

JB1



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr A D James

AND

Lloyds Bank Plc

HELD AT: London Central

ON: 26 to 28 April 2017

EMPLOYMENT JUDGE: Miss A M Lewzey

Representation

For Claimant: Mr J Mitchell of Counsel

For Respondent: Mr S Crawford of Counsel

JUDGMENT having been sent to the parties on 2 May 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant Mr A D James was employed by the Respondent for over 35 years from 8 September 1980, latterly as Visa Relationship Manager, until 16 December 2015 when he was dismissed. He presented his Claim Form to the Employment Tribunal on 18 April 2016 claiming unfair dismissal.

The Issues

2. The issues for determination by the Tribunal are:

2.1 What was the reason for dismissal?

2.2 Was the dismissal a fair dismissal under Section 98 (4) of the Employment Rights Act 1996?

This being a conduct related to dismissal, the Respondent must have a genuine belief based on reasonable grounds following an inadequate investigation.

Evidence

3. I heard evidence from the following witnesses called on behalf of the Respondent, each of whom gave evidence by means of a written witness statement:

Mr J Taylor, Senior Manager
Ms A Melville, Senior Manager
Mr J Hayward, Marketing Planning Director

4. I heard evidence from Mr James, the Claimant, who gave evidence by means of a written witness statement.

5. I also have before me an agreed bundle to which I refer by use of the relevant page numbers.

The Material Facts

6. Mr James started his employment on 8 September 1980.

7. The Respondent had a Group Information and Cyber Security Policy (45-56) together with a Group Information and Cyber Security Procedure (56a – 56i) and Acceptable Usage Responsibilities (41 – 44).

8. The Respondent's Disciplinary Policy dated 30 October 2015 (32-40) provides amongst other things:

“... Where the allegations under investigation are complex, confidential, sensitive or of a regulatory nature, a specialist investigatory team may be involved.

.....

The colleague will be given all relevant documentation in advance of the meeting to enable them to understand the allegations against them and to allow them to prepare. Documentation may be redacted or released on a restricted basis to comply with data privacy, regulatory or commercial sensitivity requirements as necessary.”

9. Mr James worked at the Respondent's Bishopsgate Office between Monday and Wednesday and worked at home on Thursdays and Fridays. When working at home he logged into the Respondent's computer system using a Virtual

Private Network (“VPN”) which connected through his home broadband. Mr James had an old, slow laptop which threw him out of the VPN a number of times a day. With the agreement of his line manager, Ms Hiral Patel, he requested a new laptop.

10. On 15 July 2015 Mr James was given a refurbished laptop as a replacement. He showed it to his wife who noted that the MacAfee icon did not show in the bottom task bar. Mr James first used the new refurbished laptop on 16 July 2015.

11. On dates between 16 July and 9 October 2015 inappropriate searches to pornographic sites were reported as having been carried out from the refurbished laptop. On 4 October Cyber Security Management reported suspicious searches (76-78).

12. On 6 October Ian Armitage, a manager in the colleague conduct management team, emailed Ms Hiral Patel about access to the websites in the following terms (75 – 76):

“...
Going forward you need to engage HR A & G to get guidance on the conversation that you will have with Alan before it happens. Disciplinary process wise, the decisions will rest with you and your BU. Doing this right at this stage is important from both an educational and awareness point of view and from a repercussion point of view. We would like to think that once he is made aware of the issue he will stop, but if he does not and the next time is worse, then this incident may be reviewed for process adherence.”

13. On 8 October 2015 and 9 October 2015 Mr James is alleged to have viewed pornography. On 9 October 2015 exchanges took place between Mr Chadwick, Group Security and Fraud Contractor, Mr Raghimi of IT Security and Mr Armitage recording the connections to the PC and suggesting the use of a Google search engine. Further exchanges took place on 12 October 2015 (87-88) between Mr Chadwick, Mr Raghimi and Mr Armitage in which they discussed malware and concluded that they would need to see the machine to identify whether malware was involved.

14. On 14 October 2015 Mr James was called to a meeting with his line manager, Ms Patel and Mr Andrew Ducker and notified that he was being investigated for breach of the disciplinary policy between 16 July and 9 October 2015. He was told that the matter was confidential and Ms Patel and Mr Ducker asked for his laptop, which he returned to them. Mr James was shocked and went for a walk for some one and a half hours and then asked for a further meeting with Ms Patel and Mr Ducker. At that meeting he raised the point that staff know that such sites are blocked so if they wished to visit them they would use their personal devices because the sites would be blocked. He made an offer for the Respondent to come to his home to check his personal devices. On the following day, 15 October, Mr James told Ms Patel that he had told his wife about the situation, notwithstanding the confidentiality requirement.

15. On 15 October 2015 the first investigatory meeting took place before Mr Taylor as investigator (101-106). Mr James repeated the points that he had already made the previous day to Ms Patel and Mr Ducker. The second

investigatory meeting with Mr Taylor took place on 19 October 2015 (104). The minutes of both meetings were contained in one document (101-106).

16. On 22 October 2015 a forensic report was prepared by Mr Neil Montgomery (107-110) concerning machine number 057A1206894 which was Mr James' laptop. The report conclusions state:

"From an examination of the forensic disk image, it is the view of this investigator that there was been the manual use of either the search bar or the main Google search page (<http://www.google.co.uk>) to search for adult content. The volume of requests recorded is indicative of "Google Instant Predictions" where a search request is transmitted prior to the user pressing the enter key or go button within the browser".

17. On 2 November 2015 a third investigatory meeting took place with Mr Taylor (111-120). On this occasion Belinda Garrett of HR was in attendance to provide HR support. Ms Garrett took part in the meeting and expressed her views during the course of the meeting, including (117):

"BG: IT's view is that either you or someone else using your computer has done this. There is no malware or virus. If that where the case instead of saying denied it would have said infected".

18. On 3 November 2015 Mr James emailed Mr Taylor with questions concerning the IT Report (163-164). On 4 November Mr James sent an amended note of the meeting. His amendments were accepted by Ms Garratt on 6 November. Mr James sent further questions on 9 November (161) to which Mr Taylor replied saying that Ms Garratt would find out and that he would not be involved in the matter any further. The questions included a question about what "internettest.fibrelink.com" was.

19. On 18 November 2015 Mr James emailed Ms Garratt asking for an update to his questions. The response from Ms Garratt (160) was:

"I have asked for some further information from IT to help answer your previous questions – we will be in a better position to then be able to cover your questions within the disciplinary meeting".

20. On 20 November 2015 a second forensic report was issued (145-152) but was not provided to Mr James at that time. This report covered machine number 057A1206894. The Report states (147):

"The Google search parameters have been extracted from the raw URL to better identify the evidence.
Using the example above, the 'Query in Progress' column indicates text being grabbed by Internet Explorer and transmitted to Google as part of 'Google Instant Predict', a feature used to suggest suitable searches based on what the user is entering into the search box."

The conclusion reads (151):

"From an examination of the forensic disk image it is the view of this investigator that there has been the manual use of either the search bar or the main Google search page ... to search for adult content and circumvent normal webfilter in categorisation. This has happened on occasions where the laptop has been outside the LBG premises connected to the network via the use of an approved VPN solution."

21. By a letter dated 25 November 2015 Ms Melville wrote to Mr James inviting him to a disciplinary hearing on 3 December (167-169). The letter sets out the details of the allegations, including specifying matters identified from the forensic analysis of the work station which include:

“On Thursday 8 October 2015 you viewed numerous pornographic images between 11.10 and 12.10 and between 14.05 and 14.37”.

22. On 26 November, Mr James emailed Ms Garratt (158-159) raising the issue that originally the meeting was to be an investigatory meeting but was now a disciplinary meeting. He also asked for the answers to his questions and whether he could bring a colleague. On 26 November (155) Ms Garratt sent a response to Mr James’ questions.

23. The disciplinary hearing took place on 3 December 2015 before Ms Melville with Ms Garratt as note-taker (174-186). Mr James was accompanied by Ms Patel who supported his integrity and said that the conduct was out of character. They also asked if searches had been conducted on Mr James’ previous laptop. There was an adjournment between 2.55 and 3.20pm while Ms Melville and Ms Garratt consulted IT. The meeting reconvened after they had done so. The notes record (181 & 183):

“AM apologised for the delay. AM advised that she had spoken to IT. In regard to the previous laptop, there is a proxy server but we only keep data for about 3 months. We confirmed AJ’s laptop was rebuilt on 10/7/15 and because only 3 months data is kept they did not have the capacity to go back

.....

AM: As you have repeatedly denied any inappropriate activity I must advise you that there is some further evidence that IT have obtained from your laptop which has not been shared with you or I prior today due to the explicit nature of the content.

Belinda has some of this evidence in a sealed envelope. I propose to take a short break now so that I can review this evidence. I will then make the information available to you to review. Then we will have the opportunity to discuss it.”

The meeting adjourned at 3.25 and at 3.45. Ms Melville asked Ms Patel to leave the room so that Mr James could review the further evidence which she gave to him. Ms Patel rejoined Mr James at 4.05 and the meeting reconvened at 4.15.

24. On 7 December 2015 Mr James raised questions with Ms Garratt and Ms Melville by email (198). These questions were referred to Derek Whigham of IT Cyber Security. Mr James raised the possibility of a home visit (202):

“Despite offering to have someone from LBG IT check my personal home computers, there has been no appetite to do so. I have therefore for my own piece of mind engaged someone to take a look and nothing unusual was found.”

The answer was:

“LBG Group IT cannot undertake any investigation on devices not owned by LBG. Likewise we cannot comment on any independent analysis. Forensics toolset utilised by a group IT Cyber Security is the same as that utilised by the Police and Forensic

Investigators have been trained at Napier University Cyber Academy which has GCHQ accreditation.”

Mr James also asked:

“While I appreciate that IT would have performed extensive tests on the laptop, I am curious to know whether they have tested it through a personal wifi connection to replicate my situation.”

The response was:

“This is an option which is technically available. Forensic clone of a hard disc (to maintain the originals integrity) can be utilised for the purposes of booting in to windows.

However, it would require an authentication to the pulse secure VPN gateway as the colleague in order to fully replicate. In the interests of fairness, this is best handled with suitable independent witnesses and/or legal approval. In order to fully replicate known instances of the events, it would be advised to connect to the colleague’s home network on a Thursday/Friday.”

25. Ms Melville issued the rationale for her decision following the disciplinary meeting (212-215), in which she recommended dismissal without notice. That rationale also records the alleged incident on Thursday 8 October 2015 which was never put to Mr James.

26. On 15 December 2015, Ms Melville wrote to Mr James dismissing him (216-220). Again, her letter includes reference to the incident on 8 October 2015, for which no evidence had been provided to Mr James at any time. The dismissal was with effect from 16 December 2015.

27. Mr James appealed against his dismissal on 23 December 2015 (222-224). He cited the decision, the process, denial of the opportunity to defend himself, no challenge made to the views of the IT Department, not being given the relevant documents and being provided with the second forensic report during the course of the meeting, as grounds for appeal. In addition, he complains that only 3 months data was relied upon.

28. By letter dated 7 January 2016 Mr James was invited to an appeal before Mr Hayward, with the appeal fixed for 28 January 2016 (225).

29. On 12 January 2016 Mr Montgomery emailed Ms Garratt with his comments on the appeal (228-231). On 18 January 2016, Mr James emailed Ms Garratt (237) asking for various people to be interviewed. Ms Garratt passed this to Mr Hayward.

30. On 25 January 2016 Mr James emailed Ms Garratt (233-235) confirming receipt of zip downloads and raising the fact that an immense amount of information had been provided and asking for advice as to how to map across in order to assimilate it. Ms Garratt passed the matter to Mr Montgomery asking him to assist. On 27 January 2016 (477) Ms Garratt emailed Mr James responding to his questions.

31. The appeal hearing took place before Mr Hayward and Ms Garratt on 28 January 2016. I have a consolidated version of the notes (514A) which show the

differences between Mr James' version and Ms Garratt's version in a number of important respects. Mr James raised further questions which Ms Garratt forwarded to Derek Whigham (515-516). Answers were provided by Mr Montgomery (518-540). Of note is the response (521) which reads:

"Each entry on the log of 3 September states "VPN Tunnelling; Sessions started for user with IPV4 address 10.90.193.22 host name 057A0120964. This includes the host name of the laptop together with the virtual IP assigned to the laptop which is used to route network traffic to and from the LBG Estate."

It is notable that the laptop number is not the laptop number of the refurbished laptop that Mr James had been issued with.

32. Mr Hayward sent the appeal outcome letter dismissing Mr James' appeal on 17 February 2016 (541-543) amongst other things the letter states:

"On the basis of this evidence, the only conclusion that can be drawn is that you, as the only person who has access to the laptop were responsible for making the searches."

Submissions

33. I had before me opening skeleton arguments from both Counsel and a closing skeleton from Mr Mitchell on behalf of Mr James. Mr Mitchell told me that all his arguments were contained in his opening and closing skeletons. Mr Crawford, for the Respondent addressed me orally. I have taken the submissions fully into account in reaching my conclusions.

Conclusions

34. The first matter is the reason for dismissal. This is a claim for unfair dismissal under Section 98(1) and 98(2) of the Employment Rights Act 1996. There is no dispute that the reason for dismissal is conduct. This is a potentially fair reason for dismissal under Section 98(2)(b) of the Employment Rights Act 1996.

35. The issue of fairness is determined pursuant to Section 98(4) of the Employment Rights Act 1996 which provides:

"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."

36. It is not for me to substitute my own view for that of the Respondent. The test is whether dismissal for the reason found fell within the range of reasonable responses. This being the conduct related to dismissal for guidance given in

British Home Stores v Burchell [1978] IRLR 379 EAT applies. The Respondent must have a genuine belief based on reasonable grounds following an adequate investigation. There is also an issue as to whether the sanction fell within the range of reasonable responses. I have considered each of these issues in turn.

37. On the evidence, I am satisfied that Ms Melville and Mr Hayward had a genuine belief in the conduct concerned based on the IT material. The issue is whether Ms Melville and Mr Hayward had reasonable grounds for that belief and whether the investigation was adequate.

38. Mr Mitchell for Mr James relies on **Whitbread plc v Hall [2001] IRLR 275 CA**. In that case the Court of Appeal held that the EAT had not erred in holding that although dismissal was within the range of reasonable responses, the process was so flawed as to render the dismissal unfair. Reasonableness relates to the outcome in terms of both penalty and process.

39. I have also been referred to the decision of Elias P as he then was in **A v B [2003] IRLR 405** that:

“Anything less than even handed approach to the process of investigation would not be reasonable in all the circumstances.”

40. Mr Crawford argues that the Respondent reached its conclusion, but that Mr James is in denial, and that two investigation reports were both detailed and thorough, that the findings of the IT investigations linked to Mr James and accordingly the dismissal was fair. He accepts that there are unusual aspects to the procedure, but argues that Mr James would have been dismissed in any event relying on **Polkey**. Mr Mitchell sets his arguments out in his closing note.

41. In determining the reasonableness of the belief and the adequacy of the investigation, I take the following matters into account:

41.1 This was a complex IT case, but on the evidence of Mr Taylor, no specialist investigatory team was appointed. There were two forensic reports from IT and questions raised with IT as and when they arose.

41.2 The Respondent did not look at the evidence that might have exonerated Mr James. Amongst other things he asked them to attend to test the equipment at his home, but this was not done.

41.3 Mr Taylor had no notes of his conversations with either Ms Patel or with IT.

41.4 The minutes of 15 October and 19 October 2015 are combined into one document so that Mr James did not see the minutes of 15 October meeting in advance of the 19 October meeting.

41.5 The first forensic IT Report was not provided in advance of the meeting on 2 November 2015.

41.6 Mr James was never provided with any documents for 8 October 2015, despite this being one of the dates on which the laptop accessed pornographic sites, and this was not referred to in the meetings with Mr Taylor. Nonetheless one of the charges against Mr James was in relation to 8 October and the access on 8 October is referred to as one of the reasons for dismissal in the dismissal letter.

41.7 In Mr Taylor's conclusion (144) he said that the colleague, i.e. Mr James, denied accessing the websites, but that IT state he must have done so as there was no other explanation, for example malware. This was raised by Mr James on a number of occasions in view of the fact that the refurbished laptop was exactly that. It was refurbished and no evidence was provided of its provenance.

41.8 Mr James raised questions, but Mr Taylor concluded his investigation without the answers to those questions and Ms Garratt merely said that answers would be provided within the Disciplinary Hearing.

41.9 In evidence before this Tribunal, Ms Melville relied on her beliefs rather than answering all the questions clearly. Her evidence was not unequivocal.

41.10 Ms Melville said that she did not have Mr James' previous laptop, but there is no evidence of there having been any search, or evidence that the laptop was not available. This would have been important evidence, both in Mr Taylor's investigation, the subsequent disciplinary and appeal hearing, and indeed, before this Tribunal.

41.11 There is no evidence as to whether the refurbished laptop had had any previous problems of this nature.

41.12 There is a clear issue in relation to the second forensic report dated 20 November. This refers to the wrong work station on the front page but no explanation has been provided.

41.13 It is noted that in answers to questions (531) IT states answers to questions put by Mr Hayward:

“Fundamentally, malware is programme, like any other programme. Microsoft Windows is itself nothing more than a large collection of programmes in libraries (which are programmes that don't run in their right but contain functions called by other programmes).

Technically anything is possible in the programme. However, in order to execute, the malware must either:-

- Be started manually by a user.
- Create an entry in one of the locations Microsoft Windows looks into start programmes. ... none of the above were impossible on their own, however if this is indeed malware then it is extremely efficient and well targeted.”

The reference leaves a possibility that malware could have been involved, but this was not investigated.

41.14 The Respondent did not provide Mr James with a timely or fair access to the evidence, in breach of its own policies and the ACAS Code. Ms Melville stated in the disciplinary hearing that IT had confirmed it was not possible for information to be wrong or caused by malware or compromise of the wifi. However, the host name is wrong in the second report and there is reference to evidence of some malware (219) and also a reference to evidence of standard applications repairing themselves. These matters were still at issue at the time of the final report (532).

41.15 Mr James was not provided with legible copies of the computer logs. He has supplied a copy of the version he was supplied with attached to his witness statement, which I find totally illegible.

41.16 Mr James was not allowed access to the laptop in order to obtain an independent report. His request was refused.

41.17 The second forensic report was provided some one and a half hours into the disciplinary meeting and Mr James was given only 15 minutes in which to read it. The report was technical and Mr James had no opportunity to have independent advice or time in which to assimilate its contents. Mr Crawford suggests that Mr James could have asked for a postponement. Indeed, it was incumbent for Ms Melville and Ms Garratt to offer a postponement in those circumstances, but they did not do so. This was a situation where Mr James' career was at stake. In addition, Ms Melville adjourned in order that she could have conversations with IT, but no notes of these conversations were provided to Mr James.

41.18 The appeal to Mr Hayward was a review, but never resolved the anomaly of the computer host name. In addition, there were issues concerning the minutes and I have a copy that shows the differences between Ms Garratt's and Mr James' versions.

41.19 This was a highly technical matter. Mr James raised questions of IT which were not addressed fully or on a timely basis.

41.20 Confidentiality was required of Mr James so it was difficult for him to obtain advice. He is a user and not an IT expert. Like many people, he does not have technical expertise in this area.

41.21 Ms Garratt was not just a note-taker at the Disciplinary Hearing. On the evidence before me she was an active participant.

41.22 Finally, Mr James had 35 years service with no previous disciplinary record. His career was at stake and should have been taken fully into account.

42. The overall position is that with such a highly technical IT issue, the investigation was neither reasonable nor adequate.

43. I have been referred to two further authorities. The first is **Daley v Bakiyev [2016] EWHC 1972 QB** at paragraphs 27 and 31 concerning the balance of probabilities and the weighing of evidence and drawing of inferences. The more

serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and to prove it.

44. Mr Crawford refers me to **Shrestha v Genesis Housing Association Limited [2015] EWCA Civ 94** at paragraph 23 in which Richards LJ stated in relation to the **Burchell** test that what mattered was the reasonableness of the overall investigation into the issues.

45. I am not satisfied that the Respondent conducted a reasonable or adequate investigation and, in those circumstances, it is my judgment that the dismissal was substantively and procedurally unfair.

Remedy

46. The issue is what award should be made to Mr James as compensation for his unfair dismissal.

47. The parties agree that the basic award is calculated on a weekly figure of £479.00. There were 10 years when Mr James was aged between 42 and 52 and therefore the calculation is $10 \times 1.5 \times 479$ which amounts to £7,185.00. There were 20 years between age 22 and 42. The calculation is $20 \times 1 \times 479 =$ £9,580.00. The total is £16,765.00, but the statutory cap is £14,700.00. I therefore award £14,700.00 as the basic award.

48. The next matter is the compensatory award. The statutory cap is £38,022.00. This is calculated by taking £3,168.50 per month $\times 12$ and dividing by 52 which comes to £731.19 multiplied by 52 weeks.

49. I do not have net pay figures for the compensatory award provided by the parties, but the net pay figure on the final payslip (552) is £2,399.10. Multiplying by 12 and dividing by 52 gives a net weekly pay figure of £553.63. There are 26 full weeks between 16 December 2015 and 20 June 2016 when Mr James commenced his new employment. 26 weeks at £553.63 net per week is £14,394.38, which is the prescribed element of the compensatory award.

50. Mr Crawford argues that Mr James failed to mitigate his loss. On the evidence, Mr James secured another job within six months. There is evidence before me of considerable effort to find another job. It is for the Respondent to prove that Mr James did not mitigate his loss. It is also relevant to consider that Mr James had been dismissed for gross misconduct after 35 years of loyal service. I am satisfied that there has been no failure to mitigate and I make no deduction for failure to mitigate.

51. In relation to the mortgage issue, Mr James has not moved his mortgage to another provider other than the Respondent. With the candour that he has shown throughout his evidence, he says that he wanted to get beyond the Employment Tribunal hearing. He may well take action in future. I make no deduction in respect of his loss of the staff mortgage discount.

52. Net pay to the 19 June 2016, when Mr James secured new employment, was £14,394.38. The total unmitigated loss relating to Mr James staff mortgage discount claimed is $200 \times 12 \times 14$ which amounts to £33,600.00 plus Mr James' additional mortgage costs because of his removal of the Respondent's mortgage scheme. I award the sum of £154.89 for loss of benefits in respect of medical insurance and £183.45 in respect of share match.

53. I award £350 in respect of loss of statutory rights.

54. The total compensatory award is £ 48,681.83. The compensatory award is capped at £38,022.00.

55. In those circumstances the total award to Mr James is £14,700.00 in respect of the basic award and the capped compensatory award of £38,022.00 making a total of £52,722.00. The Recoupment Regulations apply to this award. For recoupment purposes the grand total of the award is £52,722.00. The prescribed element of £14,394.38 must be reduced by the formula $P \times \text{capped award} / \text{total compensatory award}$, where P equals the loss of wages to the date of assessment. This is $£14,394.38 \times £38,022 / £48,681.83 = £11,242.01$ which is the reduced prescribed element for recoupment purposes. The period of the prescribed element is from 16 December 2015 to 19 June 2016.

56. I order the Respondent to pay Mr James the Tribunal fees of £1,200.00.

**Employment Judge Lewzey
23 May 2017**