that the national authorities exceeded the margin of appreciation available to them in adopting a cautious approach as regards the extent to which public knowledge of the applicant's sexual activities could impair his ability effectively to carry out his duties.

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49. It might have been open to the LPS to take less severe measures, short of dismissal, to limit the risk of adverse publicity caused by the applicant's activities, particularly as there was no evidence that his involvement with Roissy was widely known at that point. However, the Court notes the facts as found by the domestic tribunals, and notably that the applicant did not accept as reasonable his employer's view that his activities with Roissy could be damaging and that, apart from offering to ensure that the electronic links between the Roissy and BB websites were severed, he had not been willing to alter his connection with Roissy. In these circumstances, and given in particular the nature of the applicant's work with sex offenders and the fact that the dismissal resulted from his failure to curb even those aspects of his private life most likely to enter into the public domain, the Court does not consider that the measure was disproportionate."

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53. In **X v Y** [2004] ICR 1634 (CA) the employee worked for a charity working with young offenders. He was cautioned for an offence of gross indecency. He did not tell his employer. When, some months later, his employer found out about it, he was dismissed for failing to disclose that he had committed a criminal offence that had a direct bearing on his employment. He claimed unfair dismissal and argued that in particular his Article 8 Convention right had been breached. The Tribunal found the dismissal fair. The Court of Appeal upheld that decision.

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54. However, in the course of its decision the Court gave guidance. It held that section 3 of the **HRA** was engaged in a case involving a private employer, just as it was in one involving a public sector employer. Mummery LJ (with Brooke LJ specifically concurring with this passage) gave the following guidance:

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> **"64. As indicated earlier, it is advisable for employment tribunals to deal with points raised under the HRA in unfair dismissal cases between private litigants in a more structured way than was adopted in this case. The following framework of questions is suggested -.**
>
> > **(1) Do the circumstances of the dismissal fall within the ambit of one or more of the articles of the Convention? If they do not, the Convention right is not engaged and need not be considered.**
> >
> > **(2) If they do, does the state have a positive obligation to secure enjoyment of the relevant Convention right between private persons? If it does not, the Convention right is unlikely to affect the outcome of an unfair dismissal claim against a private employer.**
> >
> > **(3) If it does, is the interference with the employee's Convention right by dismissal justified? If it is, proceed to (5) below.**
> >
> > **(4) If it is not, was there a permissible reason for the dismissal under the ERA, which does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it.**
> >
> > **(5) If there was, is the dismissal fair, tested by the provisions of s98 of the ERA, reading and giving effect to them under s3 of the HRA so as to be compatible with the Convention right?"**

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55. In **Turner v East Midland Trains Limited** [2013] ICR 525 (CA) the employee was dismissed based on a finding of fraud. She claimed that this would particularly damage her reputation, ability to find other employment, and relationships with colleagues, infringing her Article 8 rights. The Court of Appeal held that Article 8 could potentially be engaged in such a case, but not where a properly conducted process established (whether in the civil or criminal context) that she had brought those consequences on herself by her own conduct. Procedurally, section 98 of the **ERA**, and the "band of reasonable responses" test applied pursuant to it, were sufficiently robust and flexible to ensure compliance with Article 8. In particular, the band of reasonable responses test already allowed for a higher standard of investigation to be adopted where the consequences of dismissal for the employee might be particularly grave. That test did not require further particular modification in a case where the Article 8 right was engaged.

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56. The Court also considered the approach to be taken to the application of dismissal as a sanction, in particular by reference to the discussion in **Sanchez v Spain** [2012] 54 EHRR 872. It concluded at paragraph 56:

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> **"Strasbourg therefore adopts a light touch when reviewing human rights in the context of the employment relationship. It may even be that the domestic band of reasonable responses test protects human rights more effectively. Whether that is so or not, *Sanchez* shows that the interests of the employer are given significant weight when carrying out the balancing exercise which Article 8(2) requires. *Sanchez* strongly reinforces my conclusion that the band of reasonable responses test provides a sufficiently robust, flexible and objective analysis of all aspects of the decision to dismiss to ensure compliance with Article 8."**

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57. In **Hill v Governing Body of Great Tey Primary School** [2013] ICR 691 (EAT) the employee claimed unfair dismissal for having made protected disclosures. It was part of her case that her Article 10 Convention rights (freedom of expression) had been infringed. After citing the guidance in **X v Y** the EAT observed (at paragraph 35): "That is informative. In the present case, however, the school was not a private litigant. It is a public authority. As such, it owes, and owed, a duty directly to secure the freedoms protected by the European Convention." Further on, at paragraphs 44 and 45, it said:

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> **44. It is dangerous, in our view, for a Tribunal to attempt to explain in its own home spun language what are complex provisions which have been the result of careful balance in their legislative expression. The motive of expressing it intelligibly for the parties may be admirable, but a decision reached in consequence of the application of such an encapsulation as if it were the actual legislative test is prone to error.**
>
> **45. The Tribunal here purports to have applied its own encapsulation. It did not purport to apply Article 10 (2) in its own terms. Its approach should have been:**
>
> **(i) to ask whether what had occurred could fall within the ambit of the right to freedom of expression and;**
>
> **(ii) if so, then to hold that the school as a public body would be bound to respect the exercise of that right, unless it could be qualified by Article 10 (2). That would have involved considering whether the restriction on the right to freedom of expression which was complained of could be justified in accordance with Article 10 (2). Accordingly, the Tribunal would have to;**
>
> **(iii) identify the aim which the restriction on free speech sought to serve – which must be one or more of the aims expressly set out at 10 (2) ("Interests of National Security" etc.). Here, two aims were potentially legitimate – the protection of the reputation or rights of others, and preventing the disclosure of information received in confidence;**
>
> **(iv) satisfy itself that the restriction or penalty imposed in the light of that aim was one prescribed by law. That does not mean, in the UK context, that it must be provided for by statute: a common law right will suffice. A contractual term requiring respect for confidential communications would, for instance, be sufficient. So, too, would a common law right to confidentiality;**

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(v) if so, consider if the restriction or penalty was "necessary in a democratic society". This involves looking to see whether the measure concerned was appropriate to the legitimate aim to which it was said to relate, and that the extent of the interference which it brought to the exercise of the right was no more than proportionate to the importance of the particular aim it sought to serve. This balancing exercise was, in the first place, for the school to perform, or, in the Polkey context, to be considered as if it had performed. However, the test in the present case for the Tribunal is not whether the school would be entitled to take a particular view of the exercise of Article 10 rights but whether that was where the law actually strikes the balance. The Tribunal has to make its own assessment: it does not apply a review test.

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The Arguments

58. I have to say that Mr Livingston's written submissions were somewhat discursive and repetitive. However, he brought his main points into greater focus in oral submissions. His principal arguments were as follows.

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59. Mr Livingston drew three points of contrast between the facts of the present case and those of the **Pay** case. First, the Claimant in the present case did not work with children. There was no link between her alleged conduct and the nature of her work. Secondly, it was "unfathomable" that the matters relating to the Claimant's alleged conduct and dealings with Social Services would enter the public domain. Thirdly, Mr Pay's out-of-work activities were a matter of choice. The Claimant's situation had not arisen through her active choice.

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60. Mr Livingston submitted that the guidance in **Turner** and that in **Hill** applied in different types of case. In this case the Tribunal should have followed the guidance in **Hill**. That was for the following reasons.

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61. Firstly, in the present case, as in **Hill**, and unlike in **Turner**, the employer was a public employer. There was therefore the additional ingredient that the employer itself owed its own duties to the Claimant in respect of her Convention rights – see **Hill** at paragraph 35.

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62. Secondly, a distinction could be drawn between cases where Article 8 was invoked, on the basis that the employee had lost their job because of *what they did* in their private life, and those in which it was invoked, because of the *impact of losing their job* on their private life.

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Turner was a case of the latter type – the focus being on the *consequences* of Ms Turner losing her job. The present case, was, like **Hill**, one about the *reason* why the Claimant had lost her job. Thirdly, **Turner** considered the implications of Article 8 for the question of procedural

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fairness. In the present case, as in **Hill**, the issue was one of substantive fairness.

63. A structured analysis, in particular of the question of justification and proportionality,

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applying the guidance from the ECtHR in **Pay**, and that in **Hill**, was required in all unfair dismissal cases where Article 8 (or, indeed Article 10) was said to be engaged. This required the Tribunal to apply the specific wording of Article 8. It needed to: identify the aim, which must be one specifically set out in Article 8(2) and prescribed by law; and assess the degree of

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interference with the Convention right in the particular case. It must then consider whether the action of the employer was necessary in a democratic society, answered a pressing social need, was appropriate to the aim and interfered with the Article 8 right no more than was

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proportionate. In a public sector-case the employer had to carry out that exercise, but the Tribunal also had to do so for itself, and not merely by way of review.

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64. In this case, submitted Mr Livingston, the Tribunal had not properly conducted that exercise in a structured way. It had failed to properly identify what was the degree and nature

of the interference with the Claimant's Article 8 rights, properly to analyse the justification, and consider which part of Article 8(2) applied to it, by reference to its actual words, including consideration of whether it was prescribed by law and necessary in a democratic society, and whether it answered a pressing social need. It had then failed properly to balance the aim or justification against the interference.

65. The interference with the Claimant's private life was in this case very significant. The subject matter was intensely private domestic and family matters, which were not in the public domain; but the Respondent was expecting her to tell it, as the Tribunal put it at paragraph 45, "everything about the situation". The Tribunal had also failed to consider that she was expected to tell her line manager, who was a temporary member of staff. The Respondent could have, but did not, confine the reporting obligation to just one, and one more suitable, person.

66. The Tribunal had not properly considered the Respondent's justification. It had not identified the specific aim falling within Article 8(2) or what the pressing social need was. It had also failed to consider whether there was any actual likelihood of the Respondent's reputation being affected, given that the matter was not in, and was not likely to come into, the public domain. "Likely" was the test in the Code. Regarding the Respondent's reliance on the Claimant's failure to co-operate with Social Services, the Tribunal failed to take into account her reasons for doing so, despite referring to them earlier in its judgment. There was no finding, or suggestion, of any unprofessional conduct in relation to her actual work with the Respondent.

67. Because it failed to properly analyse and make findings about the degree of interference with the Claimant's Article 8 rights, and the Respondent's purported justification, the Tribunal

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then failed properly to carry out, for itself, the balancing exercise between the two, and whether the interference was no more than proportionate and necessary to the aim. Dismissal was the severest sanction. The Claimant's conduct amounted at worst to *delay* in putting the Respondent fully in the picture. The Tribunal had failed to take account of this.

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68. Ms Webb's principal submissions were as follows.

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69. She agreed that **Hill** was the most pertinent authority in this case, given that the Respondent is a public sector employer, and that the case was concerned with the Claimant's conduct, rather than the process followed by the Respondent, or the consequences of losing this particular job being peculiarly serious.

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70. The Tribunal had set out Article 8 in full in paragraph 62, and could therefore be taken to have kept in mind its specific wording.

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71. While the information sought by the Respondent related (as the Tribunal found) to the Claimant's private life, and was certainly sensitive, the infringement of her Article 8 right was limited to the seeking of *information*. She was not, as in **Pay**, being expected to restrict or change her activities in her private life. Further, the Respondent did not want to be updated on matters such as the issues surrounding rights of access to the Claimant's daughter. The specific concern was, only, with the Claimant's own involvement with Social Services, because of it having been alleged that *her conduct* meant that she was a risk to her daughter and the reason why she was put on a CPP. There had also, already and in any event, been a degree of State encroachment in this area of the Claimant's private life, by virtue of the very fact of Social Services' involvement.

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72. The Respondent plainly had a legitimate and well-founded concern about managing the risk to its reputation, given the close and important statutory relationship that it had with Local Authorities. There was also the *potential* that public confidence in the Probation Service would be undermined. The information sought plainly was relevant to the Claimant's work. The Tribunal took a proper view of the Respondent's approach to all these aspects.

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73. The implied duties of the contract of employment, underpinned by the applicable codes and standards, meant that the restriction was prescribed by law. The Respondent's concern to protect its reputation with its statutory partners, and the integrity of this part of the justice system, was plainly a legitimate aim within the purview of Article 8(2), as being necessary in a democratic society to protect the rights of others. It was proper for the Claimant's line manager to be designated as the person to report to. But in any case, in fact, she had declined to deal with him. What she was sanctioned for was not bringing the matter promptly to the attention of *any* manager, even Mr H. The Tribunal had specifically (and properly) found that Mr Kerr and Ms Robinson concluded that the Claimant had *knowingly withheld* the salient information from the Respondent, at a time when she knew that she ought to disclose it promptly.

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74. The Tribunal plainly did engage with forming its own view of proportionality, in particular in paragraph 78. It considered the degree of infringement, and had recognised that the matter was "very private" and sensitive; and that these matters were not in the public domain. It scrutinised and identified the Respondent's aim, recognising in particular the significance to it of the statutory relationship with Local Authorities, and its reputation with its statutory partners. It had noted that Mr Kerr's evidence about this, and its importance, was unchallenged. It was the impact on the Respondent's relationship with Local Authorities on

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which it focussed in weighing proportionality in paragraph 78. It referred also to the impact on public confidence "if known". That was not a wrong approach.

75. Having regard to all of those features, the Tribunal was entitled to regard the interference with the Claimant's Article 8 rights as proportionate. In addition, the Respondent had been justified in taking account of the Claimant's failure to engage with Social Services, as raising concerns in relation to her professional judgment, and of the previous final written warning. These fortified the correctness of the Tribunal's overall conclusion that the dismissal was not unfair. The proper consideration of the Convention rights aspect was only part of the process.

Discussion and Conclusions

76. As to the law, I do not think there is any tension among the previous authorities. In particular I note the following.

77. Firstly, the context of the discussion in **X v Y** was that it was not controversial that the Tribunal would need to factor in the impact of Convention rights when considering a claim brought against a public authority; but what was at issue was the position in relation to a claim brought against a private employer. The main point of the discussion is to stress that, for reasons explained, the **HRA** also has an impact in relation to claims brought against a private employer, just as it does in claims brought against a public employer.

78. Secondly, I do not think there is any tension, or material difference, between the guidance emerging from **Turner** and that emerging from **Hill**. They were different types of case. The focus in **Turner** was on the impact, if any, which the engagement of Convention

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rights in a given case may have on the approach taken to questions of fair process at the section 98(4) stage; and that case was, unusually, particularly concerned with the argument that it was the consequences of dismissal that caused Convention rights to be engaged. **Hill** was, perhaps more typically of how these issues arise, concerned with a scenario in which Convention rights were found to be engaged because of features of the employee's own conduct, for which she was sanctioned.

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79. Thirdly, at a doctrinal level Mr Livingston is right that **Hill** identifies that there is an additional legal consequence which applies where the claim is against a public body. This is that, in addition to the Tribunal having a duty to weigh the impact of the dismissal upon Convention rights, and whether it is proportionate (which it must, whether the employer is a public or a private body), a public employer also itself has that same duty when taking its decision.

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80. However, while that is doctrinally correct, I am doubtful that this added feature makes any real difference in practice. When I raised this with Mr Livingston he was unable to give me an example of any scenario in which it would. I say this because, whether the case involves a public or a private employer, the Tribunal must, in deciding whether the dismissal is fair or unfair, come to its own view as to whether the imposition of the sanction of dismissal involved a disproportionate and unjustified interference with Convention rights, or not. If it did, then this will take the dismissal outside the band of reasonable responses. If not, then this feature of the case will not do so. That will be the position regardless of whether the employer had a duty of its own, whether, if so, it applied its mind to the question, and, if it did, whatever conclusion it came to. It is always the Tribunal's conclusion that, ultimately, must decide the point.

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81. In all events, while I do not consider there to be any tension between the authorities, for the reasons I have given, the one that is most in point in this case is **Hill**. I have then considered the following specific aspects of this Tribunal's decision.

82. First, the Tribunal plainly did apply its mind to the task of assessing for itself the question of whether the Claimant's Convention rights were engaged, and, if so, whether the sanction of dismissal constituted a disproportionate and unjustified interference with them. It is worth noting that the Claimant herself, who is a lay person, did not raise the issue, and it was Ms Webb who, very properly, did so; and the Tribunal did then give it consideration. It cited verbatim Article 8 in paragraph 62, and referred there to the particular authority to which its attention was drawn. It then gave specific consideration to the issue at paragraphs 77 and 78.

83. I turn to the elements that the Tribunal needed to consider.

84. The Claimant's Article 8 rights plainly were engaged, and the Tribunal properly addressed this question, and found that they were. It also cannot be faulted for its description of the issues in question as "very private issues".

85. The Tribunal also observed that these were not issues that were "not in the public domain", by which I take it to have meant that it recognised that they were not known to the general public at large (or the general public in her community). However, the Tribunal made full, and proper, findings, about what the Claimant was required to do. I think it is clear, reading the decision as a whole, that the Respondent did not require her to divulge every detail of Social Services', or the Court's involvement in matters relating to her daughter. The Claimant in fact shared information about the access issue in particular with Mr H, but this was

not something he needed or required to know. Although broader language was sometimes used, the Tribunal also identified that the specific concern was to know if there was any further involvement of Social Services in which there was an issue regarding the (alleged) conduct of the Claimant herself. It also identified that she was specifically required to keep her line manager informed.

86. I do not think it can be said, therefore, that the Tribunal did not form a picture of the degree, as a matter of fact, of infringement with the Claimant's Article 8 rights, which complying with what the Respondent wanted her to do would entail. Nor do I think it can be supposed that they did not have this in mind when they came to address this specific dimension of the decision to dismiss.

87. Turning to the question of justification, the fact that the Claimant was required to provide this information as part of her express or implied duties as an employee towards her employer, is sufficient to meet the need for any interference with her Convention rights to be "prescribed by law". I note in this context the observation of the ECHR in **Pay** (at paragraph 47, and duly recognising the very different factual context) that it was "mindful that an employee owes to his employer a duty of loyalty, reserve and discretion." Mr Livingston did not, in any event, seek to suggest that the Tribunal should have concluded that this particular requirement of Article 8(2) was not fulfilled.

88. The Tribunal plainly considered, and found, that the Respondent's purpose in imposing this requirement on the Claimant was to safeguard the effective discharge of its functions as the Probation Service. That was in particular by safeguarding its reputation and relations with the Local Authorities with which it worked, having regard to its statutory partnership with Social

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Services and its involvement, as an organisation, in issues to do with the safeguarding of children. I cannot see that it can be said that these objectives should have been found to have been outwith those contemplated by Article 8(2) – which include public safety, the prevention of crime and the protection of the rights and freedoms of others – in a democratic society.

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89. Mr Livingston referred to the ECHR's statement in **Pay** (drawing in turn on **Smith and Grady v United Kingdom** [1999] IRLR 734) at paragraph 44 that: "An interference will be considered 'necessary in a democratic society' for a legitimate aim if it answers a pressing social need and in particular is proportionate to the legitimate aim pursued." But I do not think this means that there is a distinct and additional hurdle of meeting a pressing social need which must be surmounted. Those words do not, themselves, appear in Article 8(2). As I read it, the Court was merely here saying that an interference which answers a pressing social need is one which would, in fact, if proportionate, fulfil the requirements of Article 8(2), not postulating some additional test. In any event, I do not think that the Tribunal ought to have concluded that the objectives which it found the Respondent to be pursuing did not meet a pressing social need.

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90. Mr Livingston argues that the Tribunal should have found that the interference with the Claimant's Article 8 rights was disproportionate because (unlike Mr Pay) her alleged conduct was not in the public domain, and there was no real risk of the public getting to know of it. It was certainly not "likely" that they would. Therefore, the Tribunal should have concluded that there was no real or likely risk of the Respondent's reputation or activities being damaged.

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91. However, I do not agree. First, the Tribunal specifically acknowledged, and found, that these matters were not in the general public domain. Secondly, however, it found that the Respondent's particular concern was with the potential impact on its reputation and dealings

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with its statutory partners. Whether or not the Claimant was herself, in her work for the Respondent, also dealing with the same Local Authority whose Social Service team were responsible for her daughter (I was told at the hearing that her recollection was that she was not) that was nevertheless a Local Authority with which the Respondent as an organisation dealt.

92. Mr Keen made the point that the Claimant had always denied the conduct of which she had been accused, and no Court had found her guilty of it. But there was no suggestion that the Respondent misunderstood the position on this (or that the Tribunal thought it did). It was clear to the Tribunal that the Respondent's concern was with managing the risk to reputation and relations with its statutory partners, created by the fact of Social Services having taken the action, and formed the view of the Claimant's role, that they did. Further, while the Claimant did not herself work with children, the work of the Probation Service, in liaison with Local Authorities, did include matters to do with safeguarding children. I do not think the Tribunal should have concluded, that an employee such as the Claimant being accused of something of this sort, should have been regarded by the Respondent as wholly irrelevant, and of no proper concern to it.

93. In particular, given the Tribunal's findings about the unchallenged evidence of Mr Keen, the Tribunal was, in my view, plainly entitled to conclude that he had a well founded fear that these matters could damage its reputation and relationship with its statutory partners, even if the public at large did not learn of them. Nor do I think it can be said that the Tribunal ought to have discounted entirely any risk of these matters becoming more widely known in the future; or that it was therefore wrong for it to observe that "if known" to the public, that could undermine public confidence in the Service.

94. Mr Livingston's submitted that the Tribunal neglected to consider that the Claimant had merely delayed putting the Respondent in the loop. But the Tribunal, as I have described, made a properly reasoned finding that she deliberately withheld the information that her daughter was on the Register again because (though she vehemently disputed it) she herself stood accused of presenting a risk, at a time when she knew she was expected to report this; and that she misled Mr Keen in the disciplinary process about when she first knew that her daughter had been put back on the Register. Given those proper findings, I do not think that the Tribunal erred in this regard either.

95. Mr Livingston submits that the Tribunal should have found that it was disproportionate to require the Claimant to pass this information to her line manager, Mr S, who was not a permanent employee. However, he was still her immediate line manager. The fact that he was not permanent may have perhaps meant that the Claimant knew him less well, and was more wary of him; but his duties in relation to her, and the handling of this information, would not have been any different. I do not think it can be said that the Tribunal should have regarded this as an unjustified or disproportionate direction. In any event it was the failure to divulge this development to anyone, even Mr H, in a timely fashion, that led to the Claimant's dismissal.

96. Given the very particular nature of the Respondent's activities, and responsibilities, the obvious importance of what it does to society, the goals mentioned in Article 8(2), and the importance of its relationship with Local Authorities as statutory partners, I do not think that the Tribunal erred by failing to conclude that there was a disproportionate and unjustified interference with the Claimant's Convention rights, which rendered this dismissal unfair.

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97. Nor do I think it can be said that the Tribunal should have found that the Respondent was wrong to take account of the fact that the Claimant had already received a final written warning for similar conduct. It plainly considered that the warning, and what she had been told at the time, was properly regarded as reinforcing the conclusion that she knew what she was required to do, if any similar situation recurred.

B

98. Nor do I think the Tribunal should have concluded that the Respondent was wrong to take a view that the Claimant's un-co-operative approach towards Social Services cast doubt on her professional judgment. This was plainly not the main reason for dismissal, as opposed to something regarded as reinforcing the decision to dismiss. I do not think the Tribunal should have found that it was wrong for the Respondent to have regard to it in that way.

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99. For all of these reasons I conclude that Ground 1 is therefore also not made out.

E

Outcome

100. Both Grounds having failed, this appeal must be dismissed.

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