



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr C Shancar**

**v**

**British Telecommunications Plc**

**Heard at:** Bury St Edmunds

**On:** 12-14 February 2018

**Before:** Employment Judge Laidler

**Appearances:**

**For the Claimant:** Mrs G Fama, Counsel

**For the Respondent:** Mr J Ward, Solicitor

**JUDGMENT** having been sent to the parties on 13 March 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. The ET1 in this matter was received on 17 August 2016. In its ET3 the respondent asserted it had dismissed the claimant fairly by reason of his conduct. The claimant provided further and better particulars seen in the bundle at page 32. There have been two preliminary hearings, one before Employment Judge Postle on 8 December 2016 and one before Employment Judge Sigsworth on 20 February 2017. At that hearing the claims of race discrimination and associative disability discrimination during employment were held to be out of time and struck out. The only claims that proceeded were that of ordinary unfair dismissal and discriminatory dismissal. It was clarified at the outset of this hearing that that discriminatory dismissal was associative discrimination on the basis of the claimant's disabled child. That allegation was however withdrawn on the second day of this hearing and the claimant did not pursue an application for leave to amend to assert that in fact his dismissal was because of his own disability. The case therefore proceeded as that of ordinary unfair dismissal only.
2. The tribunal heard from Andrew White, Martin Green and Jim Dempsey on behalf of the respondent. It also heard from the claimant who had a witness statement from his trade union representative, Dr Aylett, with a new statement served on the final morning of the hearing. As this gave no evidence that went to the unfairness of the dismissal it was not challenged.
3. The claimant commenced employment on 30 September 1996. He started

as a systems engineer and by the time of the events with which this tribunal is concerned had managerial status in problem management and service improvement. In any written reasons extracts from the following policies will be included: page 42, dealing with employees accused of criminal offences; page 44A, standards of behaviour policy: this lists as an example of misconduct the failure to tell a manager about a criminal offence even if it is not related to BT, it also included a non-exhaustive list of the acts amounting to gross misconduct which included committing fraud or deliberately falsifying or changing records incorrectly. There was also a policy about paid special leave.

4. On 23 July 2015 the police came to the claimant's home and he was taken to the police station at approximately 6am. In evidence the claimant accepted that he telephoned his manager from the police station, did not tell her where he was and that should have been a work day. He said he needed leave for a domestic emergency. That was given to him as paid leave. The tribunal saw emails at page 145 where his manager asked that he put the request in writing. The claimant did and he stated he had to stand in for his sick wife. That was not true as most of the working day he was at the police station. He accepted that in evidence.
5. The tribunal also saw there was a long period of sickness absence between 21 September and 6 November for 47 days and that at a return to work interview the claimant was reminded of the employee assistance programme. On 19 November 2015 the claimant was charged. He accepted throughout his evidence when being cross-examined that he should have told his manager he had been charged. It was an error on his part he said due to the stress he was under and the advice from his lawyer.
6. His criminal trial took place on 5 February 2016. The claimant accepted he knew that date well in advance but did not inform his employer. He applied for annual leave to attend. He accepted in evidence it was an error on his part in keeping this from BT but he had been informed by his lawyer that there was no evidence against him, that he would not be found guilty and would be released the same day.
7. In the policy dealing with offences that do not involve BT it can be seen on page 43 that the point of informing the manager is so BT can support the employee by having a manager present at trial to take a note of the key issues, the verdict and sentence and in the words of the policy: "It is important that we obtain a proper impartial understanding of the case so that informed decisions can be made regarding impact on employment." The respondent was denied that opportunity.
8. In paragraph 48 of his witness statement the claimant states his lawyer was so confident that he would not be convicted he told the claimant's wife to go home. Contrary to that advice the claimant was not only convicted but immediately sentenced to six weeks imprisonment and taken to the cells. He then saw his lawyer. He stated he contacted his lawyer to tell his wife, BT of his whereabouts and to appeal. In his timeline, however, to the fact-finding which is attached to the investigation report the claimant states that on the 9<sup>th</sup> when he saw his lawyer, his lawyer did not advise him to tell anybody and that there was no need to contact his employer. The tribunal

finds it hard to accept the claimant's wife did not know where he was when she herself had been at court that day. The tribunal has, however, not heard from the wife.

9. The claimant in his witness statement at paragraph 51, saw his lawyer again on 9<sup>th</sup> to discuss his appeal. On page 135 Janet Knox set out her attempts to contact the claimant and gives a note of the contact from the claimant's wife. This stated that: "Mrs Shancar asked me to let you know his father is seriously ill and he won't be able to come to work". That was the message left by the claimant's wife. The claimant provided as stated a timeline to Mr White, seen at appendix 8 to the investigation report. On page 162 the claimant states: "On Monday evening when my wife found out what had happened to me my wife was very shocked and she did not know what to do and how she was going to cope with it all". That is completely contrary to the claimant's evidence to this tribunal that his wife did not know all week.
10. The claimant appealed initially the sentence and was released on the Friday, returning home late that afternoon. On page 177 is seen a quotation from the text message that he sent to his employer, this includes the words "we didn't take the phone with us". This was disingenuous as "we" were not anywhere. It suggested that the claimant was with his wife which was not true. The respondent acted reasonably in taking this message as supporting a message left by the wife on the Monday that the absence was due to the claimant's ill father. The claimant gave no indication at that point after his release of where he had actually been.
11. On Monday 15 February the claimant returned to work. He did not contact any manager to discuss where he had been the previous week. Mr White contacted him later that afternoon to arrange to meet to discuss his absence. This was because on 12 February HR had been contacted by an ex-employee advising the claimant had been convicted. HR made further enquiries. They found out from the court twitter feed and a court record, pages 154 and 155, as to what had occurred. This was not, as suggested, investigating behind the claimant's back but checking out matters of public record.
12. On 16 February there was a fact-finding meeting with Mr White. The claimant had Dr Aylett with him, an experienced trade union representative. He admitted he had been in court on 5 February and now stated his lawyer had told him not to tell anybody. He made amendments to the hand-written notes and signed the typed version. Mr White recommended there was a case to answer but he did not make the decision. He lists his concerns at page 149 and these will be set out in any written reasons.
13. By letter of 8 March the disciplinary charges were put to the claimant and it was clearly stated that if proven these would amount to gross misconduct for which dismissal was a possible outcome. On page 165 the seriousness of the matters were set out as were options to be considered.
14. The claimant attended the disciplinary hearing with Dr Aylett again. There were set out at page 167B further enquiries Mr Green made of Ms Knox where she confirmed that the claimant's use of the words in his text to her

when he was released from prison “led me to believe he had been away with is family caring for his father”. At page 171 can be seen the rationale for dismissal. It was clear from this and from Mr Green’s evidence the claimant was not dismissed for the conviction itself but because of his dishonesty towards his employer.

15. The claimant’s appeal was heard by Mr Dempsey on 21 June and again the claimant was accompanied by Dr Aylett. The decision to dismiss was upheld. Mr Dempsey’s evidence was clear that the claimant talked about grievances he raised. When Mr Dempsey looked into these he discovered that some were in fact appeals against performance matters. He found no evidence of grievance cases from 2010. There were no outstanding grievances when the claimant was dismissed. None had been lodged. The claimant disputes that stating that one had been filed. That is not Mr Dempsey’s evidence.

### **The relevant law**

16. The claim is now only one of ordinary unfair dismissal. The respondent relies on conduct, a potentially fair reason falling within s.98 of the Employment Rights Act 1996. The tribunal must therefore have regard to the guidance laid down in British Home Stores v Birchall [1978] IRLR 379. This involves three elements. First, there must be established by the employer the fact of the belief, namely that the employer did believe it; secondly, it must be shown that the employer had in its mind reasonable grounds upon which to sustain that belief and at the stage at which he formed that belief on those grounds, the employer must have carried out as much investigation in to the matter as was reasonable in all of the circumstances. It is not necessary for the tribunal to share the same view in those circumstances, nor should the tribunal examine the quality of the material which the employer had before it, for example to see whether it was the sort of material which objectively considered would lead to a certain conclusion on the balance of probabilities or beyond all reasonable doubt. If the employer satisfies the tribunal it had a potentially fair reason, the tribunal must consider whether in all of the circumstances it acted fairly within the meaning of s.98(4).
17. In determining whether the decision was the appropriate sanction in all the circumstances it is not for this tribunal to substitute its view for that of the employer but to decide whether the decision was within the band of reasonable responses.

### **The tribunal’s conclusions**

18. The respondent relies on conduct. Applying the three-fold test in Birchall, the tribunal is satisfied the respondent had a genuine belief in the claimant’s misconduct formed after a thorough investigation. They had evidence that when in the police station in July the claimant applied for paid special leave to assist with a domestic emergency knowing he was not at home to deal with such, if one existed. He was at the police station from 6am and accepted he was there most of the working day.
19. The employer had further evidence and when asked by his manager to put

in an email that request he confirmed the need for domestic emergency leave. He never told his employer he had been at the police station. He never informed the respondent that he had been charged with an offence or that he was to be in court. He failed to advise his whereabouts the week after his trial and neither did he on the Friday of that week on his release or the Monday on his return to work. When he did text his employer on the Friday he used words that led the employer to reasonably believe he had been with his wife caring for his sick father. The respondent had reasonable grounds for believing in his dishonesty and failure to follow their procedures.

- 20. The tribunal then must consider if the respondent acted fairly in treating this as a reason for dismissal. There has been no suggestion of any procedural shortcomings and this tribunal has not identified any. The claimant attended a fact-finding interview, a disciplinary hearing and an appeal with an experienced trade union representative. He has accepted he had every opportunity at those hearings to state his position and can be seen to have done so. At no time did he or his trade union representative suggest they did not understand the charges and all his answers are recorded as giving a coherent account of his position which indeed he gave to this tribunal. At the first meeting of fact-finding he even made amendments to and signed the notes.
- 21. The respondent acted reasonably in treating all these matters a cumulatively amounting to gross misconduct, justifying summary dismissal. It had found dishonesty and a breach of trust. Dismissal was therefore clearly not only within its policy but within the band of reasonable responses. It is a misunderstanding of the respondent's reasons to state, as has been alleged, that he was dismissed for a criminal conviction and as that has been overturned the respondent in fact had no reason to dismiss.
- 22. The claimant was not dismissed for having a criminal conviction but for his dishonesty to his employers. It follows from the tribunal's conclusions that the dismissal was fair and that the claim is therefore dismissed.

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Employment Judge Laidler  
28 June 2018

Date: .....

Judgment sent to the parties on  
12 July 2018

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For the Tribunal office