THE COURT ORDERED that no one shall in connection with these proceedings publish or reveal the name and address of the school with which this appeal was concerned or of the Governing Body of that school.

Hilary Term

[2018] UKSC 16

On appeal from: [2016] EWCA Civ 766

JUDGMENT

Reilly (Appellant) v Sandwell Metropolitan Borough Council (Respondent)

before

Lady Hale, President

Lord Wilson

Lord Carnwath

Lord Hughes

Lord Hodge

JUDGMENT GIVEN ON

14 March 2018

Heard on 12 December 2017

Appellant	Respondent
Martin Palmer	Sarah Hannett
	Anna Bicarregui
(Instructed by Spencer Shaw Solicitors)	(Instructed by Sandwell MBC Legal Services)

LORD WILSON: (with whom Lord Carnwath, Lord Hughes and Lord Hodge agree)

1.
Ms Reilly, the head teacher of a primary school, is in a close relationship with Mr Selwood but it is not sexual and they do not live together. Mr Selwood is convicted of making indecent images of children. Ms Reilly has previously been unaware of his criminal activities. She fails to inform the school's governing body of his conviction with the result that, when it learns of it, her employer summarily dismisses her. The Employment Tribunal ("the tribunal") decides that, save in an irrelevant procedural respect, her dismissal has not been unfair. Should the tribunal's decision stand?

2.
The school is now an academy but at the relevant time it was maintained by Sandwell Metropolitan District Council ("Sandwell"), which is the respondent to Ms Reilly's appeal to this court. Before the tribunal the school's governing body was a second respondent to her claim but, when it became an academy, the governing body ceased to exist and its liabilities were transferred to Sandwell. This court orders an end to its ghostly presence as a second respondent to the appeal.

3.
Ms Reilly appeals against an order of the Court of Appeal dated 19 July 2016, [2016] EWCA Civ 766, [2016] IRLR 779, in which she was referred to as "A" and Sandwell was referred to as "B local authority". By a majority (Black and Floyd LJJ, the dissentient being Elias LJ), the court dismissed Ms Reilly's appeal against an order of the Employment Appeal Tribunal ("the EAT") dated 20 February 2014. The EAT (Wilkie J presiding) had dismissed Ms Reilly's appeal against the order of the tribunal disseminated on 2 November 2012 that, save in the irrelevant procedural respect, her dismissal had not been unfair.

4.
Ms Reilly qualified as a teacher in 1987 and, prior to becoming the head teacher of the school, she had been a deputy head teacher in two other primary schools and an acting head teacher in two others. Her disciplinary record was exemplary.

5.
Ms Reilly met Mr Selwood in 1998 and they became close friends. In 2003 they bought a property as an investment in their joint names and set up a joint bank account out of which to pay the mortgage instalments. Mr Selwood lived there without making any payment to Ms Reilly. She never lived there with him but she sometimes stayed there overnight. One such night was 24 February 2009. Thus it was that, early the following morning, she was witness to the arrival at the property of the police, to their search of it and to their arrest of Mr Selwood on suspicion of having downloaded indecent images of children online.

6.
One month previously Ms Reilly had applied for the post of head teacher at the school. During the progress of her application in the following months Ms Reilly never disclosed Mr Selwood's arrest to Sandwell. It is possible that at first she considered him to be innocent of the allegations against him. But there clearly came a time, not identified in the evidence, when she realised that he was guilty and likely to be convicted; and nothing turns on when that time came.

7.
Ms Reilly was duly appointed to be head teacher of the school and she took up the position on 1 September 2009.

8.
On 1 February 2010 Mr Selwood was convicted of making indecent images of children by downloading them onto his computer. On a rating system under which level 5 is the maximum, the images were graded at levels 1 to 4. He was made the subject of a three-year community order; and of a sexual offences prevention order, which included a prohibition on his having unsupervised access to minors and a requirement to participate in a sex offender programme.

9.

Ms Reilly became immediately aware of Mr Selwood's conviction but in the following months she decided not to disclose it to the governing body of the school or indeed to Sandwell. Her close friendship with him continued. In April 2010 they went on holiday together. He named her as an authorised driver on his motor insurance policy.

10.
In June 2010 Sandwell learnt of Mr Selwood's conviction and of Ms Reilly's close relationship with him. It suspended her on full pay and in due course it summoned her to attend a disciplinary hearing to answer an allegation that, in having failed to disclose her relationship with a man convicted of sexual offences towards children, she had committed a serious breach of an implied term of her contract of employment, which amounted to gross misconduct.

11.
In May 2011 the disciplinary hearing took place. The panel consisted of the chair of the governors of another primary school and two governors of the school. Ms Reilly was represented by a solicitor. The panel upheld the allegation to which I have referred and, particularly in the light of her continuing refusal to accept that her relationship with Mr Selwood might pose a risk to pupils at the school and that her failure to disclose it had been wrong, it decided that she should be summarily dismissed. On 11 May 2011 Sandwell confirmed her dismissal with immediate effect. She appealed to an appeal panel which, in July 2011, dismissed her appeal.

12.
In August 2011 Ms Reilly presented a claim to the tribunal that her dismissal had been unfair. The substantive hearing of her claim took place over four days in September 2012, at which Ms Reilly had the benefit (which she has continued to have) of representation by Mr Palmer.

13.
In its written judgment the tribunal analysed with care the evidence placed before the disciplinary panel. It noted that in her written statement to the panel Ms Reilly had said that in 2009 and 2010 she had asked numerous people, including a police officer, probation officers and officers of other local authorities, whether she had a duty to disclose her relationship with Mr Selwood to the governing body and that their answer had been that she had no duty to do so. The tribunal found, however, that her evidence to it in this regard had been unclear; it noted that two of the probation officers identified in her statement had given statements in which they had denied that their advice to her had been as she had alleged; and it observed that, shortly after Mr Selwood's conviction, a third probation officer had, by letter, advised her that it would be wise to disclose her relationship with him.

14.
The tribunal found

a) that the reason for Sandwell's dismissal of Ms Reilly was that she had failed to disclose her relationship with a convicted sex offender;

b) that Sandwell genuinely believed that the non-disclosure amounted to misconduct;

c) that there were reasonable grounds for Sandwell's belief in that it was "obvious that for a head teacher to have failed to disclose such information to her governing body whether it is expressed in her contract of employment or not is a matter of misconduct"; and

d) that, notwithstanding Ms Reilly's exemplary disciplinary record but in the light, among other things, of her continuing refusal to accept that her non-disclosure had been wrong, her dismissal had been within the range of reasonable responses open to Sandwell.

15.
Nevertheless the tribunal proceeded to find that the hearing of Ms Reilly's appeal by the appeal panel had been so unsatisfactory as to render her dismissal procedurally unfair. In the light, however, of its conclusion that, even had the hearing been satisfactory, there was a 90% chance that her appeal would still have been dismissed, it directed that her compensation be reduced by 90% in accordance with the approach indorsed in Polkey v A E Dayton Services Ltd [1988] 1 AC 344. But the tribunal went further: pursuant to section 123(6) of the Employment Rights Act 1996 ("the Act"), it also concluded that she had contributed to her dismissal by blameworthy conduct and it assessed her contribution at 100%. Although, including in her appeal to this court, she has challenged the tribunal's conclusions in both these respects, Ms Reilly accepts that the challenge would become live only if the court were to set aside the tribunal's decision that, substantively, her dismissal was not unfair.

16.
A tribunal's inquiry into whether a dismissal is unfair is governed by section 98 of the Act. The first part of the inquiry, governed by subsections (1) to (3), is whether the employer has shown both the reason for the dismissal and that the reason relates to the employee's conduct or falls within another part of subsection (2) or otherwise justifies dismissal. In this case the employer showed the reason for the dismissal, namely the non-disclosure, and that it related to Ms Reilly's conduct.

17.
The case turns on the second part of the inquiry, governed by subsection (4) of section 98 of the Act. It provides that the tribunal's determination of whether a dismissal is unfair

"(a) depends on whether in the circumstances … the employer acted reasonably or unreasonably in treating [the reason shown by 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."

18.
A tribunal's inquiry into whether the employer acted unreasonably in treating the reason as sufficient for dismissal seems simple enough in principle, albeit no doubt often difficult in application. The later reference to a determination in accordance with the merits of the case might have suggested that the tribunal somehow had a more direct function in appraising the dismissal; but any such suggestion was dispelled in the judgments of the Court of Appeal in Orr v Milton Keynes Council [2011] EWCA Civ 62, [2011] ICR 704, at paras 62 to 64 and 91 to 98. At all events the proper approach to the inquiry under subsection (4) is now firmly established at the level of the Court of Appeal; and the parties to this appeal do not invite this court to review it.

19.
The proper approach to the inquiry under what is now subsection (4) has long been regarded to have been set out in the judgment of the EAT (Arnold J presiding) in British Home Stores Ltd v Burchell (Note) [1980] ICR 303. In the present case Elias LJ described it as the "classic formulation of the employer's obligation in misconduct cases". In the passage of the judgment at p 304 frequently cited, the EAT, through Arnold J, held that the tribunal had to be satisfied first that the employer believed that the employee was guilty of misconduct; second that it had reasonable grounds to sustain its

belief; and third that, prior to forming its belief, it had carried out a reasonable amount of investigation into the matter.

20.
It is at once apparent that the three requirements identified by Arnold J do not well fit the inquiry mandated by what is now section 98(4). It is indeed clear that, on the contrary, they were directed to the first part of the inquiry under what is now section 98(1) to (3). Unlike in the present case, in which the conduct - the non-disclosure - is an agreed fact, the employee's alleged conduct is often disputed. So it was in the British Home Stores case. The issue there was whether, which she denied, the employee in the store had dishonestly abused her right to buy its goods at a discount. To the tribunal's resolution of that disputed issue relating to her conduct, Arnold J's three requirements, which all related to belief in the employee's guilt, fitted perfectly. Applying them, the EAT held that the store had reasonable grounds for its belief that the employee had conducted herself dishonestly and - which was not separately considered because it followed so obviously - that therefore, under a precursor to section 98(4), it had been reasonable for the store to treat her conduct as a sufficient reason for her dismissal.

21.
But, although the judgment of Arnold J on behalf of the EAT in the British Home Stores case did not relate to the inquiry mandated by what is now section 98(4) of the Act, the Court of Appeal has for long applied it to that inquiry. Thus, in Foley v Post Office [2000] ICR 1283 Mummery LJ, with whom the other members of the court agreed, stated at 1287-1288 that the tripartite approach there explained by Arnold J governed not only the reason for a dismissal but its reasonableness or unreasonableness. Since then the Court of Appeal has consistently adopted the same view of the breadth of Arnold J's judgment: see for example Turner v East Midlands Trains Ltd [2012] EWCA Civ 1470, [2013] ICR 525, para 1.

22.
Nevertheless, so far as I can see albeit in the absence of full argument, no harm has been done by the extravagant view taken of the reach of the judgment of Arnold J in the British Home Stores case. In effect it has been considered only to require the tribunal to inquire whether the dismissal was within a range of reasonable responses to the reason shown for it and whether it had been preceded by a reasonable amount of investigation. Such requirements seem to me to be entirely consonant with the obligation under section 98(4) to determine whether, in dismissing the employee, the employer acted reasonably or unreasonably.

23.
On any view it is clear that the tribunal is at one remove from answering the direct question: was the dismissal unfair? Instead it must answer the question: was the dismissal within the range of reasonable responses to the reason shown for it by the employer? Indeed all appellate bodies, namely the EAT and, in this case, also the Court of Appeal and this court, are at two removes from answering the direct question. For, under section 21(1) of the Employment Tribunals Act 1996, an appeal against the tribunal's decision lies only on a point of law and therefore, in the absence of procedural error, can succeed only if for some reason the tribunal's decision was not open to it or, in other words, only if the tribunal had not been entitled to reach it. Thus, in the present case, the EAT correctly identified the question to be whether the tribunal had been "entitled to conclude that … this was a case in which dismissal did fall within the range of reasonable responses". The exercise required of an appellate body is not always easy. It might, for example, be an intellectual struggle for it to conclude: "left to ourselves, we would not have considered that the dismissal fell within the range of reasonable

responses but the tribunal was entitled to conclude that it did so." But those of us required to determine these appeals must conduct the exercise as best we can.

24.
Ms Reilly's challenge to the tribunal's decision rests primarily upon a challenge to its acceptance of the panel's conclusion that she was under a duty to disclose her relationship with Mr Selwood. Sandwell responds that the tribunal was correct to accept that she was under that duty. It seems that an employee's "conduct" within the meaning of section 98(2)(b) of the Act can precipitate a fair dismissal even if it does not constitute a breach of her contract of employment: see the observation of Phillips J on behalf of the EAT in Redbridge London Borough Council v Fishman [1978] ICR 569, 574, adopted by the EAT in Weston Recovery Services v Fisher UKEAT/0062/10/ZT at para 13. But in the present case Sandwell contends that the duty of disclosure did arise under Ms Reilly's contract of employment.

25.
Section 175(2) of the Education Act 2002 provides:

"The governing body of a maintained school shall make arrangements for ensuring that their functions relating to the conduct of the school are exercised with a view to safeguarding and promoting the welfare of children who are pupils at the school."

Ms Reilly's job description included a requirement to "advise, assist and inform the Governing Body in the fulfilment of its responsibilities" and to "be accountable to the Governing Body for the maintenance of … the … safety of all … pupils". She was therefore, as she accepts, under a contractual duty to assist the governing body in discharging its duty to exercise its functions with a view to safeguarding the pupils. Indeed the disciplinary provisions in her contract of employment identified a failure to report something which it was her duty to report as being an example of conduct which might lead to disciplinary action.

26.
But (asks Ms Reilly) where was the evidence which suggested that her particular relationship with Mr Selwood engaged the governing body's safeguarding functions? The panel proceeded on the basis that the evidence existed. The tribunal observed that it was "obvious" that her relationship engaged its functions. The EAT held that the tribunal's view was open to it, as did Black and Floyd LJJ. Elias LJ, on the other hand, held that the answer to Ms Reilly's question was that there was no such evidence.

27.
As it happens, Parliament has itself recognised that sexual offenders towards children can represent a danger to children not only directly but indirectly by operating through those with whom they associate. The Childcare Act 2006 and regulations made under it contain a good example, albeit not cited to the tribunal. Sections 34(1) and 53(1) require those providing childcare in specified circumstances for children aged under eight to be registered. Regulation 4 of the Children (Disqualification) Regulations 2009 (SI 2009/1547), made under section 75(2) of that Act, would, subject to waiver, disqualify Mr Selwood from registration. But what is significant for present purposes is regulation 9, which disqualifies from registration a person who lives in the same household as a disqualified person or in a household in which a disqualified person is employed. Although the registration provisions do not apply to maintained schools and, even if they did apply, would not have led to the disqualification of Ms Reilly, who did not live in the same household as Mr Selwood, they illumine the democratic judgement about the danger posed to children by such an offender in operating through his close associates. Although no doubt in some cases the offender can

persuade his associates consciously to assist him to gain access to children, they can, as in her judgment Black LJ observed, be quite unaware of the use which he makes of them in order to gain access. The particular case of Ms Reilly is that of a head teacher, likely to know more than any other member of staff about the pupils, their circumstances at home, their personalities, their routines at school and their whereabouts from day to day; and indeed likely to be more able than any other member of staff to authorise visitors freely to enter school premises.

28.
The tribunal found that Ms Reilly “herself knew that she was subject to a duty to disclose because she would not otherwise have made enquiries as to the circumstances in which disclosure was triggered”. The proposition is, with respect, illogical. Nevertheless her wide-ranging inquiries show how near to the border-line even she, with understandable reluctance, recognised her case to be. The objective decision-makers on the panel, all school governors, ruled that the case fell on the side of the line which required disclosure. Mr Selwood was the subject of a serious, recent conviction. The basis of his sentence was that he represented a danger to children. His relationship with the head of the school created, to put it at its lowest, a potential risk to the children. The risk required assessment. It was not for Ms Reilly to conduct the assessment; it was a function of the governors. As head teacher, she represented, as Ms Hannett on behalf of Sandwell submits, the eyes and ears of the governors in the school. Had she disclosed her relationship to them, it is highly unlikely that she would have been dismissed, still less that the tribunal would have upheld any dismissal as fair. Far more likely would have been the extraction by the governors of promises by Ms Reilly that she would not allow Mr Selwood to enter the school premises and perhaps, for example, that outside the school she would not leave information about pupils, for example stored electronically, in places where he might be able to gain access to it.

29.
In my opinion the tribunal was entitled to conclude that it was a reasonable response for the panel to have concluded that Ms Reilly’s non-disclosure not only amounted to a breach of duty but also merited her dismissal. For her refusal to accept that she had been in breach of duty suggested a continuing lack of insight which, as it was reasonable to conclude, rendered it inappropriate for her to continue to run the school.

30.
So I would dismiss the appeal.

LADY HALE:

31.
I agree entirely, for the reasons given by Lord Wilson, that Ms Reilly was in breach of her contract of employment by not informing her employers of her connection with Mr Selwood. Ms Reilly had a duty to “advise, assist and inform” the Governing Body in the fulfilment of its safeguarding responsibilities towards the school’s pupils. Those who are guilty of sexual offences against children pose a risk to the safety of other children both directly and indirectly. There are many ways in which Mr Selwood, should he choose to do so, might have used his friendship with Ms Reilly to gain access to the school’s pupils: not only through being allowed to visit the school but also through finding out information about the pupils. Reporting the connection would have enabled a serious discussion to take place about how those risks might be avoided. There is no reason to think that it would have been a resigning matter. Issues could have been identified and solutions found. It is the absence of that full and frank disclosure and discussion which was the cause for serious concern. And it is the absence of

any acknowledgement of what she should have done which makes the decision to dismiss her reasonable, indeed some might think it inevitable.

32.
The case might have presented an opportunity for this court to consider two points of law of general public importance which have not been raised at this level before. The first is whether a dismissal based on an employee's "conduct" can ever be fair if that conduct is not in breach of the employee's contract of employment. Can there be "conduct" within the meaning of section 98(2)(b) which is not contractual misconduct? Can conduct which is not contractual misconduct be "some other substantial reason of a kind such as to justify the dismissal" within the meaning of section 98(1)(b)? It is not difficult to think of arguments on either side of this question but we have not heard them - we were only asked to decide whether there was a duty to disclose and there clearly was.

33.
Nor have we heard any argument on whether the approach to be taken by a tribunal to an employer's decisions, both as to the facts under section 98(1) to (3) of the Employment Rights Act 1996 and as to whether the decision to dismiss was reasonable or unreasonable under section 98(4), first laid down by the Employment Appeal Tribunal in British Homes Stores Ltd v Burchell (Note) [1978] ICR 303 and definitively endorsed by the Court of Appeal in Foley v Post Office [2000] ICR 1283, is correct. As Lord Wilson points out, in para 20 above, the three requirements set out in Burchell are directed to the first part of the inquiry, under section 98(1) to (3), and do not fit well into the inquiry mandated by section 98(4). The meaning of section 98(4) was rightly described by Sedley LJ, in Orr v Milton Keynes Council [2011] ICR 704, at para 11, as "both problematical and contentious". He referred to the "cogently reasoned" decision of the Employment Appeal Tribunal (Morison J presiding) in Haddon v Van den Burgh Foods [1999] ICR 1150, which was overruled by the Court of Appeal in Foley . Even in relation to the first part of the inquiry, as to the reason for the dismissal, the Burchell approach can lead to dismissals which were in fact fair being treated as unfair and dismissals which were in fact unfair being treated as fair. Once again, it is not difficult to think of arguments on either side of this question but we have not heard them.

34.
There may be very good reasons why no-one has challenged the Burchell test before us. First, it has been applied by Employment Tribunals, in the thousands of cases which come before them, for 40 years now. It remains binding upon them and on the Employment Appeal Tribunal and Court of Appeal. Destabilising the position without a very good reason would be irresponsible. Second, Parliament has had the opportunity to clarify the approach which is intended, should it consider that Burchell is wrong, and it has not done so. Third, those who are experienced in the field, whether acting for employees or employers, may consider that the approach is correct and does not lead to injustice in practice.

35.
It follows that the law remains as it has been for the last 40 years and I express no view about whether that is correct.