Case Number: 1804169/2019

EMPLOYMENT TRIBUNALS

Claimant: **X**

Respondent: **Y**

Heard at: **Sheffield** **On:** **27 & 28 February and 25, 26, 27 and 28 August 2020**

Before: **Employment Judge Brain**

Representation

Claimant: Mr L Bronze, Counsel
Respondent: Miss L Gould, Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant was unfairly dismissed.
2. The claimant's remedy shall be determined at a remedy hearing.

REASONS

Introduction

1. The respondent is a local authority. In common with all local authorities the respondent has a statutory duty to promote and safeguard the welfare of children in their area. The statutory duty arises pursuant to the Children's Act 1989.

2. The respondent is based in a part of the country which has experienced a chronic issue of child sexual exploitation *("CSE")* over many years. The CSE in the area has been the subject of an investigation by the National Crime Agency *("NCA").* This NCA investigation followed an independent review of the management of CSE by relevant agencies in the area. It is not in dispute that the NCA investigation was wide ranging. The investigation looked back over a large span of time and occupied significant police resources. It was very complex in its scope. The NCA investigation into CSE in the respondent's area forms the background and context of the events giving rise to the claimant's complaint before the Employment Tribunal.

3. The claimant is a qualified social worker. She has long experience of work in the field of children's social care. She worked for the respondent between November 1989 and 19 March 2019.

4. No issue arises about the claimant's competence in her role. Mrs W, one of the respondent's witnesses, agreed with Mr Bronze's suggestion that the claimant has an impressive record of challenging CSE (including giving important evidence in criminal cases arising from the NCA investigation).

5. The hearing of this case was first listed for a one-day hearing which came before Employment Judge Shepherd on 29 November 2019. It was common ground that more than one day was needed in order to hear the case. The hearing was adjourned and Employment Judge Shepherd took the opportunity to give case management orders.

6. Because there are issues in the case involving allegations of sexual offences Employment Judge Shepherd directed there to be a restricted reporting order and an anonymity order. These were made pursuant to Rule 50 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. It was directed that the claimant and respondent shall be referred to in any public record as X and Y.

7. In these reasons, the Tribunal shall refer to the parties as *"the claimant"* and *"the respondent"* respectively. In order to avoid the identification of the parties, the witnesses from whom the Tribunal heard shall be referred to by initials. The alleged victims of the CSE germane to the case shall be referred to as Z and S.

8. In the course of her long career with the respondent, the claimant was most recently employed as the manager of an advocacy rights service. She has held this post for a period of 19 years. This is a service which provides rights and advocacy services for looked after children and young people who are or who have been looked after by the respondent. Before that, she held a number of other posts. Earlier in her career she worked as a residential care worker and residential home manager. Between 1996 and 1998 she worked as a residential home manager at what shall be referred to as *"the Q care home".* It was in connection with her work there that S and Z raised allegations which impacted upon the claimant. (S and Z's allegations formed part of the NCA's CSE investigation).

9. When the matter came before him in November 2019, Employment Judge Shepherd listed the case for hearing on 27 and 28 February 2020. On 27 February 2020 the Tribunal heard evidence from Mrs W. At the material time, she was employed to work for the respondent as the Head of Safeguarding, Quality and Learning within the Children and Young People Services Directorate. She is currently employed as the Head of Children Care. The Tribunal also heard evidence from Miss L. In January 2018 she took up the role as HR business partner within the Assistant Chief Executive Directorate. This role involves HR support to the Children and Young People Services Directorate.

10. During the course of the hearing in February 2020, the Tribunal expressed concerns that the respondent had not fully complied with its disclosure obligations. On the morning of 28 February 2020, the respondent served

a significant amount of additional disclosure upon the claimant. This necessitated an adjournment. The matter was re-listed for August 2020.

11. Prior to the hearing in February 2020, the Tribunal was presented with a bundle consisting of four sections (contained within tabs A to D). When the matter resumed in August 2020, the Tribunal was presented with a fifth section of the bundle. This was, logically, labelled as tab E and ran to pages E1 to E137.

12. It is not in dispute between the parties that: the claimant was suspended from her role on 16 March 2016; she did not return to work for the respondent in any capacity after that date; she was dismissed by the respondent on 19 March 2019 with 12 weeks' pay in lieu of notice; her appeal against dismissal was heard on 11 June 2019; and the claimant was notified the appeal had not been upheld in a letter dated 13 June 2019. In this context, the claimant complains that she was unfairly dismissed by the respondent and brings a complaint of unfair dismissal under the Employment Rights Act 1996.

13. It is the respondent's case that the claimant was dismissed for a substantial reason. This is a permitted reason for the dismissal of an employee for the purposes of the 1996 Act. The substantial reason for dismissal in the respondent's grounds of resistance (at paragraphs A25 to A28 of the bundle) is pleaded as being *"due to there being concerns relating to the safeguarding of children and that [Y] are unable to sustain the claimant's employment and that [Y] feel that they have been reasonable in this situation".* The respondent went on to plead that, *"Due to the serious nature of the allegations against the claimant the respondent could not re-deploy the claimant as it could cause it reputational damage"* and that the respondent "*could not justify the use of public funds to sustain the situation any longer"* and *"had no alternative but to dismiss the claimant as it could no longer sustain the situation".*

14. The Tribunal shall firstly set out its findings of fact before going on to look at the issues in the case, the relevant law and each counsel's submissions. The Tribunal shall then set out its conclusions.

Findings of fact

15. As has been said, the Tribunal heard evidence from Mrs W and Miss L. The Tribunal also heard evidence from the claimant and Mr S who is a convener for the trade union of which the claimant is a member.

16. As has been said, the claimant was suspended from her role on 16 March 2016. The letter of suspension is at pages B20 and B21 of the bundle. The letter confirmed what the claimant had been told at a meeting which had taken place that day. This meeting was attended by Mrs W and the respondent's Head of Safeguarding and Quality Assurance. The claimant was accompanied by Mr S. It is not in dispute that the claimant was informed by Mrs W ahead of the meeting that it was not necessary for her to attend the meeting accompanied by her trade union representative. Nonetheless, as is her right, the claimant elected to be accompanied by Mr S.

17. The reason for the respondent's decision to suspend the claimant is set out in paragraph 5 of Mrs W's witness statement. Here, she says that:

"On 10 March 16 I was alerted that a LADO referral had been made by a professional in relation to [the claimant]. A disclosure had been made by an adult who had been cared for by [the respondent]. The adult alleged to the referring professional that [the claimant] had recently contacted them by phone and threatened her not to say anything around the abuse she experienced in the past. The adult also disclosed a significant longstanding sexual abuse, and physical harm while cared for by the local authority and claimed there were a number of professionals involved and aware. [The claimant] was named as part of these allegations".

(The adult in question is Z).

18. Mrs W said, in paragraph 7 of her witness statement, that *"The records I have reviewed reflect that senior officer consultation with the NCA on 10 March 2016 determined that they were conducting an investigation into the disclosures and that it would be under […] the NCA's investigation into historical abuse".*

19. In evidence given under cross-examination, the claimant fairly accepted the need for the respondent to suspend her given the circumstances.

20. Mrs W informed the Tribunal, in evidence given under re-examination, that a '*LADO'* is a statutory function whose task it is to manage allegations involving those working within the Children and Young People Directorate. The roles and responsibilities of the LADO are set out in the document introduced into evidence by the respondent during the course of the hearing and which commences at page D18. This is an extract from the respondent's staff handbook. The responsibility of the LADO as set out here is (amongst other things) to:

- *Receive reports about allegations and to be involved in the management and oversight of individual cases;*
- *Provide advice and guidance to employers and voluntary organisations and agencies;*
- *Liaise with the police and other agencies;*
- *Monitor the progress of cases to ensure that they are dealt with as quickly as possible consistent with a thorough and fair process;*
- *Provide advice and guidance to employers in relation to making referrals to the disclosure and barring service (DBS) and regulatory bodies such as OFSTED, the GMC etc.*

21. The letter at B20 and B21 confirmed that the respondent had decided to suspend the claimant pending an investigation into the following allegations against her:

- *Inappropriate recent conduct with an individual (who was a former looked after Young Person) attempting to prevent the individual from making new disclosures;*
- *Issues arising from your former role as manager of the home at which the Young Person lived.*

22. The respondent's suspension of the claimant engaged the relevant sections of the handbook contained in the extract commencing at page D18 (in particular at pages D21 and D22). Amongst other things, this provides that the *"accused member of staff"* should *"be kept informed of the progress and outcome of any investigation and the implications for any disciplinary or related process"* together with a requirement for the respondent to provide appropriate support to the employee including being kept up to date about events in the workplace. The handbook also provides a requirement for the respondent to keep a clear and comprehensive summary of the case record on the employee's personnel file and give a copy to the employee.

23. An aspect of the claimant's case is about the respondent's management of the lengthy period of suspension. This culminated in a letter sent by the claimant to Miss M, the Strategic Head of Children and Young People's Services. This letter is dated 18 April 2018 and is pages C19 to C21. The claimant complained (amongst other things) of having had no face-to-face contact with Mrs W or anyone from within the respondent's HR department following a meeting which took place on 21 November 2016. She also complained that she had not been furnished with records of meetings that had been held and that the respondent's conduct of matters had left her feeling vulnerable and concerned.

24. It is now necessary to look in a little further detail at the sequence of events following the suspension. The evidence in the claimant's witness statement is that the next contact after 16 March 2016 was at a meeting held on 28 June 2016 with Mrs W and Mr R (who was Miss L's predecessor in her role). Mrs W for her part says that she *"had a keep in touch contact"* with the claimant on 12 May 2016. Mrs W said, in cross-examination, that the *"keep in touch contact"* was by telephone. However, she was unable to corroborate this contact by means of a contemporaneous note or record.

25. When pressed as to the basis of her assertion that there was contact on 16 May 2016, Mrs W said that she had gone to her diary and *"previous records".* There are some diary entries within the bundle at pages E112 to 116. However, none of those are for 12 May 2016. Mrs W also accepted that she was meant to contact the claimant every few weeks during her suspension but had failed to do so. The contact was *"not as I would have wished"* was how she put it. On balance therefore the Tribunal finds, in the absence of any corroborative evidence, that there was no *'keeping in touch contact'* (or indeed any kind of contact) between the date of the claimant's suspension and the meeting of 28 June 2016.

26. Mr S's notes of the meeting of 28 June 2016 are at pages B72 to B75. Mrs W also prepared some notes of the meeting which are at page B23 (and which were sent to the claimant under cover of the letter dated 6 October 2016 at B22).

27. The claimant's evidence was that at the meeting of 28 June 2016, Mr R said to her that *"the police were undertaking the investigation chronologically due to the young person's* [Z's] *learning difficulties which is why the process was taking so long".* This appears to very much reflect Mrs W's note at page B23 (in particular, in the third paragraph). Mrs W's

note said that Mr R informed the claimant and Mr S that he was not in a position to inform the claimant of the details of the investigation. Mrs W's note also records that the claimant feared being made the subject of criminal charges. Mr S's note at pages B72 to B75 is in the same vein to the effect that the claimant felt extremely vulnerable.

28. Mr S's note and Mrs W's note both say that Mr R would be in regular contact with the claimant with a view to holding meetings every six weeks with fortnightly contact from Mrs W. In fact, only one further meeting took place that year. That meeting was held on 21 November 2016. The claimant's evidence was that Mrs W did not contact her fortnightly as had been agreed at the meeting of 28 June 2016. In light of Mrs W's evidence referred to in paragraph 25 above the Tribunal accepts the claimant's account.

29. Mr S accompanied the claimant at the meeting of 21 November 2016. This was attended by Mrs W and Miss C, a HR representative. The claimant's evidence is that at this meeting, there was a discussion regarding her social care registration and concerns that the claimant had about the young people with whom she had been working and concerns for the members of her team. The claimant did not receive any minutes of the meeting. No minutes of the meeting appear within the bundle. The Tribunal therefore accepts the claimant's account that no minutes of this meeting were sent to her.

30. Mrs W says that keeping in touch telephone contact was made with the claimant in July, September and December 2016 (*per* paragraphs 15 to 19 of her witness statement). There are no records corroborative of such telephone contact. Further, on 15 December 2016 Mrs W had attended a strategy meeting held between members of the respondent and the NCA. A copy of the redacted minutes of this meeting is at pages C4 to C10. The action plan at page C10 refers to the need for an individual to *'check in with'* the claimant on a monthly basis and for this to be done by 20 December 2016. No reference was made in the record of such contact having already been made before 15 December 2016 or to any contact having been made with her after 28 June 2016. The Tribunal therefore concludes that no contact was made by Mrs W with the claimant as contended for by Mrs W.

31. In paragraph 20 of her witness statement, Mrs W says that she attended a LADO meeting on 10 February 2017. She says that, *"At the meeting the NCA advised that the charge of "perverting the course of justice" was to be explored in relation to the claimant. This linked to the calls allegedly made to the adult victim; phone records had still not been accessed at this time. There was no current time limit for this but the NCA were very clear that the timeline and historical allegations needed to be investigated as they were closely linked to the nature of the alleged calls. Through the investigation process, the claimant's post was sitting vacant, with the service manager for the IRO service directly line managing the staff. The claimant continued to receive full pay".*

32. In contrast with the contact which Mrs W says that she made with the claimant after 28 June 2016 there is good corroborative evidence of her account of the LADO meeting of 10 February 2017. A copy of the minutes

of that meeting are in the bundle at pages E42 to E46. The minutes record that HR was giving consideration to terminating the claimant's contact of employment given that she had, at this stage, been on suspension for a period of 11 months. It is recorded that Mrs W *"asked if we can look into this thoroughly please as these are still allegations".* Plainly, this was a statement made by Mrs W supportive of the claimant. Mrs W wished to guard against the possibility of the claimant being dismissed prematurely.

33. Mrs W then says that she met with the claimant along with a trade union representative and Mr R on 14 February 2017. She says that at this meeting the claimant said that the NCA had told her (the claimant) that the NCA planned to speak to her. Mrs W says that the claimant accepted that a return to work was not possible at that stage because of the ongoing NCA investigation.

34. It was the claimant's case that no meeting took place on 14 February 2017. Again, Mrs W was unable to point to any notes corroborative of her case that a meeting had taken place upon that date. No reference was made to a meeting of that date within the respondent's grounds of resistance. Mrs W said that the date of the meeting was in her records but these were not before the Tribunal. The Tribunal therefore accepts the claimant's account upon this issue.

35. On 26 April 2017 Mrs W and Mr R attended a further LADO meeting the minutes of which appear at pages E48 to E52. This makes reference to a plan for Mr R and Mrs W to prepare a briefing paper for Mr T and Miss M within 48 hours. Presumably this is the paper referred to in Mrs W's witness statement in paragraph 23. (In light of the Tribunal's findings below in paragraphs 40 and 41, this briefing appears not to be in the bundle). As a further action, Mrs W was to try to arrange to meet with the claimant in mid-June 2017. She was also tasked with continuing to check with the claimant on a monthly basis. It was suggested to Mrs W by Mr Bronze that this gave a wrong impression to the representatives of the NCA present at the meeting of 26 April 2017 that regular monthly contact had been made hitherto with the claimant. There is much merit in Mr Bronze's point given the Tribunal's finding that only sporadic and irregular contact had been made up to this point with the claimant.

36. The LADO meeting of 26 April 2017 also records that Mr R was continuing to look at the employment status of the claimant. Plainly, this was being kept under review.

37. Also of some significance from this meeting was that there was reference to there being some corroboration for Z's account of sexual abuse at the hands of a member of staff at the Q care home. This corroboration was from another looked after young person named S. It was considered that S's interviews lent some credence to Z's account.

38. On 24 May 2017 the claimant was interviewed under caution regarding an allegation of conspiracy to pervert the course of justice.

39. Mrs W says (in paragraph 23 of her witness statement) that on 25 May 2017 she compiled and sent a briefing to the Director of Children's Service (Mr T) and the Assistant Director for Safeguarding (Mrs M). In evidence

given under cross-examination, Mrs W said that she had prepared a written brief. This appears not to be in the bundle.

40. There is a written brief prepared by Mrs W at pages E107 to 110 which is curiously dated 18 June 2019. (This would appear to be an incorrect date as in the body of the report Mrs W refers to Z, one of the young people in question, having been interviewed by the NCA over the past 18 months from March 2016). Mrs W also refers to a *"recent LADO meeting"* held in October 2017. Plainly, therefore, this written briefing cannot have been compiled on 25 May 2017 and the reference to a *recent* meeting of October 2017 dates this document to around that time.

41. Chronologically therefore the brief at pages E107 to E110 would appear to have been prepared by her at some point in the autumn of 2017. It is significant that this briefing paper gives a chronological overview but makes no reference to any meeting with the claimant held on 14 February 2017. Reference is made in paragraph 2.2 of the briefing of NCA investigations into an allegation against the claimant of perverting the course of justice and in paragraph 2.3 to her having been interviewed about the matter by the police in June 2017. In those circumstances, it is surprising that Mrs W would omit mention of a meeting held with the claimant on 14 February 2017. There being no contemporaneous reference to the meeting and it being omitted from the briefing paper at pages E107 to E110 persuades the Tribunal that no such meeting took place that day and is corroborative of the findings in paragraph 34.

42. The Tribunal's findings upon this are corroborated by the contents of Mrs W's letter to the claimant of 25 June 2018 in answer to her letter of complaint of 18 April 2018. It will be recalled from paragraph 23 that in the in the letter of 18 April 2018 the claimant was complaining, amongst other things, about lack of contact and support. Again, it is surprising that Mrs W made no mention of any meeting of 14 February 2017 had a meeting taken place that day in order to refute the claimant's complaint of lack of contact.

43. Mrs W sought to excuse the lack of contact upon the basis that the claimant became upset whenever contact was made and had requested there to be contact only when there was anything significant to report. When asked about this in cross-examination, the claimant said that she had no recollection of making such a request. On balance, the Tribunal prefers the claimant's account. If she had requested Mrs W to only make contact when there was anything substantive to report and that routine contact was causing upset to the claimant it is surprising that Mrs W did not say this in the letter of 25 June 2018. That would have provided some defence by way of answer to the claimant's contentions in the letter of 18 April 2020 around lack of support.

44. On 14 March 2018 a police officer *"J"* attached to the NCA emailed the solicitor who was advising the claimant in connection with the criminal investigation. The email is at pages B24 and B25. J confirmed that the claimant was no longer under investigation for the offence of attempting to pervert the course of justice. However, J went on to say that, *"As you are aware there is a wider more involved investigation surrounding complaints*

made of CSE when the complainant [Z] was historically residing in [the Q children's home]. This investigation is continuing. During a period of her career [the claimant] was the home's manager, due to this, future contact with her cannot be ruled out. Due to the complexity and sensitive nature of the investigation, we are not at present able to provide a timescale as to when this may happen".

45. The claimant's account is that on 20 March 2018 she left a message for Mrs W to discuss how the conclusion of the police investigation into the allegation of conspiracy to pervert the course of justice affected her employment. She says that she received no call back and so she telephoned Mrs W again on 10 April 2018. She says that Mrs W told her that the respondent needed to see her again. She says that Mrs W referred to being in a *"decision making process"* and that the claimant had *"been off work for a long time".* The claimant complains, with some justification, that she found the telephone call confusing. It is not clear what Mrs W meant by being in *"a decision making process".* The claimant followed this up with her letter of complaint of 18 April 2018 at pages C19 to C21.

46. Miss L had taken up her post by this stage and had taken over the conduct of the case from Mr R. Miss L denied that she was aware that the perverting the course of issue had been dropped by the police. However, Mrs W fairly acknowledges that she (Mrs W) was aware of the position from 24 March 2018: (paragraph 30 of Mrs W's witness statement). It appears to the Tribunal to be inherently unlikely that Miss L would not be aware of this significant development. However, even if she was not, it is the case that Mrs W was aware of it. Notwithstanding the significance of this development, a meeting was not held with the claimant until 13 June 2018 (even though the claimant had in March 2018 informed Mrs W of the fact that the police investigation into an alleged perversion of the course of justice had been dropped the day after her solicitor was notified of that fact).

47. The claimant and Mr S made notes of the meeting of 13 June 2018 (pages B26 to B30). The claimant says in paragraph 18 of her witness statement that she was told that the respondent could not carry out its own internal investigation pending hearing from the NCA to confirm whether or not the claimant was to be interviewed regarding historic allegations related to CSE. In paragraph 19 of her witness statement the claimant says that there was a discussion around a possible return to work. The claimant complains that she found Mrs W to be *"extremely vague about what she was proposing, the type of work and which department etc".* Her evidence is that Mrs W was to go away and develop a detailed plan for a return to work with an appropriate risk assessment. It was agreed that the parties would then meet again on 12 July 2018.

48. There was also an agreement to meet on 20 June 2018 as a meeting was scheduled to take place between the respondent and the NCA on 14 June 2018. The hope was that the respondent would be able to update the claimant on 20 June following the LADO meeting scheduled 14 June. In the event, the meeting of 20 June did not take place because Mrs W had failed to diarise the meeting.

49. Mrs W says in her witness statement at paragraph 32 that she contacted the NCA on 14 June 2018. She says that she was told that, *"the investigation had been reviewed and would continue. The position of seeking to interview under caution around historical allegations was confirmed. There was no timelining in place for the interview or conclusion of the investigation".*

50. As scheduled, a subsequent meeting then took place on 12 July 2018. Again, the claimant was supported by Mr S. The claimant says that she had to remind Mrs W that the purpose of the meeting was to explore a possible return to work. Contrary to what had been said at the meeting of 13 June 2018, no detailed plan or provision of risk assessment had been prepared. Absent any documentation to corroborate that these were prepared, the Tribunal accepts the claimant's account. The failure to advance matters as agreed on 13 June 2018 and the failure to diarise 20 June 2018 meeting also corroborates the claimant's evidence that she found Mrs W to be vague and difficult to deal with.

51. The respondent prepared notes of the meeting of 12 July 2018 (page C15). The claimant had not seen them until they were disclosed to her in the course of the Employment Tribunal proceedings. The notes record Miss L as being present. This the claimant disputes. In paragraph 34 of her witness statement, Mrs W says that she attended the meeting with an unnamed person from HR, Mr S and the claimant. Miss L had no specific recollection of the meeting. When it was put to her that Miss L did not attend the meeting of 12 July 2018 Mrs W answered in the negative. Therefore, the Tribunal concludes that Miss L was not present at that meeting.

52. At all events, the note at page C15 is very much in the same vein as the recollections of it given in evidence by the claimant and Mrs W. In essence, the respondent's position as recorded in the note is that until the NCA confirmed the nature of future discussions with the claimant the question of alternative work could not be progressed. In evidence given under cross-examination, the claimant said (again with justification) that she found Mrs W to lack enthusiasm about the prospect of the claimant's return to work. The claimant says that she was keen to return.

53. The Tribunal accepts the claimant's account of a marked lack of enthusiasm on the part of Mrs W about the prospect of the claimant returning. A clear theme that emerged from Mrs W's evidence before the Tribunal is that she was (with justification) very cautious in her approach and feared in any way prejudicing the NCA investigation. A lack of enthusiasm about the claimant returning to work is very much in keeping with Mrs W's attitude and approach throughout. The claimant fairly accepted that there was no question of her returning to work directly with children or vulnerable persons. However, she said that she could be redeployed to undertake commissioning work where she would not present any kind of risk. At all events, the question of alternative work was not progressed.

54. In September 2018 the respondent appointed a new strategic director of Children and Young People's Services. This was Mr JS. In the event, JS chaired the meeting of 19 March 2019 at which the claimant was

dismissed. He was the decision maker. Unfortunately, JS was too unfit by reason of ill health to attend to give evidence before the Tribunal.

55. Miss L says that during the first few months of his appointment JS asked that all long-term suspensions be reviewed. This of course included that of the claimant. In cross-examination Miss L was asked why JS had called for a review of all of the long-term suspensions. She said that JS was *"new in post. He wanted an overview for strategic direction".* She denied that JS was concerned about the financial cost of the long- term suspensions.

56. Upon this issue, there was introduced into the bundle (at page C33) a report prepared by Mrs W which was entitled the "*[X] safeguarding quality and learning service review".* This included detailed analysis of financial and procurement implications. It formed no part of the respondent's case (either in the grounds of resistance, in evidence or in Miss Gould's submissions) that the respondent was motivated financially to terminate the claimant's suspension by way of dismissing her.

57. On 17 October 2018 the claimant was again interviewed under caution by the police. This interview was (according to the claimant (in paragraph 26 of her witness statement)) about further allegations made by the young person (Z). Mrs W says in paragraph 38 of her witness statement that the interview was in relation to *"historical allegations of rape and sexual abuse"* and those related to the period when the claimant was the manager of the Q residential home.

58. Pages E82 to E92 is a minute of a LADO minute of 4 December 2018. This was attended by Mrs W and Miss L. It records that the claimant was interviewed under caution on 17 October 2018 about the following matters:

- *Rape and sexual assault of Z from 12 March 1991 to 26 November 1998*
- *Abuse/association by two brothers*
- *Rape of Z on the premises*
- *Knowledge of the staff about the abuse of Z*
- *The claimant sought medical attention for Z but did not disclose full information of the abuse*
- *That Z was raped by a police officer*

59. On any view, these are extremely serious allegations. At the meeting of 4 December 2018, the NCA representatives told the respondent that the matter was still under enquiry. No timeline was given.

60. In paragraph 40 of her witness statement Mrs W says that, *"The decision was made to explore legal advice via HR given there was no clear end date for the investigation, despite the recent interview, and the length of time already passed. I understood that advice was given that there were grounds to terminate [the claimant's employment]. This linked to the length of time that a suspension had been in place; that there was no future timeline to end the investigation and that there remained ongoing safeguarding issues, preventing the claimant returning to work and fulfilling her job role".*

61. Enquiries were made of the NCA by the respondent's solicitor. The relevant emails are at pages E93 to E106. These are dated between 12 September 2018 and 17 January 2019. The NCA informed the respondent on 17 January 2019 that the matter was still under investigation "*and will remain so for the near future due to a number of outstanding enquiries*".

62. The claimant's witness statement makes no reference to any contact from the respondent after the interview under caution of 17 October 2018. The next event she recounts in her evidence is being invited to attend a meeting to discuss her employment by way of letter dated 28 February 2019.

63. That the respondent made no contact with the claimant after 17 October 2018 is corroborated by paragraph 20 of Miss L's witness statement which says, "*Need to detail what happened from September 2018 to March 2019, did we write to [the claimant] or make contact with her explaining a new SD had been appointed and wanted to review long term suspensions?"*. It appears this was retained in Miss L's witness statement in error. (The reference to the SD is to JS). The question raised by Miss L is illustrative of the fact that there was no contact with the claimant by the respondent after the October 2018 interview with the police. No evidence was led that there was. That Miss L had to even pose the question when drafting her witness statement is telling.

64. On 28 February 2019 Miss L wrote to the claimant (page B31). The letter is headed "*current suspension from work".* It says that, "*I am writing to inform you that you are required to attend a meeting with [JS] … and myself on Tuesday 12 March 2019 at 15:00 hours. The meeting will be held at [venue] and on arrival you should report to reception. At the meeting we will discuss with you the current situation on your suspension and your continued employment with [the respondent]*".

65. The meeting was then rescheduled for 19 March 2019 (page B32). Miss L wrote to the claimant on 7 March 2019 to confirm the rescheduled date. The second letter is in much the same vein as the first and says that "*At the meeting we will discuss with you the current situation on your suspension and your continued employment within [the respondent]".*

66. Upon receipt of the letter at page B31, the claimant's account is that she telephoned Miss L. She raised the issue about Mr S's availability which led to the postponement. She says that she found Miss L to be unhelpful when she asked her for the purpose of the meeting. The claimant says that the letter gave her "*no indication that I may be walking into a dismissal meeting".* The claimant also complained about the approach taken by Miss L to rearrange the meeting and that Miss L had left it to the claimant to ensure that Mr S was available to attend upon the adjourned date. The claimant says that this contrasted with normal practice whereby Mr S would receive a calendar invite from those arranging the meeting.

67. It was put to the claimant by Miss Gould that Miss L explained in the telephone call that there was a possibility of the claimant being dismissed at the meeting which was (ultimately) held on 19 March 2019. The claimant complained in evidence that the letter was very vague and that Miss L did not say in terms that dismissal was a possibility.

68. In evidence given under cross-examination, Miss L accepted that the claimant had telephoned her. She said that the purpose of the claimant's call was to inform Miss L that Mr S could not make the meeting on 12 March 2019. Miss L fairly accepted that the claimant had asked her directly the purpose of the meeting and in particular, had asked whether there was a possibility that she would *"be sacked".* It was then put to Miss L that she did not answer the claimant's direct question. Miss L said that, "*it was not my decision. I said that the strategic director would discuss her continued employment and discuss with her where we were with the NCA".* It was then put to her by Mr Bronze that Miss L did not say to the claimant words to the effect that she could *"be sacked".* Miss L said, "*no, I said it was about whether her employment could be continued*". It was put to her that the letters convening the meeting, referring as they did to continued employment, could not fairly be interpreted as conveying the possibility that the claimant may be dismissed. Miss L said that, "*I think the reference to continued employment covers it".* Miss L's position appeared to be that the claimant had worked the position out for herself, having asked Miss L the direct question about the possibility of *"being sacked"* anyway.

69. For his part, Mr S was of the opinion that the letter should have referred to the possibility of the claimant being dismissed. He said that there was no agenda before the meeting of 19 March 2019 and that he was shocked to hear the claimant being dismissed when that meeting concluded. He said that he and the claimant had not been prepared for a meeting at which dismissal would be discussed. In evidence given under cross-examination he said that he and the claimant "*went along to see what JS would say. We didn't expect her to be dismissed. We did ask what the substantial reason was [for her dismissal]. We got no answer. We had no agenda or information. I expected a discussion not a decision*." In evidence given under re-examination Mr S complained that he and the claimant had been given *"no opportunity to look at the evidence upon which basis the decision [to dismiss] was made".*

70. As has been said, the Tribunal has not been able to hear evidence from JS. About the meeting of 19 March 2019, Miss L (who was there to provide support to JS) says (in paragraphs 21 to 25 of her witness statement) that:

"*The meeting went ahead on 19 March 2019 with JS supported by myself and the claimant supported by her trade union representative. Prior to the meeting I can confirm that JS had reviewed the claimant's case and previous correspondence. JS had been provided with a verbal overview from Mrs W and myself on the case and notes from LADO meetings with the NCA.*

At the beginning of the meeting JS explained that he had been in post since September 2018 and that he was currently reviewing all long-term suspensions across the directorate, which included the claimant's current situation of suspension which currently stood at three years on full pay. The suspension had been instigated due to ongoing investigations by the NCA into historic CSE allegations arising from the claimant's former role as manager of the home at which a young person lived and allegations against the claimant made by the young person.

Based on all the evidence available to JS, he concluded that the NCA was still not in a position to provide him with any information that would bring a conclusion to the claimant's current suspension or provide him with information where the respondent would be in a position to undertake our own internal investigation.

The claimant also confirmed within this meeting that she had been interviewed in October 2018 and that the NCA had also informed her that it had generated a lot of work and no timescales could be provided.

JS informed the claimant that he was aware that alternatives other than suspension had been previously explored and discussed with her, and that again he looked at whether alternative employment could be sought. However due to the nature of the claimant's suspension and having no indication at this stage from the NCA of how it may proceed it was felt that this was not an option for the respondent.

71. In paragraph 31 of her witness statement, where she gives evidence about the meeting of 19 March 2019, the claimant does not appear to take issue with Miss L's account of how the meeting proceeded. However, the claimant says in paragraph 32 that "*I am sceptical about the review undertaken by JS and Miss L into my case. JS did not appear to have full knowledge of issues during the meeting when I was dismissed. He did not appear to know about my letter of complaint of 18 April 2018 and at one point he needed to talk to Miss L out of the room."*

72. There are no minutes of the meeting of 19 March 2019. Further, there is no record of which documents (if any) were before JS when he made the decision to dismiss the claimant.

73. On 20 March 2019, the day after her dismissal, her solicitor wrote to the police officer J. The email from the solicitor informed J that the claimant's contract of employment with the respondent had been terminated the previous day. J was asked whether he could give any indication as to when the respondent's investigation may be concluded.

74. In reply, J said the following (pages B34 and B35):

"*Just to affirm our position, the investigation surrounding the allegations made by Z is still progressing, a number of officers from the NCA are dedicated to the job and a diligent and thorough enquiry is being conducted. We are all conscious of the amount of time this has taken but must never lose sight of the scale of the operation. Officers are investigating numerous offences of rape on Z over a number of years and by many individuals including social workers and police officers. All of the offences were said to have taken place whilst she was in the care of [the respondent] in Q children's home. It has been important to ensure that we have considered all potential lines of enquiry, including all third party material and this has led to the review of several thousand documents in addition to speaking to both residents and ex-staff of Q. As there are still a number of avenues of enquiry to consider I cannot today give you a specific time parameter as to when we will be a position to finalise. On a positive note, I believe that we are approaching a natural culmination enabling a considered decision and whether the offences under investigation have been proved or disproved."*

Plainly, this communication was not before JS as it was created the day after he had made his decision. From page B34, it can be seen that the claimant forwarded the email to Mr H, a trade union representative who was to conduct the appeal on her behalf. She sent it to Mr H on 6 June 2019.

The claimant appealed against the decision to dismiss. The letter of appeal is dated 29 March 2019 (pages B78 to B82). The claimant made no reference to J's email of 20 March 2019 in her letter of appeal.

75. Her grounds of appeal, in summary, were:

- *That she was not informed that she was at risk of dismissal.*
- *That she was not provided with any evidence prior to the hearing that may be relied upon by management.*
- *She was not allowed to put forward any evidence in her defence.*
- *No alternatives to dismissal were considered.*

76. The claimant said, in her letter of appeal, that "*while I am aware that I am not being dismissed on conduct or more conventional grounds, I am led to understand that even in the case of a dismissal for "some other substantial reason" a fair process should still be followed in order for the decision to be fair and reasonable".*

77. This ground of appeal was a reference to the reason for the dismissal set out in JS's letter dated 20 March 2019 (pages B37 and B38). After setting out the history of the matter JS concluded that,

"…*as the NCA have confirmed that their investigations will continue for the foreseeable future it was my decision that your contract be terminated for some other substantial reason due to there being concerns relating to the safeguarding of children and that [the respondent] are unable to sustain your employment. [The respondent] feel that we have been reasonable in this situation and I confirmed that you would be entitled to be issued with 12 weeks' notice, which will be paid in lieu of notice and therefore the 19 March 2019 will be recorded as your last date of employment*."

78. The appeal hearing was arranged for 11 June 2019. The claimant's statement of case presented by Mr H at the appeal is at pages B50 to B61. At page E116 is an *"index page"* which refers to seven appendices (A to G). This appears to be the index page of the respondent's management statement of case for the appeal. This consists of:

- *The notes of the meeting of 28 June 2016 (page B23).*
- *The letter of complaint from the claimant of 18 April 2018 (pages C19 to C22).*
- *The respondent's response to the letter of complaint (pages C23 to C24).*
- *The letter of invite to the meeting of 12 March 2019 (page B31).*

- *The letter of invite to the meeting of 19 March 2019 (page B32).*
- *Mr S's letter terminating the claimant's contract of employment (pages C27 to C32).*

79. The *"index page"* also refers to a *'background/summary'* document. This is at pages C29 to C32. It cross-refers to the seven appendices just described in paragraph 78. The claimant said in evidence that the first time that she had seen this document was in connection with the Employment Tribunal proceedings. The respondent accepted this to be the case. It was put to the claimant by Miss Gould that JS went through this document at the appeal hearing when he presented the respondent's case.

80. There are no minutes of the appeal hearing. The matter was decided by a panel of elected members. The Tribunal did not have the benefit from hearing evidence from any of those presiding over the appeal.

81. When given the opportunity to give supplemental evidence, Mr S was asked about a remark allegedly made by one of the elected members during the course of the appeal hearing to the effect that it was not necessary to go through an appeal process where the dismissal was for a substantial reason. Mr S confirmed that such a remark had been made albeit that he could not recall who had said it.

82. Although there are no minutes of the appeal hearing, the Tribunal is assisted to some degree by the handwritten annotations upon the claimant's appeal pack at pages B50 to B61. In particular, at B61 a note has been made by Mr H that, *"there is a requirement to follow a fair process even when dismissal is for some other substantial reason. You cannot terminate someone's contract without reason. There has been no process and a catalogue of failures which have marred this case from the beginning".* This contemporary handwritten note made by Mr H is corroborative of Mr S's evidence that an untoward remark was made by an elected member to the effect that an appeal process was not warranted where dismissal was for a substantial reason. On balance, therefore, the Tribunal prefers the claimant's account that such a remark was made. The respondent has not helped itself by failing to call evidence from anyone who was upon the appeal panel and from the failure to prepare a note of the appeal hearing.

83. On 13 June 2019, a letter was sent to the claimant dismissing her appeal. The letter is at pages B62 and B63. The letter says that,

"*After careful consideration, elected members decided to not uphold your appeal against dismissal. In reaching this decision, the panel believed the reason to dismiss for some other substantial reason due to concerns relating to the safeguarding of children, was a reasonable one based on the facts as presented".*

84. An issue arose as to whether or not the email from J to the claimant's solicitor of 20 March 2019 (pages B34 and B 35) was before the appeal panel. It is not referred to in the claimant's appeal letter nor in the claimant's appeal pack at pages B50 to B61. There is no handwritten annotation made by Mr H recording the fact that he mentioned it.

85. The claimant said, in evidence given under cross-examination, that she *"cannot honestly say if page B34 was in the bundle".* She then said that she had no note to that effect and could not find any contemporaneous documentation or emails that may help corroborate her case. Further, there is no reference to J's email of 20 March 2019 within the claimant's printed witness statement. The claimant quite candidly said in evidence, *"I wish I had put it before the panel and I wish I had put it in my witness statement."* In light of this evidence the Tribunal concludes that the email at pages B34 and B35 were not before the appeal panel.

86. Miss Gould suggested that in any event, the optimism expressed by the police officer J in the email at pages B34 and B35 that matters were coming to a conclusion had been unfounded because the investigation was still ongoing in June 2019 in any case.

87. On 6 November 2019 RW was informed that no further action was to be taken against the claimant arising out of Z's allegations. This is evidenced at page E111. The salient part of the meeting note reads that:

"*The outcome of the investigation is that although police believe Z, the information obtained through the investigation does not meet the evidential criteria needed to pursue charges. All crimes alleged by Z have been logged and closed due to insufficient evidence.*"

It goes on to say that, "*the unanimous decision for the outcome of the LADO to be unsubstantiated".*

88. On 28 November 2019, the police officer J wrote to the claimant's solicitor. J confirmed that on 22 November 2019 he had spoken to the claimant in person and informed her that the NCA investigation was complete and that she was being released from being under investigation. J said,

"In layman's terms, I made it clear that she had nothing further to answer to".

The email is at page D16.

89. An argument pursued on behalf of the claimant by Mr Bronze was that it had been open to the respondent, without prejudicing the NCA investigation, to conduct its own enquiries about the allegations raised against the claimant by Z. He also challenged the respondent's witnesses as to the credibility and veracity of Z's contentions. This was (at least in part) upon the basis that Z was known to have a chaotic lifestyle. There are several references to this within Tab E of the bundle (for example at page E22). There was also a question of inconsistency as Z and S had named different individuals as being implicated in the alleged offences (for example at page E49).

90. It was also suggested by Mr Bronze that it was within the respondent's gift to check elements of Z's story. For example, Z had alleged that there was contact between her and the claimant upon the claimant's work mobile telephone. (For example, there is reference to this at pages E66 and E67). He suggested that the claimant's work mobile telephone number records could have been checked. Additionally, Z contended that she had given birth to a stillborn baby. The claimant said that this incident did not take place at the time that the claimant was working at the Q care home.

Allegations from Z about this and that she had sustained very serious injuries could have been corroborated, it was suggested, by accessing medical records to see if these coincided with the claimant's time at Q. In short, it was part of the claimant's case that a number of steps could have been taken by the respondent, without in any way trespassing upon the NCA investigation, to check the veracity of Z's account.

91. The following additional evidence was given by the claimant under cross-examination:

    1. The claimant said that at the hearing of 19 March 2019, JS and Miss L had both said that the claimant had done nothing wrong. However, the difficulty with this for the claimant is that there is no reference in her printed witness statement to such observations having been made by JS or Miss L.

    2. The claimant fairly acknowledged the allegations raised by Z were very serious. The claimant also fairly acknowledged that Z had had a troubled history and that the NCA investigation was a complex process. (Indeed, this is corroborated by J's email of 20 March 2019 where he refers to the need to review thousands of documents).

    3. The claimant recognised the difficulty for the respondent in lifting the suspension and re-deploying her in any capacity in circumstances where the respondent had been notified that the claimant attracted *'designated suspect status'*. Reference was made to the document at pages E119 and 120. This is known as a form *"GN117"* and serves to notify an interested party of designated suspect status. The claimant was so named in this document which appears to be dated 13 June 2017. (There are some unfortunate errors as the claimant's date of birth, address and gender are incorrect). It was put to the claimant by Miss Gould that the public may find it difficult to understand the redeployment of an individual who attracts designated suspect status upon suspicion of the commission of the types of offences being investigated by the NCA. The claimant appeared to recognise the difficulty faced by the respondent. She said that, "*some [members of the public] would be ok. If you are in the profession you'd understand the vulnerability we have to allegations. But the wider public … I can see that".*

    4. It was put to the claimant that even had she and Mr H had been told explicitly that there was a possibility of her being dismissed in the letters of 28 February and 7 March 2019, the claimant's approach would have been no different. When asked what she would have done differently, the claimant said "*I don't know. I would take advice from my trade union representative. I was denied that opportunity".* When this issue was raised with Mr S, he did not say what it was that he would have done differently.

92. The following further evidence emerged from the cross-examination of Miss W:

    1. It was suggested that Mrs W lacked impartiality in that she was inclined to believe Z (for instance, in the reliance upon S's corroborations as may be seen at page E85 and paragraph 2.1 at page E108). Mr Bronze

put it to Mrs W that this contrasted with the partiality shown against the claimant by, for instance, not crediting her with 30 years of service (page E108 at paragraph 3.2) and not fully crediting her for her achievements during her 30 years of service with the respondent. Miss W denied a lack of impartiality. She said that Mr T and Miss M both knew of the claimant's contribution to the respondent: (they were the recipient of the report prepared at some point in the autumn of 2017 at pages E107- E110). She defended her reference to Z as *"a victim"* in paragraph 9 of her witness statement. She said that this was appropriate terminology commonly used at the time.

2. The tenor of Mrs W's evidence upon the issue of the respondent moving on with its internal investigations was clear throughout. Her evidence was that she was very cautious about doing so. She did not wish to prejudice the NCA's investigation. Her view was that the internal investigation should take a back seat. She conceded the matters such as telephone records could have been checked but plainly took the view that it was a matter for the police in the context of a wider investigation.

3. Upon the question of review of the claimant's ongoing suspension, Mrs W accepted that the claimant had no input into matters contrary to the respondent's policies. She said that the suspension was reviewed at every LADO meeting and outside of those meetings with HR. There was little by way of corroborative evidence of Mrs W's account.

4. On the question of alternative employment, Mrs W was asked why the respondent had not undertaken a risk assessment. She said that this was because the respondent *"did not have the final position from the NCA, there is a level of unknown risk until we get further information regarding the risk of a return to work as part of the children's workforce".* Mrs W denied that the claimant suffered a *'backlash'* so that the respondent could be seen to be doing something. She said that the respondent was only acting as would all councils.

5. Mrs W said that she had had only one conversation with JS between January and March 2019. She appears to have shared little information with him. According to paragraph 41 of her printed statement, she received the police interview and transcript and shared this with Miss L on 6 December 2018: (presumably, this is the interview of 17 October 2018). The email exchanges at pages E100 to 106 about the progress of the police investigation were, likewise, shared with Miss L but not with JS.

6. Finally, Mrs W was asked to comment upon the reason for the claimant's dismissal. She said that it was about "*sustainability given safeguarding concerns. It is about how long we can sustain the position".* She then said that there was *"an element of reputational concern. We couldn't rule out that these had happened. We couldn't resolve the question in March and have her in work. The primary focus was on safeguarding".*

93. The following evidence emerged during the cross-examination of Miss L:

1. While she did not accept that no investigations could be carried out until the police had finished with their enquiries, Miss L said that the respondent was unable to take any disciplinary action until the police had concluded their investigation. She said that, *"any internal investigation may interfere and any information used outside LADO may provide information to the claimant that the police would not want us to".*
2. With reference to the notes of the meeting of 11 June 2018 (at pages C17) it suggested that Miss L was disingenuous when she sought to infer that there had been regular face-to-face meetings with the claimant. Miss L said that *"that's what Mrs W had said".*
3. Miss L was asked what information was before JS prior to the meeting of 19 March 2019. Miss L said that he had been provided with the information *"on the system to where progress is with the LADO investigation and the NCA and he had contact with senior officers in the NCA to try to get a definitive answer re a timeline. The NCA said the claimant was part of other investigations. He took into account that she was a person of interest. It was taken into account that she was not just a witness and there was no alternative employment due to reputational risk and the nature of the allegations".*
4. Miss L accepted that none of the information garnered by JS had been shared with the claimant. When it was put to her that the claimant therefore had no chance to respond Miss L said, "*she was dismissed due to SOSR having been suspended for three years. We couldn't bring her back into any alternative role so we wouldn't be sharing the information with her. If the NCA had said it was not substantial we would do our own internal investigation and at that stage documents would be shared. There was still an ongoing NCA criminal investigation so we couldn't share documents."* It was put to her that there was no reason why during the meeting the respondent could not have shared with the claimant the information emanating from the NCA that no decision had been made". Miss L said that *"that was discussed at the meeting. The claimant said that she could not provide a timescale".*
5. When asked about the question of alternative employment, the tenor of Miss L's evidence was that this could not be advanced because of the NCA's position and that the allegations were so serious. She said that *"should it be proven, there was a reputation risk to the respondent to bring her back into employment"* and for that reason "*we couldn't look at alternative employment or redeployment".*
6. Miss L was taken to the email from the police officer J at pages B34 and 36. Miss L sought to downplay the significance of this. She said that whether or not action was taken against the claimant was not a decision for J and at all events there had still been no decision at the time of the appeal in June 2019. She said that she *"thought"* that JS had made enquiries of the NCA before the appeal hearing as to the position and that he had said in the appeal that the matter was ongoing.

For her part, Miss L said that she had not seen the email at pages B34 and B35 before the Tribunal proceedings.

7. Miss L was questioned as to the reason for the claimant's dismissal. She had spoken about reputational risk upon the question of alternative employment. It was put to her by Mr Bronze by way of contrast that in paragraph 26 of her witness statement the substantial reason given for dismissal was *"due to there being concerns relating to the safeguarding of children and that [the respondent] were unable to sustain her employment".* There was no mention there of reputational risk. Miss L said that the statement in paragraph 26 of her witness statement sets out the reason for the dismissal of the claimant (because of safeguarding concerns). It was also put to Miss L that there was no reference in the letter of dismissal at pages B37 and B38 to reputational risk. She repeated that the allegations against the claimant concerned the issue of safeguarding of children.

The relevant law

94. The Tribunal now turns to a consideration of the relevant law. The complaint is one of unfair dismissal and is brought pursuant to the Employment Rights Act 1996. There is no issue that the respondent dismissed the claimant. Section 98 of the 1996 Act provides (in part):

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
(a) the reason (or, if more than one, the principal reason) for the dismissal and;

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employer held.

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

95. The respondent's case is that the claimant was dismissed for a substantial reason of a kind such as to justify the dismissal of her. Accordingly, it is unnecessary for the Tribunal to recite sections 98(2) and (3) which are concerned with the four other permitted reasons for the dismissal of an employee.

96. It is for the employer to show the reason for the dismissal and that it was a potentially fair one. The reason for the dismissal will be the set of facts known to the employer which caused him to dismiss the employee. The burden of proof is upon the employer to show a permitted reason for dismissal. The burden of proof on the employer is not a heavy one. The employer does not have to prove that the reason

actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness.

97. Section 98(1)(b) is a catch all provision covering dismissal for a substantial reason of a kind such as to justify the dismissal of the employee. It is intended to cover circumstances falling outside the four permitted reasons provided for by sections 98(2) and (3). Section 98(1)(b) therefore provides a residual potentially fair reason for dismissal that the employer may be able to rely on if the reason for the dismissal does not fall within those four specific categories. It is often referred to as '*SOSR'* and the Tribunal will adopt this acronym from time-to-time.

98. The reason relied on under section 98(1)(b) must be of a kind such as to justify the dismissal of an employee holding the job in question. The job in question here was, of course, the claimant's position as a qualified social worker and manager of the advocacy rights service. By way of reminder, this is a service which provides rights and advocacy services for looked-after children and young people who have been looked after by the respondents. It is a role which involves working closely with vulnerable individuals.

99. Conduct of the employee is one of the permitted reasons for dismissal in section 98(2). Conduct is not relied upon by the respondent as a permitted reason for the claimant's dismissal. Conduct may also be relevant when an Employment Tribunal considers remedy issues should it find a dismissal to be unfair. Miss Gould confirmed that the respondent raises no issue about the claimant's conduct upon any of the issues to which this case gives rise.

100. It is well established that prevention of damage to the employer's reputation may constitute a permitted reason for dismissal falling within SOSR. As we saw in paragraph 13, reputational damage was one of the reasons pleaded by the respondent as a substantial reason for the claimant's dismissal. The other reasons were the respondent's concerns relating to the safeguarding of children and the sustainability of the claimant's employment in any capacity.

101. Once the employer has shown a potentially fair reason for the dismissal, the Tribunal must go on to decide whether the dismissal for that reason was fair or unfair. This involves deciding whether the employer acted reasonably or unreasonably in dismissing for the reason given in accordance with section 98(4) of the 1996 Act. It is not enough that the employer has a reason that is capable of justifying dismissal. The Tribunal must be satisfied that, in all of the circumstances, the employer was actually justified in dismissing for that reason. In this regard, there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the Tribunal to decide.

102. It is the employer's conduct which the Tribunal must assess, not the unfairness or injustice to the employee. That said, injustice to the employee is not completely ignored and will be balanced against the benefits gained by the employer when considering whether the employer acted reasonably. The relative advantage and disadvantage of the parties is therefore one factor which the Tribunals may take into

account. The potential consequences to the employer can also be taken into account when deciding whether dismissal was fair.

103. The Tribunal must determine whether the employer had reasonable grounds to sustain its belief in the potentially fair reason upon which it relies after having carried out as much investigation into the matter as was reasonable (including the carrying out of a fair procedure which meets the requirements of natural justice). The Tribunal must then go on to consider whether the employer acted reasonably or unreasonably in dismissing the employee in the circumstances.

104. Tribunals must not substitute their view of what is the right course for that of the employer. The Tribunal must be satisfied that the employer's decision to dismiss was one which fell within the range of reasonable management responses in the circumstances. The question is, was it reasonable for the employer to dismiss the employee? If no reasonable employer would have dismissed the employee then the dismissal will be unfair. However, if a reasonable employer might have reasonably dismissed the employee then the dismissal is fair. In all cases, there is a band of reasonableness within which one employer might reasonably take one view, and another employer may quite reasonably take a different view.

105. The range of reasonableness test applies not only to the decision to dismiss but also to the procedure by which that decision is reached. In determining the reasonableness of a dismissal, the Tribunal will take account of those facts or beliefs that were known to those who took the actual decision to dismiss. Generally, the Tribunal only needs to look at the reasons given by the appointed decision maker. However, where a manager other than the decision maker has some responsibility for the conduct of the enquiry in question, it might be necessary to attribute the manger's knowledge to the employer even if that is not shared by the decision maker.

106. The reasonableness test is based on the facts or beliefs known to the employer at the time of the dismissal and which caused the employer to dismiss the employee. Where there is an internal appeal, this will extend to facts known to the employer at the time of the appeal.

107. In determining whether the employer acted reasonably in the circumstances, the Tribunal must have regard to the size and administrative resources of the employer's undertaking. This extends to looking at the kind of procedure adopted by the employer and it may also extend to the question as to whether suitable alternative work should have been provided for the employee.

108. Tribunals are required to determine the reasonableness of a dismissal in accordance with the equity and substantial merits of the case. Equity in this context is equivalent to *"fair play".* However, it is not a separate part of the reasonableness test.

109. An employer that dismisses an employee after receiving information that the employee has been engaged in activities that could seriously damage the employer's reputation may be able to show a substantial

reason for dismissal. This is so even if the employee's conduct is unproven or not directly relevant to his or her working responsibilities.

110. In **Leach v Office of Communications** [2012] EWCA Civ 959, CA, the employee was employed in a senior position by the Office of Communications ('*Ofcom'*), a public authority. His job did not involve working with children. However, child protection was one of Ofcom's responsibilities.

111. The Metropolitan Police Child Abuse Investigation Command contacted Ofcom in November 2007 and made a number of allegations against the employee, in particular that he had been engaged in paedophile activity in Cambodia. He had been arrested in Cambodia in April 2005. He was acquitted by a Cambodian court on 26 April 2005. The decision to acquit him was upheld by an appellate court in April 2006 and the Supreme Court of Cambodia on 15 May 2007. Notwithstanding his acquittal, press interest in the claimant continued. In August 2007 he learned that a national tabloid may be going to run a story about him. In the event, no story was published.

112. However, in November 2007 the Metropolitan Police Child Abuse Investigation Command asked for a meeting with Ofcom. Ofcom was already aware of concerns around the claimant's activities in Cambodia having, amongst other things, offered pastoral support for their employee. The Metropolitan Police provided Ofcom with information going substantially beyond what Ofcom already knew. Ofcom took the view that the allegations carried a significant risk of reputational damage.

113. The employee was dismissed. An Employment Tribunal held that he was dismissed for SOSR. Given the nature of Ofcom's work, the allegations and the employee's role, the Tribunal held that dismissal was within the range of reasonable responses and there were no reasonable alternatives available.

114. The Employment Appeal Tribunal upheld Employment Tribunal's decision: (the case before the EAT is reported as **A v B** (UKEAT/0206/09). On further appeal, the Court of Appeal endorsed the Employment Appeal Tribunal's analysis.

115. The EAT had taken the view that when an employer receives information under an official disclosure regime that an employee poses a risk to children, it must in principle be entitled to treat that information as reliable. An employer cannot be expected to carry out its own independent investigation to test the reliability of the information since it will typically have neither the expertise nor the resources to do so. That said, an employer will not be acting reasonably if it takes an uncritical view of the information disclosed and if it is in a position to question the reliability of the information, it ought to do so.

116. In paragraphs 27, the EAT (Mr Justice Underhill President presiding) said:

"Where the facts relied on are objectively established in the form of a relevant conviction, no difficulty of principle arises. Where they depend on untested information – or where indeed the employee has been

acquitted in relation to the very facts relied on – the position is very different. It sticks in the throat that an employee may lose his job, and perhaps in practice any chance of obtaining further employment, on the basis of allegations which he has had no opportunity to challenge in any course of law – or may indeed have successfully challenged. On the other hand, it has to be recognised that there are cases where it is necessary for employers to be warned of facts which indicate that an employee (or potential employee) is a risk to children, even in the absence of any conviction. The courts have had to grapple in a number of cases with how the balance should be struck … But in an unfair dismissal case an employment tribunal is not concerned with the rights and wrongs of the disclosure system, or even – subject to the point we make below – with how it has been operated in a particular case. If the system is inconsistent with an employee's fundamental rights or has been abused by the relevant authorities, the employee's primary remedy must be against those making the disclosure. [The Tribunal interposes here to observe that the EAT remarked (in a footnote) that the employee in question had issued proceedings against the Metropolitan Police]. *The focus of the employment tribunal's enquiry has to be on how the employer should reasonably have acted when such disclosure is made to him. That axiomatically, follows from the language of section 98(4)…"*

The EAT upheld the Tribunal's decision that Ofcom had adopted an appropriately critical approach in questioning the police about the reliability of their sources. Ofcom was at risk of serious reputational damage which would be exacerbated if it emerged that it had been warned by the responsible authorities about the employee's activities but had taken no action. In paragraph 33 it was said that,

"*It was in our view legitimate for [Ofcom] in its particular position, to be jealous of its public reputation: it was entitled to take the view that if it continued to employ, in the position in question, a person who it had been officially notified was a child sex offender and continuing a risk to children, would – if he were subsequently exposed (which it was plainly reasonable to anticipate)- severely shake public confidence in it. We are acutely aware, as was the Tribunal, that to justify the claimant's dismissal on the basis of reputational risk in the absence of any established misconduct may involve a grave injustice to him. But it is essential to bear in mind that under section 98 the central question is what it was reasonable for the employer, in the relevant circumstances, to do. If the claimant is in fact innocent, the injustice has been caused not by the employer but by those who have falsely accused him and by [the Metropolitan Police] which has given credence to those accusations."*

Again in a footnote, the EAT observed that the European Court of Human Rights in **Pay v United Kingdom** [2009] IRLR 139 recognised the legitimate interest of a public authority in maintaining the confidence of the public.

117. When **Leach** reached the Court of Appeal, Mummery L J (who gave the only reasoned Judgment of the court) said at paragraph 6 that:

"*…this case shows the need for an employer, to whom a third party discloses information or makes allegations, to assess for itself, as far as practicable, the reliability of what it has been told. The employer should check the integrity of the informant body and the safeguards within its internal processes concerning the accuracy of the information supplied. The employer should consider the likely effective disclosure and whether there was cogent evidence of a pressing need for disclosure to the employer."*

118. Mummery L J said (at paragraph 50) that in his view, "…*both sides were placed in a very difficult situation following the limited disclosure by the CAIC [the Metropolitan Police]. On the one hand, it would not be reasonable for the respondent simply to ignore the CAIC's assessment of the claimant, but it was not in the same position as the CAIC to make an assessment of the allegations against him and the risk he posed. On the other hand, the claimant was at risk of a serious injustice, if he were to lose his job on the basis of unproven and untested allegations made to, rather than by, his employer, which then relied upon the fact of them as leading to a loss of trust in the context of risk of reputational damage to the respondent if he did not dismiss him".*

Mummery L J noted (in paragraph 32) the information provided by the Metropolitan Police appeared to conflict with the respondent employer's initial view on some aspects and the respondent "*did not simply accept the information provided by the CAIC but, as far as possible, had pursued further confirmation, clarification and information. There was little else the respondent could do other than rely on the integrity of the CAIC process*".

Ofcom had interviewed the employee who had been given a chance to explain. Mummery L J noted (in paragraph 30) that Ofcom was entitled to conclude that the employee's responses were not, in all respects, wholly convincing. Ofcom therefore made a judgement for itself.

119. In **Lafferty v Nuffield Health** [UKEATS 0006/19] the Employment Appeal Tribunal said that it was not open to an employer to dismiss an employee for reputational reasons just because the employee faces a criminal charge. There must be some relationship between the matters alleged and potential for damage to reputation.

120. In this case, the employee worked as a hospital porter. His duties included transporting anaesthetised patients to and from theatre. He was charged with assault to injury with intention to rape. The employer respondent decided that the risk to its reputation of continuing to employ the employee, where he had access to vulnerable patients, was too great. It was held that the employer respondent's belief that there would be a risk to reputation was genuinely held, it had conducted such investigation as was reasonable in the circumstances and the dismissal fell within the band of reasonable responses.

121. The EAT in **Lafferty** referred to the Court of Appeal's Judgment in **Leach.** In paragraph 16 of **Leach**, the EAT (HHJ Choudhury as he then was presiding) referred to paragraph 36 of **Leach** where Lord Justice Mummery had said:

"(*36) The EAT, having decided to dismiss the claimant's appeal on the ground that no question of law arose from the EAT's decision, said this towards the end of their judgment:*

"(48) We have found this a worrying case. It is not our role, and we are in no position to make a judgment as to whether the claimant has committed offences against children. The Metropolitan Police clearly believe he has, and it would, or in any event, should, not have formed that belief without reasonable information. But it is only fair to record that the claimant has been (in effect) acquitted in the only proceedings brought against him; and he has … produced apparently powerful statements in support of his innocence. If he is indeed innocent, he has suffered a very grave injustice. But the risk of injustice is inherent in a system where the police are permitted to make apparently authoritative "disclosures" of the kind made here, unsupported by any finding of a court; and it will no doubt be said that the risk is the price that has to be paid for achieving the protection of children. In any event, as we have already emphasised, the question for the Employment Tribunal was not, as such, whether the claimant has suffered an injustice but whether the conduct of the respondent towards him was fair. If he was treated unfairly by the CAIC, his remedy is against them.""

122. The facts of **Lafferty** may be distinguished from those in **Leach**. In **Lafferty,** the reliability of information about the employee's conduct was somewhat greater than in **Leach** because there had been a decision upon the part of the Crown in Lafferty's case to proceed with prosecution. As HHJ Choudhury said in **Lafferty** (in paragraph 18),

"The extent to which the respondent could go behind that decision [of the Crown to prosecute] *is perhaps somewhat more limited than in other cases, where for example an investigative body makes limited disclosure to an employer about an employee's unproven conduct. That said, even where there is a decision to prosecute, an employer may not be acting reasonably if it simply took the fact of that decision at face value without at least some enquiry as to the circumstances."*

123. In **Lafferty,** the employer did not rely upon any immediate damage to reputation but what would happen if there was a conviction. As was said by the EAT, (in paragraph 22), "*that was not unreasonable given that it would be at the point of conviction, if that were to arise, that the damage to reputation would crystallise. The risk to reputation will arise from the fact that if there is a conviction the respondent would be subject to criticism or may be subject to criticism for having exposed patients to a risk for the period between first learning about the charges and the date of the conviction."*

124. In **Lafferty,** it was emphasised (*per* **Leach**) that the employer should not take an uncritical view of matters and perhaps ought to make some enquiry. From paragraph 29 of the report in **Lafferty**, we see that it was suggested by the employee's counsel that the employer ought to have found out more about the charge, spoken to the employee and the Crown to find out more about the case and its progress and assess the information provided critically. The EAT did not accept those arguments but held that the investigation carried out by the employer was justifiably more limited. The enquiries were focused upon the potential reputational damage to the respondent rather than whether or not the employee was guilty of the charges. The EAT said (in paragraph 33) that even a large employer such as the respondent in the **Lafferty** case might have done more in the way of investigation "*although it is difficult to pinpoint exactly what more could have been done."* The EAT went on to say that,

"Even with its resources the respondent was not in a position to investigate the actual incident itself to any substantial extent given that it was not alleged to have occurred in the workplace or in the course of employment."

125. The dismissing officer in **Lafferty** considered that the options open to him were to either dismiss the employee or suspend him on full pay. The employer chose to dismiss the employee, taking the view that suspension on full pay was not considered reasonable because of the respondent's charitable status and the unnecessary expenditure that an open-ended suspension with pay would entail. The Employment Tribunal's decision that this was a reasonable response and fell within the range of reasonable prerogative was upheld by the EAT.

126. In **Z v A** [UK EAT/0203/13] the Employment Appeal Tribunal (HHJ Langstaff (President) presiding) upheld an Employment Tribunal's decision that a school caretaker's dismissal, after allegations were made against him of historic sex abuse, was not for a substantial reason and nor was it fair. In this case, the police reported to a school that it had received an allegation of historical sex abuse against the employee school caretaker. He was suspended and after about a year the school governors decided to dismiss him on the grounds of a breakdown in trust and confidence, despite indications that the police were hoping to conclude their investigations within two weeks and that none of the witness statements taken supported the claim. The governors concluded that the allegation created a serious safeguarding issue for the school and that even if the employee were to be completely exonerated their trust and confidence in him had been eroded.

127. The Employment Tribunal recognised that it was necessary to strike a balance and to weigh the employer's responsibilities against the employee's interests. It observed that "*to condemn on the basis of accusation alone is a standard that a reasonable employer would not have adopted."* The EAT upheld the Employment Tribunal's decision.

128. The President acknowledged the difficulty of balancing the issues that arose in that case of unsubstantiated allegations of sexual abuse. He observed that **Leach** had established a clear line of authority to guide employers and Tribunals in carrying out such a task. Although the duty of an employer concerned with serving children is first and foremost to safeguard the children, that does not remove its responsibility to its employees.

129. A feature of X's case is the length of her suspension. She was suspended for a period of almost exactly three years, this period running from 16 March 2016 to 19 March 2019 (upon which date she was dismissed).

130. The issue of delay was considered in **A v B** [2003] IRLR 405. This was a decision of the EAT chaired by the then President Elias J. In **A v B** [2003]**,** the employee was suspended in June 1997. A police investigation commenced in October 1997. The investigation concerned an alleged inappropriate relationship which the employee had with a 14-year-old girl residing in a local authority children's home. The police investigation concluded in or around October 1998. Disciplinary proceedings were launched by the employer in December 1999, two-and-a-half years after the commencement of the investigation in June 1997. The employee did not complain about the delay during the currency of the police investigation but rather about the further 18 months' delay after the police investigation concluded in October 1998. In other words, the employee complained about a further 18 months' delay which was attributable to the employer. The EAT held that, "*the delays were so lengthy and the justification for them was so limited that we consider that the Tribunal did err in concluding that they did not render the dismissal unfair. That is particularly so when these delays are combined with the other factors to which we return."* These other factors concerned a failure by the employer to serve witness statements and interview relevant witnesses.

131. The EAT in **A v B** [2003] held that, "*The question whether an employer has carried out such investigations as is reasonable in all the circumstances necessarily involves a consideration of any delays. In certain circumstances a delay in the conduct of the investigation might of itself render an otherwise fair dismissal unfair."*

132. In **Secretary of State for Justice v Mansfield** [2010] UK EAT 05309 (HHJ Bean presiding), it was held (in paragraph 21) that, "*while prejudice to the employee from the delay may be an additional ground of challenge, it is not essential that prejudice should be shown. Delay may still render the dismissal unfair if it is substantial and there is no good reason for it."*

133. In paragraph 27 of **Mansfield**, it was held that "*the employer's decision that the disciplinary hearings should be postponed while the police were still gathering evidence and a while a Crown Court prosecution was underway, was entirely proper."*

134. **Mansfield** concerned a prison officer who in April 2006 was alleged to be orchestrating violence among prisoners and planting drugs on a particular prisoner. He was suspended from duty and on 2 May 2006 the matter was referred to the police. The internal investigation which had begun in April 2006 was not proceeded with during the police investigation. The employee was charged with offences of orchestration of violence and a drugs allegation. The orchestration of violence allegation was dropped before the matter was sent to the Crown Court. The drugs allegation came to an end in the criminal courts when on 30 April 2007 the Crown Prosecution Service offered no evidence against the employee. The employer then picked up the internal disciplinary investigation which culminated in the employee's dismissal on 6 February 2008. The EAT held that the employer's decision to postpone the disciplinary hearings was one that lay within the band of reasonable responses.

135. The mere fact that an employee has been charged with a criminal offence is not sufficient on its own for the employer to conclude that the offence has been committed. Employers need not wait until the outcome of the criminal trial before dismissing an employee but they must obtain sufficient material to justify their decision to dismiss. If they do so, then that a criminal court later acquits the employee will not affect the fairness or otherwise of the employer's decision made at the time of the dismissal. The authority for this proposition may be found in **Harris (Ipswich) v Harrison** [1978] ICR 1256, EAT.

136. In **Harris**, there was disapproval of the suggestion made in the Court of Session in **Carr v Alexander Russell Limited** [1975] IRLR 49, that it was improper after an employee had been arrested and charged with a criminal offence alleged to have been committed in course of his employment, for the employer to seek to question him when the matter of dismissal is under consideration. In **Harris**, Phillips J said, *"While we can see that there are practical difficulties and that care is necessary to do nothing to prejudice the subsequent trial, we do not think that there is anything in the law of England and Wales to prevent an employer in such circumstances before dismissing an employee from discussing the matter with the employee or his representative; indeed, it seems to us that it is proper to do so. What needs to be discussed is not so much the alleged offence as the action which the employer is proposing to take."* **Harris** concerned an allegation of theft from the employer when "*various articles of meat, most of which were undoubtedly the products of the employer*" was found in a deep freeze cabinet at the employee's home.

137. The EAT in **Harris** recognised that it was often difficult for an employer to know what is best to do given that many months may elapse before a criminal trial takes place. Phillips J said that,

"*What it is right to do will depend on the exact circumstances including the employer's disciplinary code. Sometimes it may be right to dismiss the employee, sometimes to retain him, sometimes to suspend him on full pay, and sometimes to suspend him without pay. The size of the*

employer's business, the nature of that business and the number of employees are also relevant factors. It is impossible to lay down any hard and fast rules. It is all a matter of judgment for the industrial tribunal."

138. In **Alexander Russell**, the Court of Session (Lord Macdonald presiding) held that,

"*In some situations suspension pending the final outcome of criminal proceedings may be more appropriate than dismissal. In a case such as the present this would, in my opinion, be impracticable. It took seven months before the employee was brought to trial and convicted. It would be unrealistic to expect the employer to retain a labourer in their employment over this period of time pending the final outcome of his trial."*

The Court of Session held that it was reasonable for the employer to dismiss the employee in that case and that it would have been improper for the employer to carry out any form of internal enquiry into the circumstances of the theft while a criminal prosecution was pending. As has been said, this proposition has been doubted in **Harris (Ipswich) Limited.**

139. The Tribunal shall in due course apply the law to X's case. The Tribunal shall refer to X's case from time-to-time as '*the instant case.'*

140. The following propositions may be drawn from the case law which the Tribunal has considered and which are of relevance to this case:

140.1 In a case such as this where an employer receives information or allegations, the employer and the employee are placed in a difficult situation.

140.2 An employer presented with such information from an authoritative source will generally not be acting reasonably if the employer takes an uncritical view of the information disclosed. The employer (where this is practicable) ought to put questions to the authority providing the information and seek credible reassurance that all relevant information has been taken into account. However, there are cases where the employer may not be in a position to question the information

140.3 However, there are limits as to the extent to which an employer may be expected to carry out its own independent investigation in order to test the reliability of the information provided by responsible public authority. An employer (and even a large employer) will typically have neither the expertise nor the resources to do so.

140.4 There is generally nothing to prevent an employer before dismissing an employee from discussing the matter with the

employee or his/her representative. However, what it is right for the employer to do depends upon the circumstances of the case.

140.5 The central question to bear in mind is what it was reasonable for the employer in the relevant circumstances to do. The focus is upon the employer's conduct and not the unfairness or injustice to the employee. However, injustice to the employee is not completely ignored and will be balanced against the benefits gained by the employer considering whether the employer acted reasonably.

140.6 Potential consequences as well as actual consequences to the employer may be taken into account when deciding whether the dismissal was fair.

140.7 Delay may render a dismissal unfair if it is substantial and there is no good reason for it. However, delay attributable to an employer's decision to suspend internal disciplinary action pending the outcome of a police investigation would generally not be castigated as unreasonable.

140.8 Resource issues including costs to the public purse of continued employment (particularly during suspension) may contribute a substantial reason for dismissal.

140.9 A public authority with a statutory responsibility for children may legitimately be jealous to guard its public reputation.

The parties' submissions

141. In submissions on behalf of the claimant, Mr Bronze sought to distinguish the authorities which the Tribunal has reviewed.

142. Mr Bronze also submitted that the substantial reason advanced by the respondent for the dismissal of the claimant has shifted. In particular, he was critical of the respondent for seeking to introduce reputational risk or damage in circumstances where this was not given as a reason for the dismissal of the claimant in the dismissal letter at pages C27 and C28 and was not advanced by Miss L as the reason for the dismissal of the claimant in her printed witness statement.

143. Mr Bronze submitted that the respondent had carried out no scrutiny of its own into Z's allegations albeit that it was open to the respondent to conduct at least a limited enquiry into the timelines by reference to the claimant's mobile telephone records and Z's medical records. He said that this was an important feature given the inherent unreliability of Z who was regarded as a chaotic individual. He said that not only was the respondent incurious, it was also partial against the claimant (for instance, not crediting her with 30 years of service and for her achievements during her service with the respondent (see paragraph 92.1)).

144. Mr Bronze was critical of the lack of information provided to the claimant by the respondent throughout the process. The Tribunal has already found as a fact that Mrs W's contact with the claimant was infrequent. There was a failure by the respondent to comply with its suspension policy (see paragraph 22). In her submissions, Miss Gould fairly recognised that there may be some criticism of the respondent about these matters.

145. Mr Bronze observed that there had been no input from the claimant into any of the LADO meetings. Indeed, there were very few meetings with the claimant during the three years' period of suspension. This resulted in the claimant's letter of complaint dated 18 April 2019 (at pages C19 to C21).

146. Mr Bronze submitted that it was not clear what information had been provided by Miss L and Mrs W to JS before the hearing of 19 March 2019. He was critical of the procedure followed before and during the hearing of that date and the appeal process, describing the latter as *"a sham".*

147. Miss Gould submitted that it was open to the respondent to have dismissed the claimant sooner than she was. The question that arises is why the respondent decided to dismiss the claimant when it did, having tolerated suspension for such a long period.

148. Miss Gould said that the respondent's decision was not random, but was one reached by the respondent after making enquiries of the police in January 2019 and receiving no satisfaction to the question as to when matters may be concluded. She submitted that the respondent's decision was vindicated by the fact that it was almost a year later (in November 2019) when both the respondent and the claimant were notified that the police were taking no further action.

149. Miss Gould defended the criticism of the respondent made by Mr Bronze upon the issue of the shifting reasons for dismissal. She said that the issue of reputation, although not expressly stated in JS's letter of 20 March 2019, was intertwined with the issues of safeguarding and the sustainability of the claimant's employment. "*The reason for dismissal is multifunctional"* was how she put it.

150. She submitted that the respondent was entitled to say that "*enough is enough"*. She drew an analogy with ill-health dismissals where an employer maintains the employment for a period of time until the employer cannot reasonably be expected to tolerate continued further periods of absence. She said that the respondent had reached that position after contacting the police in January 2019 (see paragraph 61).

151. Miss Gould submitted that in the context of this particular respondent, reputational risk was an acute issue. It is *"**Nuffield** squared"* as Miss Gould pithily put it (this being a reference to the **Lafferty v Nuffield** case where reputational concern was held to be a substantial reason for that employee's dismissal). She said that the context of the

respondent was such that it had to *"act more cautiously and take even harsher decisions than others would."*

Discussion and conclusions

152. The Tribunal now turns to its conclusions. The Tribunal is disadvantaged by not having the benefit of hearing JS or any member of the appeal panel. Although the claimant very fairly and properly raises no issue that JS is unfit to attend to give evidence this does not detract from the fact that the Tribunal has not had the benefit of hearing evidence from the decision makers in order to be satisfied that they had reasonable grounds upon which to sustain a belief that there was SOSR open to the respondent at the time of the dismissal.

153. The evidence of Miss L and Mrs W was that JS was briefed by them before the hearing of 19 March 2019. The Tribunal accepts their evidence. It seems inherently unlikely that they would not have briefed JS about the position before he met with the claimant and Mr S on 19 March. The Tribunal therefore accepts that JS had a genuine and honest belief that there were concerns relating to the safeguarding of children within the local authority and that the respondent was unable to sustain her employment. This is upon the basis that Miss L and Mrs W informed JS that the police enquiries were not nearing completion, that the claimant still attracted "*designated suspect status*" and there was no firm timescale for the resolution of matters.

154. The Tribunal accepts Miss Gould's submission that part of the reasoning over the sustainability of the claimant's employment rests upon reputational risk to the respondent. This was an acutely sensitive issue for this particular local authority. In the Tribunal's judgment, JS honestly believed that enough was enough and that there was no end in sight. Accordingly, the Tribunal is satisfied that the respondent has established a permitted reason for the claimant's dismissal, that being a substantial reason relating to the safeguarding of children, the sustainability of employment and (entwined within those) concerns about the respondent's reputation.

155. The Tribunal's function then, the respondent having established a permitted reason for dismissal, is to review the conduct of the respondent. The burden is a neutral one. The Tribunal's function at this stage is to review matters and determine whether: the employer had reasonable grounds for the belief; could reasonably have reached the conclusion which it did based upon the material before it; reach that conclusion after carrying out as much investigation into the matter as was reasonable in accordance with principles of natural justice; and whether the dismissal of the claimant fell within the range of reasonable responses of reasonable management in the circumstances. Natural justice (*per* **Khanum v Mid-Glamorgan Area Health Authority** [1978] IRLR 215 EAT) requires the employee to know the case against them, be given an opportunity to state their case; and that the employer should act in good faith towards them

156. A difficulty for the Tribunal in being able to reach a conclusion that the respondent acted reasonably in concluding upon the material before it that there was a substantial reason permitting the dismissal of the claimant is the paucity of evidence before the Tribunal as to what was before JS and the appeal panel when their decisions were taken.

157. As far as the meeting with JS of 19 March 2019 is concerned, the respondent's evidence was tantamount to nothing more than that he had received a verbal brief from Miss L and Mrs W. Nothing was shared with the claimant before the meeting of 19 March 2019. She simply did not know the case against her that her employment could no longer be sustained.

158. There is much force in Mr Bronze's point that Mrs W had prepared earlier briefings which were not impartial. The Tribunal refers again to paragraph 92.1. From this, the Tribunal cannot be satisfied that when Mrs W spoke to JS at some point between January and March 2019 (see paragraph 92.5) she briefed him in any way other than in line with how she had conducted matters hitherto.

159. In paragraph 42 of her witness statement Mrs W refers to sending an update briefing to JS around the current position. The Tribunal has not seen this document. That said, the Tribunal accepts that Mrs W will have told JS of the fact of the claimant's interview under caution on 17 October 2018 and that the claimant still attracted designated suspect status. This accords with the matters discussed at the LADO meeting of 4 December 2018 in which reference is made to the claimant's status and the fact of her being interviewed under caution in respect of the very serious allegations referred to in paragraph 58.

160. The Tribunal also has no basis upon which to conclude that the respondent had reasonable grounds to believe that alternative employment could not be found for the claimant. In reality, the respondent's position appeared very much to be the case that until the NCA investigation was concluded the respondent was not prepared to look seriously at alternative employment. Both Mrs W and Miss L were concerned that the reputational damage that would arise were the claimant to return to the workplace in any capacity and then be charged with and/or found guilty of the criminal offences in respect of which she was interviewed. This was a case of the respondent being unwilling to allow her back as opposed to being unable so to do in some capacity. The basis upon which the employer concluded that it was unable to countenance any alternative employment was not before the Tribunal. The claimant had been led to believe by Mrs W that steps would be taken to at least look at alternative work (paragraph 47 above). Again, it was a breach of the principles of natural justice for the employer not to set out is case upon this before the meeting of 19 March 2019 in order that the claimant may respond to them.

161. Given the seniority of the claimant and the serious nature of the matters with which this case is concerned, it is surprising (not to mention unusual) for there to be no statement of case of any kind prepared for

the benefit of JS when he met with the claimant and her trade union representative on 19 March 2019. In light of that, it is difficult to see how the Tribunal can be satisfied that the decision maker had reasonable grounds upon to which sustain his belief that there was a substantial reason for the claimant's dismissal even allowing for the imputation to JS of the knowledge of Mrs W and Miss L.

162. The approach of the respondent was reflected by what transpired at the appeal hearing. The Tribunal refers to paragraphs 81 and 82. The Tribunal found as a fact that one of the elected members made a remark to the effect that it was not necessary to go through an appeal process where the dismissal was for a substantial reason, that Mr H was compelled to make submissions that a fair process must be followed where the dismissal is for a substantial reason and that employment may not be terminated without reason.

163. The material before the appeal panel (as set out in paragraph 78) fails to demonstrate the basis upon which JS reached the conclusion that he did. JS presented the management's case to the appeal panel. Again, it is unfortunate that the Tribunal did not have the benefit of hearing from him or from a member of the appeal panel as evidence of what was said. By way of reminder, the material before the appeal panel was the following, none of which address the basis of the respondent's conclusion reached on 19 March 2019.

- *The notes of the meeting of 28 June 2016 (page B23).*
- *The letter of complaint from the claimant of 18 April 2018 (pages C19 to C22).*
- *The respondent's response to the letter of complaint (pages C23 to C24).*
- *The letter of invite to the meeting of 12 March 2019 (page B31).*
- *The letter of invite to the meeting of 19 March 2019 (page B32).*
- *Mr S's letter terminating the claimant's contract of employment (pages C27 to C32).*

164. The Tribunal also concludes that the decision to dismiss the claimant was tainted by significant procedural flaws. Firstly, the claimant was not furnished with any material upon which basis the respondent was seeking to advance its case that it had open to it a substantial reason for her dismissal. Secondly, the Tribunal agrees with Mr Bronze that the invite letters at pages C25 and C26 were so deficient as to be outside the range of reasonableness.

165. When those letters were sent, the claimant had been suspended for a period of getting on for three years. There had only be intermittent and somewhat erratic contact from the employer during this time. The

claimant at no stage received any intimation that the respondent was contemplating her contract of employment to an end.

166. It falls outside the range of reasonable responses for the employer, in these circumstances, to issue an invitation for the employee to attend a meeting where the invitation is confined to a discussion of *"the current situation on your suspension and your continued employment with [the respondent]"* where the employer contemplates dismissal.

167. This is not of course a misconduct case. However, it is of relevance to note that the *ACAS Guide: Discipline and Grievances at Work (2019)* recommends to employers that notification of a disciplinary case to answer should contain sufficient information about the alleged conduct or poor performance in question and its possible consequences so as to enable the employee to prepare to answer the case at a disciplinary meeting.

168. By analogy with the ACAS Guide, the Tribunal's conclusion is that it fell outside the range of reasonable responses for the employer:

168.1. Not to inform the claimant of the possibility that she may be dismissed given the circumstances summarised in paragraph 165.

168.2. Not to provide the claimant with the basis upon which the respondent's human resources department was going to seek to persuade JS that there was an ongoing safeguarding risk, that the claimant's employment could not be sustained any longer and the reputational risk to the employer of continuing to sustain that employment.

169. The failure to take these steps led the claimant and Mr S to be unprepared. There is much justification in Mr S's expression of shock when the claimant was informed that her employment was to be terminated that day. The respondent informing the claimant by letter that the meeting was to discuss her *"continued employment within [the respondent]'* is (given the circumstances) a small peg upon which for the respondent to hang the heavy coat that the claimant and her trade union representative had received fair notice that dismissal was a possibility.

170. In his statement of case prepared ahead of the appeal, Mr H on the claimant's behalf pertinently observed (at page B52) that "*no evidence has been presented AT ALL, by the council to justify this dismissal. Reference has been made to the ongoing police/national crime agency investigation into historic CSE allegations."* He goes on to say that, "*no update has been presented or statement has been made by [the respondent] to suggest that there has been a recent significant development that could trigger this process [X's] own conversations with the police have confirmed this as well."*

171. The appeal procedure did not correct this deficiency. The documents referred to in page E116 (summarised in paragraphs 78 and 163) provide no basis upon which for the respondent to have reached the conclusion that it did. The Tribunal reminds itself that risk or potential risk to reputation and sustainability of employment cannot simply be asserted but have to be shown. The respondent did not share with the claimant the information which the respondent had received from the NCA about the progress of the investigation. No management statement of case was prepared to address the question of why the respondent took the view that the claimant's employment was not sustainable, how the question of alternative employment had been addressed and why the respondent was concerned about the issue of safeguarding. These procedural failures resulted in substantive unfairness as the claimant was unable to respond to them and state her case.

172. That said, both the claimant and Mr S were asked in cross-examination what difference it would have made had these procedural failures not occurred. They were asked what they would have done differently. Neither the claimant nor Mr S were able to explain how the carrying out by the respondent of a fair process would have resulted in a different outcome.

173. The Tribunal concludes that the instant case is not on all fours with any of the authorities cited in paragraphs 110 to 145.9 above. The facts in instant case distinguish it from those cited.

174. In **Leach**, the employer sought to investigate matters as best it could by making enquiries of the Metropolitan Police and with the employee. In contrast, at no stage in the instant case was the claimant asked by the employer to respond to any of the allegations against her. The Tribunal agrees with Mr Bronze's characterisation of the respondent as simply being the recipient of information from the NCA. The Tribunal refers in particular to paragraph 92.2 which summarises Mrs W's approach. The respondent made no attempt to corroborate or enquire into Z's allegations about the claimant (see paragraph 90).

175. The claimant in the instant case was never charged with any criminal offence. Her case may therefore be distinguished upon that point from those of **Lafferty** and **Mansfield**.

176. The claimant's case resonates more with the facts of **Z v A** in which the police reported to the school at which the employee worked the fact of an allegation of historical sex abuse following which the employee was suspended and then dismissed in circumstances where the employee faced no charges from the police. **Z v A** also bears other factual similarities to that of the instant case in that (as recorded by the EAT in paragraph 18 of **Z v A**) the employee was not briefed about what the employer was being told by the police and strategy meeting notes were not disclosed to the employee in advance.

177. However, the instant case may be distinguished from **Z v A** in that there, a conclusion of the police investigation was imminent. This was not the case at the time that the respondent determined to dismiss the claimant and to dismiss her appeal in the instant case.

178. The Tribunal therefore concludes that the respondent unfairly dismissed the claimant. While the respondent has shown a potentially fair reason for the dismissal of the claimant, the Tribunal cannot be satisfied that the respondent had before it reasonable grounds upon which to sustain that belief and that such a belief was reached after carrying out as much investigation into the matter as was reasonable consistent with the principles of natural justice. The dismissal of the claimant therefore fell outside the range of reasonable responses and was unfair.

179. Remedy shall be determined at a separate remedy hearing. At the outset of the hearing in February 2020, the Tribunal directed that any issue arising out of the application to the case of the principles in **Polkey v AE Dayton Services Limited** [1987] IRLR 503, HL may conveniently be determined at the merits hearing.

180. The issue for the Tribunal upon a **Polkey** assessment is to ask what would have happened had a fair procedure been carried out. In assessing the chance that the employee may have been dismissed by the particular employer after carrying out a fair procedure, the Tribunal should have regard to any material and reliable evidence that might assisted in fixing what is just and equitable compensation to compensate the employee for the loss sustained in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. This may involve a degree of speculation.

181. In the Tribunal's judgment, there is ample material from which it may be concluded that had a fair procedure been followed the claimant would have been dismissed in any case. An issue may arise as to when the dismissal would have taken place had the respondent followed a fair procedure. The Tribunal reaches this conclusion for the following reasons.

182. When preparing a management statement of case for the benefit of JS, Miss L (or the respondent's HR department) may have obtained a statement from Mrs W as to the state of play with the NCA investigation. There is ample material within the bundle from which Mrs W could fairly have stated that the NCA investigation was complex, long running and (in March 2019) open ended in its scope with no finite end date. Indeed, there was material at pages E100 to 106 from the NCA themselves.

183. The respondent would have been able to present a case that was fair to the claimant (recognising her 30 years' length of service and significant contribution to the respondent, not least in the prosecution of CSE offences) while on the other hand emphasising its position as a public authority with a statutory responsibility for children and that it is a public authority under intense public scrutiny. These are factors which significantly tell against the re-deployment of the claimant within the

respondent's organisation pending the outcome of the NCA investigation.

184. The respondent may reasonably have reached the conclusion that it would have been improper to seek to carry out any kind of investigation of its own in the circumstances. We have already observed that Mrs W was very cautious. In the Tribunal's judgment, she was right to be so. To interview the claimant about the allegations made against her by Z would be contrary to NCA advice as to how the respondent should proceed. As Miss L said, this may be tantamount to divulging something to the claimant which the NCA would not wish the respondent to do. As Miss Gould said, the criminal investigation being conducted by the NCA was in a different league to that in the **Harrison (Ipswich)** case. In **Harris** the Employment Appeal Tribunal had emphasised the need for a careful consideration of the circumstances when considering the employer's conduct in the context of a dismissal where there is a pending police or criminal enquiry. The potential damage to the respondent's reputation of prejudicing a criminal investigation was, as Miss Gould said, "***Nuffield** squared".*

185. The respondent acted reasonably in postponing its investigation into the sustainability of the claimant's employment pending the NCA investigations *per* **Mansfield** (paragraph 133). The delay was attributable to the respondent heeding the NCA advice and not because of delays on the part of the respondent once the NCA investigation had concluded.

186. The respondent was not in a position to conduct any investigation of its own because of the NCA instruction and it was thus not practicable for them to do so. The respondent therefore acted within the range of reasonableness. The *dicta* in **Leach** is to the effect that an employer ought not to take an uncritical view of matters in so far as it is practicable so to do. It was not practicable in this case given the circumstances of the CSE issue and NCA investigation. It would be unthinkable for this employer to do anything which may prejudice the NCA investigation. The respondent acted reasonably in taking the view that their investigation must effectively be put on ice pending the outcome of the NCA investigation into the claimant's activities.

187. In the Tribunal's judgment, this particular respondent, acting within the range of reasonable responses, could reasonably have taken the decision to dismiss the claimant. What is under scrutiny is the respondent's conduct. It found itself in an acutely difficult position when informed of Z's allegations on 10 March 2016. The respondent was warned off conducting its own enquiries by the NCA. The respondent did not do so.

188. The Tribunal recognises the principle from **Leach** and **Lafferty** that an employee upon receipt of such information must not normally be uncritical of it and must make its own enquiries in so far as reasonable. In Lafferty it was recognised that it may (but not necessarily would) be unreasonable for an employer not to make its own enquiries. As has

been said, the Tribunal's judgment, the respondent acted reasonably in the circumstances in not conducting its own enquiries given the sensitive position in which it found itself against the backdrop of the CSE enquiry. This particular authority was in a very sensitive position given the highly critical publicity that it had attracted over CSE. In any case, neither the claimant nor Mr S were able to give any evidence that the claimant being able to speak to the respondent about the allegations would have made any difference to the outcome. They were unable to point to anything which would have discredited the police investigation in the eyes of the respondent.

189. Further, what led the respondent to conclude that *"enough was enough"* was the information garnered from the police in January 2019. There was no evidence from the claimant that she had obtained any different information than that obtained by the respondent. Had JS and the appeal panel been presented with the information appearing within the bundle at pages E100 to 106 the claimant would not have been able to add any further or different information.

190. The Tribunal is not satisfied that the information from the police officer obtained by the claimant on 20 March 2019 was before the appeal panel. However, even had that information (in the bundle at pages B34 and B35) been seen by the appeal panel in the Tribunal's judgment the decision could still reasonably have been taken (within the range of reasonable responses) that matters were still some way from resolution.

191. In the Tribunal's judgment, therefore, had a fair procedure been followed which all of the information had been laid before JS and the appeal panel the respondent could reasonably have concluded that:

    191.1. The claimant remained of designated suspect status, a status afforded to her by a credible authority (in the form of the police).

    191.2. She had been suspended for a period of three years.

    191.3. The complex NCA investigation was not likely to conclude in the foreseeable future.

    191.4. That it was reasonable for the respondent to take the view that the claimant could not be re-deployed in any alternative position within the workplace. To allow her to return in some capacity would be a hostage to the fortune of the criminal investigation and any subsequent proceedings.

    191.5. Should she have been so re-deployed and then charged or convicted, this would have done serious reputational damage to the respondent. Reputational risk was an inherent part of the sustainability of employment and impacted upon the consideration of allowing her back in any capacity. Indeed, this difficulty was fairly recognised by the claimant (in paragraph 91.3). There was no basis to conclude (in contrast to **Z v A**)

that the police conclusion of the investigation was imminent, there was justified concern about the continued expenditure of public funds in sustaining the employment (*per* **Nuffield**) and no alternative role for the claimant.

191.6. Given the length of time of the suspension, that she remained of designated suspect status and the uncertain timescales, enough was enough and the employee's contract of employment ought to be terminated.

191.7. That Mrs W had reasonably acted cautiously in not interrogating the information provided to her by the CSA about the enquiry.

191.8 The respondent was unable to ask the claimant about the allegations because this would be contrary to NCA advice.

191.9 Investigating Z's allegations for itself in so far as it was able would be contrary to NCA advice. It would be imprudent to do so because, while enquiry of an employee under suspicion of a criminal matter is generally permissible, the acute circumstances of the CSE and the respondent's position in relation to it, permitted a reasonable management view to be taken that such ought not to be done in this case.

192. Balancing the interests of the respondent (including the expenditure of public funds on continuing to fund the suspension) as against the interests of the claimant the respondent could reasonably conclude dismissal of the claimant was a reasonable decision, particularly as no end was in sight with the NCA enquiry in March or June 2019 and that it was legitimate for the respondent to be jealous of its public reputation.

193. The Tribunal's conclusion therefore is that although the claimant's dismissal was unfair, and had a fair procedure been followed then the respondent would, acting within the range of reasonable responses, have fairly dismissed her in any case. This finding of course has a significant impact upon the compensatory award (where the question of when, acting fairly, the claimant would have been dismissed) but not the basic award.

194. The matter has been listed provisionally listed for a case management hearing in advance of a remedy hearing. These shall now proceed as listed.

Employment Judge Brain

Date: 26 November 2020