



# EMPLOYMENT TRIBUNALS

**Claimant:** GWQ  
**Respondent:** UFP  
**Heard at:** East London Hearing Centre (by telephone)  
**On:** 13 April 2022  
**Before:** Employment Judge Barrett

**Representation**  
Claimant: Represented himself  
Respondent: Mr Simon Tibbitts of Counsel

## JUDGMENT

The judgment of the Tribunal is that: -

1. The Claimant was fairly dismissed.
2. The Claimant's claim for unfair dismissal is not well-founded and is dismissed.

## REASONS

*This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was by telephone. A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.*

### Introduction

1. The Respondent is an entertainment company. The Claimant worked as the General Manager of one of the Respondent's sites. In June 2021, the Claimant was arrested and bailed under police investigation relating to an allegation that he had viewed indecent images of children. On 13 October 2021, the Respondent dismissed the Claimant with a payment in lieu of notice. The reason given was

that he was unable to fulfil the duties of his role. Following a period of early conciliation from 12 to 16 November 2021, the Claimant presented a claim for unfair dismissal on 18 November 2021.

### The hearing

2. The hearing was conducted by video on 13 April 2022. Two preliminary issues arose:
  - 2.1. The Claimant had not provided a witness statement in accordance with the Tribunal's case management directions. The Respondent contended that the Claimant should not be permitted to give evidence at the hearing. The Claimant said he had been confused as to what was required of him.
  - 2.2. The Claimant indicated that he wished to apply for privacy and anonymity orders. After a 20-minute adjournment to allow the Claimant to prepare what he wished to say, a short case management preliminary hearing in private was convened to hear that application.

### Claimant's evidence

3. In relation to the witness statement issue, I considered the overriding objective to deal with the case justly and to ensure a fair trial. I considered that the proportionate sanction to be imposed in relation to the Claimant's failure to serve a witness statement, was to permit him to give evidence but to confine his evidence in chief to the content of his ET1 claim form. The prejudice to the Respondent was limited because that information had been in its possession since the claim was served.

### Application for privacy and restricted reporting orders

4. In relation to the Claimant's application for privacy and anonymity orders the parties' submissions were:
  - 4.1. The Claimant said that the subject matter of the claim was extremely sensitive. He was trying to get on with his life and if this information came into the public domain with would be difficult for him in his local community and to find further employment in the hospitality industry. He asked for a private hearing and a restricted reporting order so that his name would not be put into the public domain. He said that he had done nothing wrong and was still under investigation.
  - 4.2. The Respondent adopted a neutral position, but Mr Tibbitts helpfully summarised the applicable legal principles and emphasised the need to conduct a proper balancing exercise.
5. The legal principles relevant to consideration of the Claimant's application were:
  - 5.1. Article 6 of the European Convention on Human Rights ('ECHR') provides:
    1. **In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or**

the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

5.2. Article 8 ECHR provides:

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

5.3. Article 10 ECHR provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

5.4. Rule 50 of the ET Rules provides:

**50.—(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.**

**(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.**

**(3) Such orders may include—**

**(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;**

**(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;**

**(c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;**

**(d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.**

(4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.

(5) Where an order is made under paragraph (3)(d) above—

(a) it shall specify the person whose identity is protected; and may specify particular matters of which publication is prohibited as likely to lead to that person's identification;

(b) it shall specify the duration of the order;

(c) the Tribunal shall ensure that a notice of the fact that such an order has been made in relation to those proceedings is displayed on the notice board of the Tribunal with any list of the proceedings taking place before the Tribunal, and on the door of the room in which the proceedings affected by the order are taking place; and

(d) the Tribunal may order that it applies also to any other proceedings being heard as part of the same hearing.

(6) "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998

5.5. Section 11 of the Employment Tribunals Act 1996 provides:

11.— Restriction of publicity in cases involving sexual misconduct.

(1) Employment tribunal procedure regulations may include provision—

(a) for cases involving allegations of the commission of sexual offences, for securing that the registration or other making available of documents or decisions shall be so effected as to prevent the identification of any person affected by or making the allegation, and

(b) for cases involving allegations of sexual misconduct, enabling an employment tribunal, on the application of any party to proceedings before it or of its own motion, to make a restricted reporting order having effect (if not revoked earlier) until the promulgation of the decision of the tribunal...

5.6. Simler J provided the following guidance in the case of *BBC v Roden* [2015] ICR 985:

'22. The principle of open justice is accordingly of paramount importance and derogations from it can only be justified when strictly necessary as measured to secure the proper administration of justice.

23. Where anonymity orders are made, three Convention rights are engaged and have to be reconciled. First, article 6 which guarantees the right to a fair hearing in public with a publicly pronounced judgment except where to the extent strictly necessary publicity would prejudice the interests of justice. Secondly, article 8 which provides the qualified right to respect for private and family life. Thirdly, article 10 which provides the right to freedom of expression, and again is qualified.

24. Lord Steyn described the balancing exercise to be conducted in a case involving these conflicting rights in *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17, as follows:

"What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative

importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience, I will call this the ultimate balancing test.”

25. The paramountcy of the common law principle of open justice was emphasised and explained in *Global Torch Ltd v Apex Global Management Ltd* [2013] 1 WLR 2993, where Maurice Kay LJ referred to *R v Legal Aid Board, Ex parte Kaim Todner* [1999] QB 966, 977 and Lord Woolf MR's holding that the object of securing that justice is administered impartially, fairly and in a way that maintains public confidence is put in jeopardy if secrecy is ordered because (among other things):

“It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely ... Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it.”

26. Having referred to the question to be asked when seeking to reconcile these different rights as affirmed by the Supreme Court in *In re Guardian News and Media Ltd* [2010] 2 AC 697, para 52, per Lord Rodger of Earlsferry, as

“whether there is sufficient general, public interest in publishing a report of the proceedings which identifies M to justify any resulting curtailment of his right and his family's right to respect for their private and family life”,

Maurice Kay LJ set out the relevant passages from the Practice Guidance (Interim Non-disclosure Orders) [2012] 1 WLR 1003, given by Lord Neuberger including, at para 11: “The grant of derogations is not a question of discretion. It is a matter of obligation ...” and, at para 13: “The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence ...”

6. On application of the legal principles to the facts of this case, I reached the following conclusions:
  - 6.1. Article 8 ECHR was engaged due to the subject matter of the case. The Respondent contended that the Claimant had been dismissed because he was unable to perform his contractual role due to bail conditions arising out of a criminal investigation into allegations of serious sexual misconduct. Although the Claimant was not dismissed for misconduct and the Tribunal was not required to make any findings about the criminal allegations, it was inevitable that the allegations would need to be referred to in evidence.
  - 6.2. I accepted the Claimant's submission that if the allegations were made public, they would impact on his reputation in his local community and his ability to find employment in the future. I also considered it was likely that the allegations being made public would have an adverse impact on the Claimant's family. I took into account the level of distress the Claimant exhibited at the prospect that observers might be permitted to attend the hearing.
  - 6.3. I further took into account the fact that while the Claimant was under investigation by the police, there had been no findings made against him in that process and the Respondent made no allegations of misconduct against him.

- 6.4. I noted the need to balance the Claimant's Article 8 right to privacy with the public interest in open justice. In particular, I considered that the principle of open justice is of such paramount importance that derogations 'can only be justified when strictly necessary as measured to secure the proper administration of justice'. Compared to the other three types of order set out in rule 50(3), an order that a claim be heard in private represents the greatest derogation from the principle of open justice. As such, the scales are weighed heavily against the hearing of claims in private.
- 6.5. I considered that a fair trial would not be possible if the hearing were to proceed in public or to proceed in circumstances where the Claimant knew that his identity could be publicly reported. If the Claimant was worried about what observers might hear or what might subsequently be published, he would not be able to give full or open evidence due to concerns about the potential impact on his reputation and family life. He would also be restricted in asking the questions he wished to ask of the Respondent's witnesses which concerned the criminal investigation.
- 6.6. In the circumstances, I concluded that it was necessary to both conduct the hearing in private and restrict reporting of the Claimant's identity, in order to secure the proper administration of justice. The balance therefore tipped in favour of granting the Claimant's application.
7. The Claimant's application was granted, and orders made as follows:
  - 7.1. Pursuant to rules 50(1) and (3)(a) of the Employment Tribunals Rules of Procedure 2013 ('ET Rules'), an order that the proceedings would be heard in private; and
  - 7.2. Pursuant to section 11 of the Employment Tribunals Act 1996 and rules 50(1) and 29 of the ET Rules, a restricted reporting order prohibiting the publication of any matter likely to lead to the identification of the Claimant, including the Claimant's name, Respondent's name, Respondent's witnesses' names, and the name and location of the Respondent's site at which the Claimant worked.

### Evidence

8. The hearing proceeded to hear evidence from:
  - 8.1. On behalf of the Respondent:
    - 8.1.1. The Respondent's Operations Manager ('OM'), who made the decision to dismiss;
    - 8.1.2. The Respondent's Commercial Director ('CD'), who heard the Claimant's appeal; and
  - 8.2. The Claimant on his own behalf.
9. The Tribunal was provided with a bundle of documentary evidence numbering 295 pages.

Issues

10. The issues for determination were:
  - 10.1. What was the reason or principal reason for the Claimant's dismissal? The Respondent said the reason was a substantial reason capable of justifying dismissal, namely the Claimant being unable to carry out his contractual role.
  - 10.2. Was it a potentially fair reason?
  - 10.3. Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?
  - 10.4. Did the Respondent follow a fair procedure in dismissing the Claimant?
  - 10.5. If the Claimant was unfairly dismissed, was there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
11. Mr Tibbitts clarified that the Respondent relied on the Claimant's bail conditions preventing him carrying out his role, and potential reputational damage as a subsidiary reason. He submitted that both underpinned the overarching reason for dismissal, which was that the Claimant could not work for the Respondent while under investigation for an alleged criminal offence.
12. The parties agreed that other issues relating to remedy should be determined separately, should the Claimant's claim succeed.

**Findings of fact**

The Claimant's role

13. The Claimant was a long-standing employee who worked for the Respondent from 2002. The Respondent acknowledges that his service record was good.
14. By 2021, the Claimant was General Manager of one of the Respondent's family entertainment centres. This was a multi-faceted, demanding role which included overall supervisory responsibility for all staff on a large site. The Claimant's duties were primarily office-based but also required him to move around the site to respond to issues as they arose, and to engage with members of the public visiting the site.

Arrest and bail

15. On 7 June 2021, police attended the site where the Claimant worked and arrested him. He was told it was alleged that a computer with an IP address at his home address had been used to access indecent images of children.
16. The Claimant was released on bail. His bail conditions, insofar as they are relevant to this case, stipulated that he was:
  - 16.1. To present any internet enabled device to police or National Crime Agency ('NCA') officers for inspection;

- 16.2. Not to delete any internet history or searches on any internet enabled device;
  - 16.3. Not to install any software that cleans or wipes internet activity on any internet enabled device;
  - 16.4. To inform the NCA of the acquisition of any internet enabled devices providing the type, model serial number and SIM card details; and
  - 16.5. Not to knowingly have unsupervised contact directly or indirectly with any person under the age of 18 either physically or online.
17. The Claimant had a welfare visit from his Area Manager ('AM') the following day, during which he provided a copy of his bail conditions to the Respondent.

### Suspension

18. On 9 June 2021, OM called the Claimant to inform him that he was suspended from work on full pay, pending the outcome of the bail review that was due on 5 July 2021. The suspension was also communicated by letter from OM the same day.
19. On 10 June 2021, OM called the NCA to inquire whether it was permissible to change the Claimant's password on the Respondent's computer systems. He was told that the NCA had "triaged" the Claimant's "work assets" and found no evidence of wrongdoing. He was further told by the NCA that the investigation was likely to take 4 to 6 months to complete. The NCA later confirmed that the Claimant's work laptop and phone had been seized, and that there was no issue with resetting passwords.
20. During the Claimant's suspension, AM made regular welfare calls. These were initially weekly, then became less frequent. AM reported his conversations with the Claimant to OM, who in turn from time to time updated his own line manager CD.

### First extension of bail

21. On 30 June 2021, the Claimant told AM that he had been informed by the NCA his bail had been extended to 6 September 2021.
22. OM called the NCA on 5 July 2021 to confirm this information. He was told that the Claimant's bail conditions were unchanged, including the fifth condition prohibiting unsupervised contact with anyone under 18. OM noted in an email to CD that day, "*condition 5 would not allow him to be in our business.*"
23. On 9 July 2021, OM sent the Claimant a suspension review letter stating that he would remain on paid suspension "*either until 6<sup>th</sup> September 2021, or until such time as we believe that it is unreasonable for us to continue maintaining paid suspension, whichever is the soonest.*"
24. On 14 July 2021, OM wrote to the NCA asking whether the Claimant's bail might be further extended beyond 6 September 2021. The reply came that most investigations took 6 to 12 months to complete and that the NCA would look to making an application to the Magistrates Court to extend the Claimant's bail.



Second extension of bail

25. On 3 September 2021, the NCA emailed OM stating that they had applied for a three-month bail extension to 8 December 2021. However, on 8 September 2021 the Claimant's bail was in fact extended to 2 November 2021. The same bail conditions remained in place.

First formal meeting

26. On 4 October 2021, OM wrote to the Claimant to invite him to a formal meeting. OM's evidence, which I accept, was that he decided to instigate this process on reviewing the Claimant's suspension and the needs of the business at that time. The invitation stated that the meeting was to discuss the following issues:

**'You are unable to undertake your role as General Manager due to your current bail conditions which are in place until at least 2 November 2021.**

**The potential risk of reputational damage to the business, given the nature of the criminal allegations made against you by the Authorities.'**

27. The letter informed the Claimant:

**'Depending on your comments regarding the above, your employment may be terminated as a result of this meeting on the basis that you are unable to continue to undertake the role for which you were employed.'**

28. The Claimant was told that he was entitled to be accompanied by a work colleague or an accredited trade union representative.

29. The formal meeting took place on 6 October 2021. OM conducted the meeting. AM attended and took notes. The Claimant confirmed that he was content to go ahead without a companion.

30. At the outset of the meeting, OM acknowledged that he had misunderstood how the Claimant's bail conditions affected his ability to access the internet. The minutes of this part of the conversation read:

**'[OM]: As part of the bail conditions, you are unable to have access to any internet enabled devices or unsupervised contact directly or indirectly with any person under the age of 18 either physically or online. Obviously, these conditions preclude you from being able to undertake your role as General Manager either at site or working from home. Do you understand and agree with that statement?**

**[C]: I can have access to the Internet I just have to provide the NCA with all the details of the device and serial numbers etc.**

**[OM]: Oh! I had misunderstood the condition around the access to the internet. Does that mean you have access to emails?**

**[C]: I can receive emails via my AOL account.**

**[OM]: That said the challenge working on the estate remains when you are not allowed to be anywhere where there is any unsupervised contact with under 18's.'**

31. OM went on to state that the management situation at the Claimant's site needed to be addressed. Another manager had left recently, and the operation was under severe pressure.

32. The Claimant said that he wanted to return to work and asked whether he could be redeployed to a different site, which was closed to the public at that time.
33. OM adjourned the meeting to allow for further consideration.

Reconvened formal meeting, third extension of bail and dismissal

34. The meeting was reconvened on 13 October 2021, with a different note-taker. By this time, the Claimant had been informed that his bail had been extended again to 8 December 2021, and he provided the relevant paperwork to the Respondent.
35. At the outset of the meeting, the Claimant raised that it was not practically possible for him to bring a companion due to the nature of the allegations against him. OM replied that he saw the Claimant's point, and that he would have considered allowing a companion outside the stated categories (of colleague or union representative) had the Claimant asked. He checked whether the Claimant was happy to proceed and the Claimant said he was.
36. OM acknowledged that he had misunderstood the terms on which the Claimant was allowed to access the internet. However, he went on to say that given the time the investigation process had taken and the uncertainty around when it would be completed, he had concluded that it was not likely to be resolved soon. He stated that the Claimant was at present unable to carry out his contractual obligations to the company. He said that for that reason, he had decided to terminate the Claimant's employment.
37. The Claimant protested that he was being judged guilty before the police had investigated, and that there was no reason why he could not return to work. He was not on site on his own, and neither were children on site unaccompanied. He asked if he could work at an alternative site that was closed.
38. OM replied that the alternative site only required engineering work and preventative maintenance, and that at the Claimant's site it could not be guaranteed that all under 18s would be accompanied. He reiterated that the Claimant could not work under his bail conditions, and the Respondent could not manage with the Claimant on suspension any longer.
39. OM sent the Claimant a letter on 15 October 2021 confirming that he had been dismissed with 12 weeks' pay in lieu of notice. In the letter, he wrote:

**'We discussed your continuing bail restrictions and you confirmed that you have been informed that your bail has been extended further to 8th December 2021. You suggested that you could return to work because under 18s are accompanied in the workplace. My understanding of your bail conditions is that you are not allowed unsupervised conduct either directly or indirectly with any person under the age of 18 either physically or online. We cannot guarantee that all under 18s are accompanied on our premises.**

**I also have to give consideration to the potential reputational damage to the Company which could be brought about by the disclosure of the allegations made against you, particularly if you were present on site with under 18s also on site.**

**In light of my belief that the above issues show that you are unable to continue to undertake the role for which you were employed to do, and you are therefore unable to carry out your contractual obligations, I have determined that you should be dismissed with immediate effect but with a payment in lieu of notice.**

I have considered alternatives to dismissal, namely alternative sites, but the [alternative] sites are limited to mainly engineering work and preventative maintenance over winter, for which you are not qualified or experienced. We had also discussed whether you could work from home, you would not be able to undertake your duties from home.'

Appeal

40. The Claimant appealed by letter of 19 October 2021 on the grounds that: he did not agree that he could no longer fulfil his role; he did not agree there was risk of reputational damage; insufficient consideration had been given to the possibility of working from home; the misunderstanding of his internet bail condition had hindered the proper consideration of alternative employment; consideration ought to be given to working on sites not open to the public, special projects or a job swap; there had been a lack of investigation; and he had been allowed insufficient time to prepare his defence.
41. The appeal hearing was conducted by CD on 5 November 2021. Prior to the hearing, CD prepared a detailed script with 33 questions to ask the Claimant, focussing on each of the Claimant's grounds of appeal.
42. At the outset of the hearing, the Claimant raised that the appeal invitation letter only allowed him to be accompanied by a work colleague or trade union official. CD stated that it would have been possible to make an alternative arrangement, as had been discussed in the second formal meeting with OM. The Claimant confirmed that he was happy to proceed anyway.
43. During the meeting, CD asked the Claimant how he proposed to conduct various aspects of his role from home, including managing customer experience, cash controls, technical reviews, contractor meetings, crisis management and maintaining team morale. The Claimant replied that he could be on site, there was no need for him to have interactions with under-18s. CD asked how the company could protect itself from the Claimant breaching that condition? The Claimant replied that he would not want to breach his bail conditions. CD asked the Claimant to consider the risk to the company, "*if there was a dark side about you*", which the Claimant found to be offensive and upsetting. The Claimant accepted that his role could not be done entirely online.
44. In relation to possible alternative roles, the Claimant raised the possibility of working on the closure of a different site, being on 'special projects', or swapping with a particular colleague. CD said that the Claimant did not have the technical skills required, that the colleague whom the Claimant proposed to swap jobs with did not want to move his family and that his role had ended.
45. In relation to the possibility of the Claimant working online, CD noted that his bail conditions required him to make all internet-enabled devices available for inspection to the police and the NCA. CD considered this might compromise the Respondent's obligation to hold commercially sensitive data securely.
46. In relation to possible reputational risk, the Claimant stated that it had been 5 months since his arrest and the allegations against him were not in the public domain. CD objected that as time went on there was a danger of information leaking, and that were the Claimant to be charged, the matter would be made public. The Claimant argued that in such a situation the Respondent could then

review his employment, and that it was premature to dismiss him before it happened.

47. Following the appeal meeting, the Claimant made his own notes. He wrote that CD had asked him closed questions and that he felt the outcome was predetermined.
48. CD wrote to the Claimant on 10 November 2021, saying that his appeal had not been upheld. The outcome letter stated:

**'As I explained to you at the hearing the company is not making any judgement or decision of guilt regarding the allegations you face. Your previous good and lengthy service was factored into our decision; however, it is the Company's view that due to your bail conditions you are unable to fulfil your contractual role as General Manager of the [site] location.**

**During the hearing you accepted and agreed your role could not be fully undertaken whilst working from home. Clearly, we cannot operate in the same way as we did during the closed period during the pandemic.**

**I considered in your claim that you would be able to work on site as there would not be any opportunity for you to be alone and that you would not 'intentionally' break your bail conditions. I have concluded that it would be impossible for the company to ensure that the bail conditions are not breached, intentionally or otherwise. Even if we chose to apply one to one supervision of you whilst on site, which would not be economically viable, we could not be certain there would be no breaches. The company cannot safely rely on your assertion you would not intentionally breach conditions.**

**The company has acknowledged that we had not correctly interpreted the original ball conditions regarding the use of internet enabled devices, however as stated above and agreed by yourself, access to such devices would not still allow you to fulfil your full contractual role. In addition, I have considered that there are practicalities and limitations of the bail conditions. Firstly, we are not dealing with just a couple of devices (a single pc & mobile). There is a complex network of internet enabled devices at the location which would require the registration of all site equipment, totalling over 15. Secondly the bail conditions would mean that commercially sensitive information will be available to third parties which is unacceptable. The company is unable to accept your assertion that the third-party access is entirely safe.**

**The matter of finding alternative roles for you was discussed during the hearing. I confirmed that the company had previously considered this matter, but we had failed to identify any suitable alternative roles. Should an alternative role have been found or job swap opportunity there would still have been the same limitations as to working in any location of your bail conditions to be overcome.**

**You refer in your appeal letter to a role of special projects and an opportunity for a job swap.**

**The special projects role you refer to... In my view your level of technical skill and experience would not have qualified you for this role.**

**The job swap opportunity was not a live Company project as the other party chose not to move and with the closure of his location means there is no role to swap with.**

**I have taken note of your position that there is no reputational risk as there had been no breach of confidentiality to date. However, as a family focused business the Company needs to ensure protection of its image to safeguard sales and employees. I am of the view that the longer the situation continues the more likely there is a breach of confidentiality. Without doubt should the police refer the case**

to the Magistrates this matter will become public knowledge at which point our reputation is a risk.

...

I fully accept that you are in a very difficult position and that the length of time to reach an investigation conclusion is out of your hands. However, in my deliberations on your appeal I have to have regard to safeguarding the company's future.

As you are aware the last 18 months have been extremely challenging for us and the wider hospitality business with enforced closures and multi-million-pound losses. Since reopening we have seen a positive bounce back of business, however there are new challenges in areas such as staffing and increased cost base. As a business we therefore need to ensure each business, including [the Claimant's site] needs a fully engaged manager at the helm. I understand the police have indicated that cases such as yours can take 12 months to conclude the investigation, let alone go through the court process. Such a period of not having a long-term manager in [the site] is not sustainable for the company.'

49. On 12 November 2021, the Claimant emailed to request a copy of the appeal meeting minutes. These were provided on 15 November 2021.
50. On 6 December 2021, the Claimant's bail conditions were lifted, and he was released from police custody without bail.

### Submissions

51. After the evidence had been completed, there was a 15-minute adjournment for the parties to consider the points they wished to make in closing submissions.
52. The Claimant submitted that he did not feel the Respondent had followed due process in dismissing him. No consideration had been given to other opportunities in the company. The Respondent had been confused about his bail conditions and how they affected his role. Insufficient weight had been given to his long service and good record. The decision was predetermined, and he had not been listened to. The company had been told by the NCA that the investigation would take 4 to 6 months and had rushed to dismiss without waiting for that period to elapse. In fact, his bail conditions had been lifted on 6 December 2021, within a month of the appeal outcome. In any event, he could have worked even with the bail conditions in place. The criminal allegations against him should not have been taken into account before he had been investigated or charged.
53. The Claimant relied on the first instance Employment Tribunal case of *Bosher v EUI Limited* 1601207/2017, in which an employee who was dismissed after being charged with possession of two indecent images succeeded in a claim for unfair dismissal. I explained that a first instance decision would not be binding on the Tribunal but that it could be persuasive. Since the hearing, I have found and read the judgment, which is a helpful example of how the law might apply to the situation where an employee is under investigation by the police. However, there were differences because the employer in that case had dismissed for misconduct on the assumption that the criminal allegations were true. The employee in that case was not doing a job which would involve coming into contact with children.

54. For the Respondent, Mr Tibbitts submitted that the Respondent had a potentially fair reason for dismissing the Claimant, which was 'some other substantial reason' for the purposes of s.98(1) Employment Rights Act 1996. The Claimant was the General Manager of a family entertainment site, and his role required him to be on site. The factual reason for dismissal was that he could not carry out his role. The Respondent reasonably interpreted bail condition 5 to mean that the Claimant could not be in unsupervised contact with under-18s. The Respondent could not guarantee that every under-18 on site would be accompanied. A subset of the same reason was that the Claimant's presence on site would have been a reputational risk for the Respondent; it was a family-oriented business, the Claimant was alleged to have viewed indecent images of children and was under police investigation. Even absent the bail conditions, the Respondent could not have allowed him to carry out his role unsupervised; and practically, as he was the most senior person on site, it would have been difficult to monitor him at work. The Respondent had a genuine belief that the Claimant could not carry out his contractual role. This was a substantial, not frivolous or trivial, reason for dismissal.
55. Moving on to fairness in all the circumstances, Mr Tibbitts submitted that the Respondent had not rushed to dismiss. The Claimant's arrest was in June and the first formal hearing was not convened until October. At that time, there was no information as to when the bail conditions might be lifted. Dismissal was within the range of reasonable responses and the Tribunal should not substitute any more lenient view. A fair process had been followed. The Claimant had been warned, consulted, and given the opportunity to present any evidence he wished to. He had the right to be accompanied and was given the opportunity to adjourn if he sought to arrange an alternative companion. He was offered and took the opportunity to appeal. The Respondent considered all the alternatives to dismissal put forward by the Claimant at the dismissal and appeal stages. It was relevant to fairness, as well as the reason for dismissal, that the Claimant was the most senior employee on a family-oriented site, whose operational role required to him to be present on site, who could not practically be supervised, and who would necessarily be coming into contact with members of the public including under-18s. The Respondent had reasonable grounds for dismissing and the decision was within the range of reasonable responses. Alternatively, if there was any defect in the procedure there should be a 100% reduction of compensation to reflect the fact that the Claimant could not practicably have returned to work during the ongoing police investigation.
56. Mr Tibbitts referred me to the principles in *Harper v National Coal Board* [1980] IRLR 260, *Willow Oak Developments Ltd t/a Windsor Recruitment v Silverwood* [2006] ICR 1552, *Leach v Office of Communications* [2012] ICR 1269 and *Lafferty v Nuffield Health* EATS 0006/19. He submitted that *Bosher v EUJ Limited* 1601207/2017 was distinguishable because it concerned a misconduct dismissal.

### The law

57. Section 94 Employment Rights Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by her employer.

58. Section 98 ERA provides so far as relevant:

**(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**

**(a) the reason (or, if more than one, the principal reason) for the dismissal, and**

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

...

**(4) ... where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**

**(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**

**(b) shall be determined in accordance with equity and the substantial merits of the case.**

59. The 'reason' for a dismissal is "*a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*": *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, 330B-C, NIRC.

60. Any type of reason for dismissal may qualify under s.98(1)(b) so long as it is substantial and not frivolous or trivial: *Willow Oak Developments Ltd t/a Windsor Recruitment v Silverwood* [2006] ICR 1552. It must of course be genuinely held: *Harper v National Coal Board* [1980] IRLR 260. If there is a genuine and substantial reason which *could* justify dismissal, it is a potentially fair reason. The Tribunal will go on to decide whether the employer acted reasonably under s.98(4) in dismissing for that reason.

61. Protection of the employer's reputation may, depending on the facts of the case, amount to 'some other substantial reason' of a kind such as to justify dismissal of an employee holding the job in question: *Leach v Office of Communications* [2012] ICR 1269. However, there must be some relationship between the matters alleged and the potential for damage to reputation: *Lafferty v Nuffield Health* EATS 0006/19.

62. The 'range of reasonable responses' test applies to 'some other substantial reason' dismissal as it does to conduct dismissals. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at §16–17) held:

**'... the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see *J Sainsbury plc v Hitt* [2003] ICR 111.'**

63. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the Tribunal's view, have been appropriate, but rather whether dismissal was within the band of reasonable

responses. The fact that other employers might reasonably have been more lenient is irrelevant: *British Leyland (UK) Ltd v Swift* [1981] IRLR 91.

64. In cases where there is a procedural defect, the question that remains to be answered is whether the employer's procedure constituted a fair process. A dismissal will be held unfair either where there was a defect of such seriousness that the procedure itself was unfair or where the results of the defect taken overall were unfair: *Fuller v Lloyds Bank plc* [1991] IRLR 336; see also *Slater v Leicestershire Health Authority* [1989] IRLR 16.
65. Procedural defects in the initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness, according to the decision of the Court of Appeal in *Taylor v OCS Group Ltd* [2006] IRLR 613.
66. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness (the *Polkey* issue).
67. In *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 the EAT (Langstaff P presiding) noted that a *Polkey* reduction has the following features:

**'First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) ... The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.'**

## Conclusions

### What was the reason or principal reason for the Claimant's dismissal?

68. The set of facts known to and beliefs held by OM which caused him to decide to dismiss the Claimant were:
  - 68.1. The Claimant was subject to a bail condition "*Not to knowingly have unsupervised contact directly or indirectly with any person under the age of 18 either physically or online.*"
  - 68.2. OM believed that it would not be possible to comply with that bail condition if the Claimant were to attend work, where members of the public under the age of 18 might be unaccompanied.
  - 68.3. The Claimant's bail, subject to said condition, had been extended three times, most recently to 8 December 2021.
  - 68.4. OM believed that the police investigation was unlikely to be concluded soon.
  - 68.5. OM believed that the Claimant's attendance on site whilst under investigation could cause the Respondent reputational damage.



69. Overall, OM's reason for dismissing the Claimant was his belief that the Claimant could not carry out his contractual role.

Was it a potentially fair reason?

70. The reason was a genuine one; OM believed that the Claimant could not carry out his contractual role.
71. It was not a frivolous or trivial reason. An employee's inability to carry out his or her contractual role is a substantial reason which may be capable of justifying dismissal.
72. It was therefore a potentially fair reason within the definition at s.98(1) ERA.

Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

73. The factors relevant to fairness are as follow:

73.1. The timing of the dismissal. The Respondent says that the Claimant was suspended on full pay for 4 months before the Respondent instigated the process that led to his dismissal, and by that time there was no prospect of a resolution in the short-term. The Claimant says this was an insufficient period in circumstances where the NCA had warned the investigation would take 4 to 6 months. He was a senior employee with 19 years' good service and so deserving of some flexibility. In particular, I have considered whether the Respondent ought reasonably to have maintained the Claimant in employment but on suspension. This would have avoided any possible workplace breach of the Claimant's bail conditions or potential reputational risk of the Claimant attending work while under police investigation. It would have had an ongoing financial cost (the Claimant did not suggest to OM or CD that he would have been willing to take a pay cut). More importantly, it would have left the Respondent unable to recruit a new General Manager to the Claimant's site, during a difficult period when the company was seeking to recover from Covid-19 closures. Overall, while some employers might have waited longer, the Respondent's approach to timing was within the reasonable range.

73.2. Whether the Respondent's interpretation of the Claimant's bail conditions was reasonable. The Claimant contends that the bail condition "*Not to knowingly have unsupervised contact directly or indirectly with any person under the age of 18 either physically or online*", did not preclude him working on site because (i) he would not be working alone, and (ii) he would not make contact with unaccompanied minors. The Respondent's position is that the Claimant as the most senior person on site could not practicably be monitored, and not all under-18s attending the site would always have adult supervision. I conclude that the Respondent's interpretation was reasonable. The Claimant could not be continuously monitored while at work. As a company providing family-oriented entertainment, the Respondent had to be scrupulous in meeting its safeguarding responsibilities. While from the Claimant's perspective this felt unfair – he had no intention of breaching his bail conditions – it was reasonable for the Respondent to ensure that he was not placed in a situation that could lead to a breach.

- 73.3. The consideration of alternatives to dismissal. The alternatives the Claimant put forward during the formal meetings and on appeal were: working from home; redeployment to a different site; re-allocation to a 'special projects' role; and a job swap. I accept the evidence of the Respondent's witnesses that these matters were considered but rejected for the reasons they gave. While the Claimant could have undertaken some tasks remotely, he could not have performed his managerial role without attending the site – as he accepted during the appeal hearing. The only work available on closed sites was engineering and preventative maintenance work, for which the Claimant did not have the technical experience required. There was no 'special projects' or job swap role available at the relevant time. It may have possible for the Respondent to retrain the Claimant; but it was not outside the range of reasonable responses not to have done so. The Claimant raised in cross-examination of CD that consideration ought also to have been given to the possibilities of an unpaid sabbatical or pay reduction; however, he did not suggest to OM or CD in the relevant meetings that he would be willing to take a pay cut, and the Respondent had no contractual basis for imposing one.
- 73.4. Whether continued employment of the Claimant exposed the Respondent to reputational risk. The Claimant argued forcefully that he had not been found guilty of any misconduct and that it was premature to dismiss him before the police had even reached the stage of making a charging decision. However, as noted above, the Respondent had to be scrupulous in meeting its safeguarding responsibilities. Allowing the Claimant to return to work while under investigation for an alleged offence relating to indecent images of children, would have posed a reputational risk for the Respondent regardless of the Claimant's bail status. The matters alleged against the Claimant were directly related to the potential reputational damage (*Lafferty v Nuffield Health*) because of the family-oriented nature of the Respondent's business.
74. I do not consider OM's misunderstanding regarding the Claimant's internet bail conditions to be a relevant factor. That misunderstanding was corrected at the beginning of the first formal meeting and was not operative in OM's later decision-making process leading to dismissal. OM reasonably concluded that even though the Claimant was able to access the internet, bail condition 5 precluded him from returning to work.
75. Neither is it a relevant factor that the Claimant's bail conditions were in fact lifted on 6 December 2021. This was not within the knowledge of OM when he made the dismissal decision or CD when he made the appeal decision.
76. Overall, while some employers may have allowed a longer period of suspension in consideration of the Claimant's years of good service, the Respondent's decision to dismiss fell within the range of reasonable responses.

Did the Respondent act follow a fair procedure in dismissing the Claimant?

77. The procedural criticisms raised by the Claimant were as follow:

77.1. The practical difficulty in finding a companion when he was not a trade union member and the nature of the allegations against him meant he felt unable to disclose his situation to colleagues. It is unfortunate that after the Claimant raised the problem at the 13 October 2021 meeting, he was still sent an appeal hearing invitation with standard wording referring to being accompanied by a union representative or colleague. However, at both formal meetings prior to dismissal and at the appeal hearing, the Respondent's managers checked with the Claimant whether he was content to proceed in the absence of a companion. At the 13 October 2021 meeting, OM indicated that he would be willing to allow a different companion should the Claimant request it. The Claimant did not ask for any meeting to be adjourned so a companion could be arranged. If this was a procedural defect, it was a minor one which did not affect the overall fairness of the process.

77.2. Whether CD was an appropriate manager to hear the appeal. The Claimant's objections to CD's involvement were: that CD had been involved in his case throughout in discussion with OM; and that he felt CD was not prepared to listen to him during the appeal hearing and that the outcome was predetermined.

77.2.1. In relation to the first, while CD had been kept updated by OM, he had no prior involvement in any decision-making relating to the Claimant prior to hearing his appeal. It was the Respondent's ordinary and reasonable practice for a more senior manager in the line management chain to hear the appeal.

77.2.2. In relation to the appeal hearing, it is apparent from the documents that CD had considered the Claimant's written appeal prior to the meeting and had to an extent prepared points of objection or rebuttal to the Claimant's grounds. This resulted in the Claimant experiencing the hearing as adversarial rather than supportive. However, CD's purpose in raising these points was to enable the Claimant to respond to them and to listen to his answers. I do not accept the Claimant's submission that CD had predetermined the outcome.

78. This was not a conduct dismissal, and as such not necessarily governed by the ACAS Code of Practice on Disciplinary and Grievance Procedures. Nonetheless, the Respondent followed an equivalent procedure. The Claimant was able to state his case against dismissal during the two formal meetings with OM and on appeal. Overall, the procedure followed was within the range of reasonableness.

79. Therefore, the Claimant was fairly dismissed. In the circumstances, there is no need to go on to consider the *Polkey* issue.

80. I sincerely apologise to the parties for the delay in providing this reserved judgment and written reasons, which was caused initially by illness and then by the pressures of other work.

**Employment Judge Barrett  
Dated: 3 August 2022**