Case Number: 2501324/2016

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr P Cunningham	**AND**	**Her Majesty's Revenue & Customs (HMRC)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **Middlesbrough** **On: 23, 24, 25 May 2017 and 7 June 2017**

Before: **Employment Judge Shepherd**

Appearances

For the Claimant: **Ms Millns**
For the Respondent: **Ms Callan**

JUDGMENT

The judgment of the Tribunal is that the claim of unfair dismissal is not well founded and is dismissed.

REASONS

1 The claimant was represented by Ms Millns and the respondent was represented by Ms Callan.

2 I heard evidence from:

Louise Wright-Johnson Higher Officer ;
Paul Pemrick, Senior Officer;
Laura Woods, Operations Lead;
Nigel Jessop, Trade Union Representative;
Philip Cunningham, the claimant.

3 I had sight of a bundle of documents which, together with documents added during the course of the hearing was numbered up to page 952. I considered those documents to which I was referred by the parties.

4 The issues to be determined by the Tribunal were discussed at the commencement of the hearing and agreed. The claimant brings a claim of unfair dismissal only. There was an actual dismissal and the respondent maintained that this was on the ground of the claimant's conduct. I had to determine whether the reason for dismissal was that of conduct and, if so, whether the respondent held a genuine belief in the claimant's guilt on reasonable grounds after a reasonable investigation and whether his dismissal was within the band of reasonable responses available to the respondent.

5 Having considered all the evidence, both oral and documentary, I make the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings I made from which I drew my conclusions.

5.1 The claimant was employed by the respondent as a tax collector from 2 April 1991.

5.2 On 12 May 2016 the respondent's Anti-Fraud Assurance Team(AFAT) provided a report which indicated that a potential misuse of the respondent's corporate system by the claimant had taken place. It was indicated that it had been identified that there was a potential unauthorised access by the claimant to the self-assessment records of one of his neighbours.

5.3 On 15 June 2016 Paul Pemrick wrote to the claimant informing him that Mr Pemrick had been appointed as the Decision Manager in an investigation into the claimant's alleged misconduct. It was stated that

> "The incident is an allegation of unauthorised access to a Self Assessment record that occurred on the 23 March 2016. If the allegation is founded then this would be treated as gross misconduct as all incidents of potential computer misuse are taken very seriously and may lead to your dismissal."

It was also indicated that Louise Wright-Johnson had been appointed as the investigator and would be in touch to arrange a date when she could interview the claimant.

5.4 Louise Wright-Johnson wrote to the claimant on 29 June 2016 indicating that she had been appointed to investigate the alleged misconduct and inviting the claimant to an investigation meeting. It was stated:

> "Because there is a possibility that the disciplinary process you are undergoing could lead to your dismissal, I need to give you some information about the Cabinet Office Internal Fraud Hub (IFH).
> The misconduct alleged against you appears to fall within the Cabinet Office definition of internal fraud. The full definition is as follows:
> 1. Dishonest or fraudulent conduct, in the course of employment in the Civil Service, with a view to gain for the employee or another person;
> 2. For employees of HMRC, this includes dishonest or fraudulent conduct relating to tax, duties, contributions or payments administered by HMRC, even if not connected with employment.
> If, as a result of the disciplinary process, it is concluded that you are guilty of internal fraud and that dismissal is the appropriate sanction, your details will be sent to the Cabinet Office for inclusion on their IFH database."

5.5 The claimant attended a meeting with Louise Wright-Johnson on 6 July 2016. The claimant was accompanied by Gary Flakes, Trade Union Representative. The claimant admitted that he had accessed the customer records. He had been approached by a neighbour who had given the claimant authority to access his records. After a short break in the meeting the claimant indicated that he was sorry and that he had never done anything like that. It wasn't on purpose and it was not malicious. He had had stress with regard to the scoring on his PMR and the illness of his parents.

5.6 The claimant's Trade Union Representative said that the claimant was naive, they had a difference of opinion on what authority was and the claimant had then accepted Mr Flake's version and had apologised for it. It was said that it was an oversight on the claimant's part and that he had accessed the record for a couple of minutes and thought he had the customer's authority. He had a long service record of 26 years. He had a good record with no previous misdemeanours. The claimant thought that he was doing the right thing and he was now fully aware of the consequences.

5.7 On 21 July 2016 Louise Wright-Johnson completed her investigation report and sent it to Paul Pemrick. It was indicated that:

> "Following full review of the AFAT report, the meeting evidence, mitigation and the fact that Craig admitted accessing the records, yes I believe there is sufficient evidence and a case to answer."

5.8 The claimant attended a Discipline Decision Meeting with Paul Pemrick on 9 August 2016. The claimant was accompanied by his line manager, Eric Hindmarsh.

5.9 On 15 August 2016 Paul Pemrick wrote to the claimant setting out his decision. Mr Pemrick was on annual leave from 22 August 2016 to 30

August 2016. When he returned to work he found that Royal Mail had returned the letter and a further copy of the decision letter was then sent to the claimant on 25 August 2016.

5.10 The letter informed the claimant that he was dismissed with immediate effect. The letter enclosed notes of the meeting and the decision manager's deliberations.

In those deliberations Mr Pemrick referred to various policies with regard to confidentiality and customer privacy and conflict of interest. In the deliberations it is stated:

> "I have taken into account the mitigation presented by Mr Cunningham in regards to the domestic issues he currently faces as well as the issues relating to his end of year performance marking. However, I can find no direct causal link between the mitigation evidence provided and the actions taken in accessing a record without authority"
> Mr Cunningham did not initially admit the allegation in that he saw no wrongdoing in accessing a customer record as he believed he had authority to do so from the customer. Although Mr Cunningham has since admitted the allegation, my concern is that this may now be as a result of this investigation and calls into question his judgment and integrity. There was also an initial lack of recognition that his actions could be viewed as an actual or perceived conflict of interest as Mr Cunningham did not see fit to follow existing processes in his business area for reporting potential conflicts of interest.
> In his actions the jobholder has compromised the Civil Service Code of Conduct of Integrity and Honesty. Although the action may not have been intended for personal gain, the actions taken do break trust in his ability to undertake the job role responsibly. In taking these actions, this brings into question trust, honesty and integrity, and could damage the reputation of HMRC to the general public.
> As a HMRC officer with over 25 years' experience in the department and working in a role dealing with sensitive and large value cases, the expectations from the Department are a lot higher than you have demonstrated in this instance.
>
> Decision
>
> I have decided that your actions represent an act of gross misconduct, as per HR 23007 in that you did knowingly access the records of your neighbour without a clear and unambiguous business reason to do so. The penalty is dismissal without notice."

5.11 Within the letter of dismissal it was also stated:

> "Because you are being dismissed as a result of conduct which is covered by the Cabinet Offices definition of internal fraud, details of your dismissal will be sent to the Cabinet Office for inclusion on their database of civil servants dismissed for internal fraud."

5.12 The claimant appealed against his dismissal and the appeal was heard by Laura Woods, Operations Lead.

5.13 In his letter of appeal the claimant referred to a number of perceived procedural errors and indicated that, with regard to the decision to dismiss, the claimant referred to the Decision Manager as placing inappropriate weight on the question of his honesty despite his contention about what he thought at the time of the computer access about the question of whether or not he had authority of his neighbour to make the access. He stated:

> "The difference is that, initially, I was of the view that the access was authorised because I had the taxpayer's authority and I later changed my view as to whether the action of the neighbour (in giving me that authority) constituted a clear, unambiguous business need to access that record and, by applying my mind to that question in a much more rigorous way, I concluded that the authority given to me by the tax payer did not meet those exacting criteria."

He went on to say:

> "I fully accepted that I should not have accessed the account, irrespective of the fact that the customer gave permission for me to go into the account for a general tax query, because he was not a customer within my workload and he was a neighbour of mine. The incident happened whilst I was suffering a great deal of stress and anxiety.
> I do not consider that sufficient weight or consideration has been put on to my mitigating circumstances for accessing the record."

5.14 The appeal hearing took place on 17 October 2016, the claimant was accompanied by Nigel Jessop, his Trade Uunion representative.

5.15 The claimant provided a copy of information obtained by way of a Freedom of Information request which gave details of the number of computer misuse cases investigated by HMRC. It was confirmed that the data referred to unauthorised access to HMRC systems by employees where employees had accessed HMRC systems or customer records that they were not entitled to view as part of their normal duties. The figures produced were in respect of the calendar years 2014, 2015 and the period of 1 January 2016 to 9 September 2016. The figures did not provide any details of the specific cases. Laura Woods indicated that she discussed the position with HR who informed her that, although they could not provide case specific information, in cases of computer misuse where the

penalty was not dismissal, it was said that the decision-maker had reported strong mitigating evidence to support the lesser penalty, such as direct causal link between the mitigating evidence and the misconduct before dismissal could be avoided. Laura Woods indicated that she concluded that Mr Pemrick had fully considered the mitigation given and correctly reviewed that there had to be a strong causal link.

5.16 Laura Woods upheld the decision to dismiss but she upheld the claimant's appeal in relation to his inclusion on the HMRC internal fraud database.

5.17 On 21 October 2016 Laura Woods wrote to the claimant indicating that his appeal was not upheld and enclosing notes of the appeal meeting and her deliberations.

5.18 On 16 December 2016 the claimant presented a claim to the Employment Tribunal in which he brought a complaint of unfair dismissal.

5.19 The respondent has an Acceptable Use Policy in which it is made clear that the employee must not access or attempt to access customer information unless the employee has a legitimate business reason to do so. When an employee uses the respondent's computer system a pop-up screen arises in which the employee is required to do as follows:

> "You must read HMRC's Acceptable Use Policy
> You must not access, or attempt to access, customer information (including use of tracing tools) unless you have a legitimate business reason to do so.
> …
> Use of HMRC's computers is monitored routinely. If you breach HMRC's rules you may be disciplined for gross misconduct.
> In certain circumstances you may have committed a criminal offence and could be prosecuted.
> You must speak to your line manager if you have any questions."

5.20 Within the respondent's Acceptable Use Policy it is made clear that the employee must only access the customer record where they have a clear and unambiguous reason for doing so. Any breach of the policy is taken very seriously and accessing customers' records is a serious disciplinary offence which may result in dismissal. In a section headed For Managers it is provided that misuse of IT systems may be an indicator of fraudulent or corrupt behaviour and "You should enforce the policy of ZERO tolerance."

6 The law

Unfair Dismissal

7. Where an employee brings an unfair dismissal claim before an employment tribunal, it is for the employer to demonstrate that its reason for dismissing the employee was one of the potentially fair reasons in section 98(1) and (2) of the Employment Rights Act 1996. If the employer establishes such a reason the Tribunal must then determine the fairness or otherwise of the dismissal by deciding in accordance with section 98(4) of the Employment Rights Act 1996 whether the employer acted reasonably in dismissing the employee. Conduct is a potentially fair reason for dismissal under section 98(2).

8 In determining the reasonableness of the dismissal with regard to section 98(4) the Tribunal should have regard to the three part test set out by the Employment Appeals Tribunal in British Home Stores Limited v Burchell [1978] IRLR379. That provides that an employer, before dismissing an employee, by reason of misconduct, should hold a genuine belief in the employee's guilt, held on reasonable grounds after a reasonable investigation. Further, the Tribunal should take heed of the Employment Appeal Tribunal's guidance in Iceland Foods Limited v Jones [1982] IRLR439. In that case the EAT stated that a Tribunal should not substitute its own views as to what should have been done for that of the employer, but should rather consider whether the dismissal had been within "the band of reasonable responses" available to the employer. In the case of Sainsbury's Supermarkets Limited v Hitt [2003] IRLR23 the Court of Appeal confirmed that the "band of reasonable responses" approach applies to the conduct of investigations as much as to other procedural and substantive decisions to dismiss. Providing an employer carries out an appropriate investigation and gives the employee a fair opportunity to explain his conduct, it would be wrong for the Employment Tribunal to suggest that further investigation should have been carried out. For, by doing so, they are substituting their own standards as to what was an adequate investigation for the standard that could be objectively expected from a reasonable employer. In Ucatt v Brain [1981] IRLR225 Sir John Donaldson stated:

> "Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, 'Would a reasonable employer in those circumstances dismiss', seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question 'Would we dismiss', because you sometimes have a situation in which one reasonable employer would and one would not. In those circumstances, the employer is entitled to say to the Tribunal, 'Well, you should be satisfied that a reasonable employer would regard these circumstances as a sufficient reason for dismissing', because the statute does not require the employer to satisfy the Tribunal of the rather more difficult consideration that all reasonable employers would dismiss in those circumstances".

9 Stephenson L J stated in Weddel v Tepper [1980] IRLR 96:

> "Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt.

> There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And they do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, per Burchell, 'carried out as much investigation into the matter as was reasonable in all the circumstances of the case'. That means that they must act reasonably in all the circumstances, and must make reasonable enquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate enquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are not acting reasonably".

10 The question of disparate treatment was considered by the EAT in the case of MBNA Ltd v Jones, EAT, 1.9.15 (0120/15).The EAT pointed out that, when considering a claim of unfair dismissal based on disparity, the tribunal must focus on the treatment of the employee bringing the claim. if it was reasonable for the employer to dismiss this employee, the mere fact that the employer was unduly lenient to another employee is neither here nor there. The EAT referred to the case of Hadjioannouv Coral Casinos Ltd 1981 IRLR 352, EAT, in which it was held that an employer's decision made in a truly parallel case may support the argument that it was not reasonable to dismiss the employee, but it will be rare for the facts to be sufficiently similar. The tribunal had erred by considering whether the respondent was unreasonably lenient in the other the case of another employee. It should have focused on its treatment of the claimant, since it was he who was claiming unfair dismissal.

11 The Hadjioannou test provides scope for a dismissal to be taken outside the range of reasonable responses by a lack of consistency in truly parallel circumstances, however, the tribunal should be aware of the risk of the adopting a substitutionary mindset when addressing the question of whether the circumstances were in fact parallel.

12 I was provided with skeleton arguments on behalf of the claimant and the respondent and I heard oral submissions from Ms Millns and Ms Callan. The submissions were extremely clear and thorough. I have not set out all the details within those submissions but I have considered them carefully in reaching my conclusions.

13 I was referred to further cases during submissions. Ms Millns referred to the case of Taylor v Parsons Peebles NEI Bruce Peebles Ltd [1981] IR LR119 in which it was stated that the Tribunal made the mistake of equating what was in the employer's policy with whether the decision to dismiss was fair in all the circumstances and fell within the range of reasonable responses. In that case, dismissing the employee for fighting was unfair, given his long service and employment history, even though fighting was cited as an instance of gross misconduct in the disciplinary policy.

14 Sandwell & West Birmingham Hospitals NHS Trust v Westwood UK/EAT/0032/09 in which the EAT summarise the case law in what amounts to gross misconduct and found that it involves either deliberate wrongdoing or gross negligence. In cases of deliberate wrongdoing, it must amount to wilful repudiation of the express or implied terms of the contract.

15 In Vincent T/A Shield Security service v Hinder UK EAT/0174/13 the E a T upheld an employment judge's finding that deciding to dismiss without consideration of any alternative sanction in the case of an employee with a good record fell outside the band of reasonable responses. Length of service may be a relevant consideration when deciding whether dismissal is the appropriate sanction. In Strouthos v London Underground Ltd [2004] IRLR the Court of Appeal that the EAT had been wrong to decide that having 20 years' service and no previous warnings was not relevant when the employer came to dismiss. To establish fairness, an employer should be able to show that it had considered mitigating factors, such as whether the employee showed remorse or was acting under extreme stress, or the employee's long service and previously unblemished record.

16 The case of Newbound v Thames Water Utilities Ltd [2015] EWCA 677 was referred to in respect of the application of the band of reasonable responses available to an employer in a case in which the claimant acknowledged that there was an error of judgment on his part but no intention to misuse any health and safety regulations and consideration of the claimant's long service and clean disciplinary record had not been given sufficient weight.

17 Among the authorities Ms Callan referred to was the case of Tayeh v Barchester Healthcare Ltd [2013] EWCA Civ 29 in respect of, in deciding whether dismissal was an appropriate sanction, the question was not whether some lesser sanction would be appropriate, but rather whether dismissal was within the band of reasonable responses that an employer could reasonably make in the circumstances. The fact that other employers might reasonably have been more lenient is irrelevant.

18 Siraj-Eldin v Campbell Middleton Burness & Dickson [1989] IRLR 208 in which it was held that where an employer has a rule that is plainly and clearly set out, is routinely applied, and is sufficiently publicised, that particular conduct will constitute gross misconduct, that has the effect of a substitute warning, so as to more easily justify dismissal on those grounds.

19 In Steen v ASP Packaging Ltd [2014] ICR the EAT gave guidance that Tribunals should address four questions in their judgment in respect of reductions of both basic and compensatory awards (1) what was the conduct in question? (2) was it blameworthy? (3) (in respect of the compensatory award) did it cause or contribute to the dismissal? (4) to what extent should the award be reduced?

Conclusions

20 I am satisfied that the reason for the dismissal in this case was that of conduct. The respondent found the claimant guilty of unauthorised access to customer records.

21 The respondent held a reasonable belief in the claimant's guilt. The claimant acknowledged that he had gained access to customer information without a legitimate business reason.

22 The respondent takes these issues very seriously and the claimant was aware of this. The Accessible Use Policy was readily available on the respondent's intranet and employees' attention was drawn to this on each occasion that they logged on to the respondent's system. The claimant was aware of how seriously this issue was taken and that the respondent's view of such breaches of its policy had been taken more seriously in recent years. The freedom of information figures obtained on the claimant's behalf by the Trade Union indicated that, in more than half of the cases in which employees had been found guilty of unauthorised access to HMRC systems or customer records, they had been dismissed and, in the last eight months of those records, this figure had risen to approximately two thirds. The reputation of HMRC is of importance. The public must have confidence in the security of their information.

23 There was no evidence that would support a finding of disparity of treatment. The respondent was satisfied that all others who accessed the record on the same day had legitimate reasons to do so. Neither the claimant nor his Trade Union representative were able to provide details of any case in which an employee had been found guilty of the same misconduct and not dismissed The usual sanction for unauthorised access in the circumstances was dismissal.

24 I am satisfied that the respondent had reasonable grounds on which to reach its conclusion that the claimant was guilty. There was a reasonable investigation I am satisfied that there was consideration of the claimant's length of service and the claimant's mitigating factors in respect of his family and work related stress.

25 I am not satisfied that there were any procedural defects that would take the process outside the band of reasonable responses. I have considered the process as a whole. It was submitted that the investigation was deficient in that Ms Johnson-Wright did not seek out or consider mitigating factors. The investigation concluded that there was a case to answer and I am satisfied that that conclusion was not outside the band of reasonable responses.

26 With regard to the disciplinary hearing, it was submitted that this was also so deficient that no reasonable employer could have dismissed the claimant as a result. I am satisfied that Paul Pemrick took into account the claimant's length of service and his unblemished record together with the stress under which claimant was suffering. The finding in respect of internal fraud was overturned on appeal and did not take the decision or the procedure outside the band of reasonable responses.

27 The respondent found that there was no causal link between the mitigation the claimant raised in respect of his stress at home and at work and how this affected his judgment. The respondent found that this was not a momentary lapse of reason. The claimant was approached by his neighbour's wife and met with that neighbour on the evening before he gained access to the records.

28 During the respondent's disciplinary procedure there was consideration of the claimant's mitigation raised in respect of his stress. It was within the band of reasonable responses for the respondent to reach the view that there was no causal connection shown between the claimant's stress and the breach of the Acceptable Use Policy. The respondent found that was no evidence that his work performance or ability to make decisions had been affected.

29 I have been careful not to substitute my views for those of the respondent It is most unfortunate that the claimant's career should come to an end due to one incident such as this after 25 years' service. I may consider this to be a harsh decision but I find that it is not outside the band of reasonable responses. The claimant and his Trade Union representative were aware of the seriousness with which the respondent took these issues. The claimant was alerted to this when he switched on his computer and it was clearly set out in information available on the respondent's intranet where it was made clear that such unauthorised access of customers' records was treated as gross misconduct and likely to lead to dismissal I have considered this very carefully and I have concluded that dismissal was within the band of reasonable responses available to the respondent.

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30 The guidance to managers was also readily available to all employees on the respondent's Intranet and this provided for a zero tolerance approach. Also, the claimant had managerial responsibilities on one day of each week. It was reasonable for the respondent to determine that he should have been aware of the potential consequences.

31 The claimant indicated that he was not being dishonest and there had been no gain for himself. However, he was assisting his neighbour and there was a potential for reputational damage to the respondent. It is important to the respondent that it should not be known that a taxpayer could jump the queue or gain some advantage as a result of an approach to a neighbour. It may have been a small advantage but, in the circumstances, it is a matter of concern to the respondent.

32 In all the circumstances, I am satisfied that the claim of unfair dismissal is not well founded and it does not succeed.

EMPLOYMENT JUDGE Shepherd

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
19 June 2017
JUDGMENT SENT TO THE PARTIES ON

19 June 2017

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL