Case Number: 2201335/2014

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL** **BEFORE:**
EMPLOYMENT JUDGE ELLIOTT (sitting alone)

BETWEEN:

Mr P Chokski

Claimant

AND

Royal Mail Group Ltd

Respondent

ON: **10 and 11 December 2018**

Appearances:

For the Claimant: **Mr J Crozier, counsel** **For the Respondent:** **Mr S Peacock, solicitor**

JUDGMENT ON REMITTED HEARING

The Judgment of the Tribunal is that the claimant was unfairly dismissed.

REASONS

1. This decision was given orally on 11 December 2018. The respondent requested written reasons.

2. At a hearing on 13, 14 and 20 November 2014 before Employment Judge Professor Neal, the claim for unfair dismissal failed and was dismissed. Written reasons were sent to the parties on 6 March 2015.

3. There was an appeal to the EAT which was heard by Hand J on 21 January 2016. The sealed copy of the judgement was sent to the parties on 21 March 2016. The decision of the EAT was that this case should be remitted to this tribunal.

4. On 24 June 2016 case management orders were made by Employment Judge Professor Neal. It was agreed that the question for consideration by the tribunal arose out of an amended additional ground of appeal raised orally at the EAT. The remitted hearing took place on 15 September 2016 before Professor Neal. Once again, the claim for unfair dismissal failed.

5. There was a further appeal to the EAT, heard by Laing J on 20 February 2018. The decision was that the case should be remitted to a fresh tribunal. The sealed copy of the decision was sent to the parties on 20 April 2018.

6. On 19 June 2018 a case management hearing took place before Employment Judge T Lewis. It was agreed at that hearing that in relation to liability there be no fresh oral evidence but that there may need to be evidence on remedy in relation to mitigation and pension loss. It does not appear from Judge Lewis's Order that there was any application by the respondent to seek to adduce more evidence for this tribunal's consideration.

7. It was agreed that in relation to liability the tribunal would rely on the fact findings in the original ET decision, as clarified by the EAT. Directions were given as to the contents of the trial bundle.

Documents

8. I had an agreed bundle of documents from the respondent which contained the decisions of the EAT and of Employment Judge Professor Neal and a large quantity of remedy documents. There was a further document introduced by the claimant at this hearing, to which there was a no objection from the respondent. It went to remedy. The bundle ran to just over 500 pages.

9. There was an agreed bundle of authorities prepared by the claimant, with 11 cases.

10. I had written submissions from both parties to which they spoke and which are not replicated here. All submissions and authorities referred to were fully considered even if not expressly referred to below.

The issues

11. The issues with this hearing were identified at the hearing on 19 June 2018 by Employment Judge Lewis, as follows:

12. Was the dismissal effected by Mr O'Donovan or Mr Miranda? At the start of this hearing the parties agreed that the dismissal was effected by Mr O'Donovan but they had further submissions to make on the matter.

13. If by the latter, whether the appeal process allowed for a different and graver sanction to be imposed without notice having been given to the claimant that he was at risk of imposition of a more severe sanction?

14. Whether in all the circumstances including further consideration of the Royal Mail Code of Conduct, the ACAS Code and further evidence limited to these issues, the dismissal was fair in accordance with section 98(4) ERA; and, if not,

15. To consider, if appropriate section 122(2) and section 123(6) ERA (contribution);

16. If appropriate, to consider the issue of remedy.

A short summary of the existing findings of fact

17. As I am required to do, I adopt the findings of fact made by Employment Judge Professor Neal in the written reasons sent to the parties on 6 March 2015.

18. For the purposes of context for this decision, I adopt summary of the facts from the decision of Laing J and set out from paragraph 6 of her reasons sent to the parties on 20 April 2018 as follows:

19. The claimant was an Operational Support Manager. He was dismissed for gross misconduct after a career with the respondent lasting 27 years. On 10 October 2013, 28 files containing obscene material were found in a folder in the claimant's cloud storage account which was provided by the respondent for work purposes. The respondent found these files and informed the police. The claimant was arrested at work, interviewed by the police, charged and bailed. It was well-known at his workplace that this had happened.

20. Access to cloud accounts is protected by a personal password. An employee can get into his cloud account at work or remotely. Anyone who tried to log onto an account is warned that access must be authorised. The warning was described as graphic. Use of the respondent's computer system is governed by a Code of Conduct which forbids the sharing of personal passwords and obtaining access to pornographic material, storing or publishing it.

21. The claimant accepted that he knew about those rules. His case was that he did not know about the 28 files in his cloud storage account until he was arrested. He said he had not put them there and did not know how they got there. His case was that there was a widespread practice of

password sharing among employees, which was essential to facilitate efficient working.

22. Mr O'Donovan was the head of the claimant's department but not his line manager. He was asked to investigate and if necessary carry out the disciplinary procedure. Mr O'Donovan suspended the claimant and interviewed him. The claimant said he did not know the files were in his cloud storage account and did not know how they got there.

23. Mr O'Donovan had a technical report which claimant did not see until a late stage in the disciplinary process. The ET (Employment Judge Professor Neal's first decision) did not think that the report helped very much. Mr O'Donovan had formed the mistaken impression that the report told him about computer transactions linked with the claimant. The respondent accepted at the ET hearing that all the report showed was that the files were present in the claimant's cloud storage account.

24. Mr O'Donovan formed the view early on that the claimant had breached the rules by sharing his password with others. The claimant gave the names of eight such employees or former employees whom he said would confirm that this was a widespread practice. Mr O'Donovan contacted six of them. He did not try to contact the two former employees, one of whom, the claimant said had a grudge against him.

25. Hand J summarised Mr O'Donovan's interviews with the various employees in the first decision of the EAT. Mr O'Donovan decided that the claimant had shared his password (he had admitted as much), and that he had been responsible for downloading pornographic material into his cloud account. I saw Mr O'Donovan's dismissal letter at page 110 this bundle and his rationale for his decision from pages 111-112. He considered that password sharing was a serious offence, but would not on its own justify dismissal: "*Of itself, I would consider this a serious matter, one which could be dealt with using action short of dismissal."* (bundle page 111 of the bundle).

26. The claimant appealed to Mr Miranda. Mr Miranda conducted a re-hearing but he did not carry out any fresh investigation. Mr Miranda's view was that if he had found that the claimant had shared his password, that would justify dismissal. Mr Miranda took a dim view of the claimant's credibility. He said that there had never been a practice of sharing login details. Managers, especially at the claimant's level, are absolutely clear on the consequences of sharing login details.

27. Following the claimant's appeal against the ET's finding that there had been a fair dismissal, the EAT's Order recited that Mr O'Donovan had decided that the password allegation on its own would not have justified dismissal and that Mr Miranda thought that it did justify dismissal on its own. The Order required the ET to decide who dismissed the claimant

and if it was Mr Miranda, whether the appeal process permitted a harsher sanction to be imposed without notice to the claimant.

28. Laing J held (paragraph 53 of her decision) that decision of Mr O'Donovan, that he considered password sharing as not being sufficiently serious as to invite a sanction of dismissal, could not be revisited by the ET or the EAT. I have no authority to revisit that finding and I do not seek to do so.

The relevant law

29. Section 98(4) of the Employment Rights Act 1996 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 reason shown by the employer)-*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee..." and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case ..."*

30. In ***Taylor v OCS Group Ltd 2006 EWCA Civ 702,*** the Court of Appeal said that the fairness of procedures should be considered as a whole.

31. In ***Smith v City of Glasgow District Council 1987 IRLR 326*** the House of Lords held that in resolving the question of what is the reason or principal reason for dismissal, if there is more than one, the question of the principal reason is important to the issue of whether the respondent treated it as a sufficient reason for dismissal. The allegation relied upon must have formed at the very least an important part of the reason for dismissal.

32. In ***Barchester Healthcare v Tayeh EAT/0281/11***, citing ***Smith,*** at paragraphs 35 and 36, the EAT found (Richardson J) that:

> *"If the charges were cumulative, in the sense that all of them together formed the principal reason for dismissal, it would be fatal to the fairness of the dismissal if any significant charge were found to have been taken into account without reasonable grounds: see* ***Smith v City of Glasgow District Council 1987 IRLR 326****……..*
>
> *"If, however, each charge stood on its own, for example independent instances of gross misconduct such that the employer would have dismissed for any of them without the other, then they would require separate consideration in determining whether it was reasonable to dismiss."*

33. There are four questions to be considered in respect of contributory fault ***Steen v ASP Packaging Ltd 2014 ICR 56, EAT*** (Langstaff P):

(a) The tribunal must identify the conduct which is said to give rise to the contributory fault;

(b) Having identified it, the tribunal must ask whether that conduct is blameworthy;

(c) The tribunal must ask for the purposes of section 123(6) ERA whether it considers that the blameworthy conduct caused or contributed to the dismissal to any extent. If not, there can be no reduction to the compensatory award;

(d) To what extent the award should be reduced and to what extent it is just and equitable to reduce it.

34. The contributory conduct does not have to be the principal reason for dismissal as long as it was one of the reasons - see ***Robert Whiting Designs Ltd v Lamb 1978 ICR 89***. This point is also illustrated by ***Carmelli Bakeries Ltd v Benali 2013 EAT 0616/12*** (see judgment paragraph 44)***.***

Findings and conclusions

Issue 1

35. On the question before me, as to was the dismissal effected by Mr O'Donovan or Mr Miranda, this gives little difficulty. EJ Professor Neal's decision was that Mr O'Donovan made the decision to dismiss. The parties informed me at the outset of this hearing that they agreed that the dismissal was effected by Mr O'Donovan.

36. At paragraph 50 of its submissions the respondent said that Mr O'Donovan, on behalf of his employer, dismissed and Mr Miranda, on behalf of his employer, upheld the dismissal. The submission for the respondent was that it was the "employer's" decision and both officers made decisions that resulted in dismissal.

37. Whilst it is correct that it is the employer's decision to dismiss, the respondent is a corporate body which acts by its officers. It is the decision of the particular officer which is for consideration in an unfair dismissal claim. It is necessary to look at the decision made by the relevant decision maker. The decision maker and dismissing officer was Mr O'Donovan.

38. I find at this remitted hearing that the dismissal was effected by Mr O'Donovan.

Issue 2

39. This might then have rendered otiose the second question which was, if by the latter (ie Mr Miranda), whether the appeal process allowed for a different and graver sanction to be imposed, without notice having been given to the claimant that he was at risk of imposition of a more severe

sanction? Nevertheless, I have gone on to consider the second half of the question in relation to the appeal, namely whether the appeal process allowed for a different and graver sanction to be imposed without notice to the claimant that he was at risk of a more severe sanction.

40. At paragraph 53 of its submissions, the respondent said that it was uncontroversial that the respondent's Conduct Policy allows the appeal to impose a lesser, but not a greater penalty. This is consistent on my finding with the paragraph in the Conduct Policy at page 155 of the bundle which says:

> *The appeal is a hearing at which the appropriate appeal manager will rehear the case in its entirety. It is the employee's opportunity to state his/her case why the penalty should be set aside or reduced. The result could be revoking or confirming the decision, or reducing the penalty.*

41. There is no question under the Conduct Policy of the sanction being more severe. On top of this, I have considered the non-statutory ACAS Guide (which provides good practice advice) and states, at page 236 of the bundle: "*An appeal must never be used as an opportunity to punish the employee for appealing the original decision, and it should not result in any increase in penalty as this may deter individuals from appealing".*

42. The decision of the Court of Appeal in ***Macmillan v Airedale NHS Foundation Trust 2014 IRLR 803*** makes observations that the general understanding among both employers and employees is that an employee's right to appeal against a disciplinary sanction is conferred for his or her protection, so that its exercise will not leave them worse off; and that view is strongly reinforced by the terms of the ACAS Guide. If an employer wishes to have the right under its disciplinary procedures to increase the sanction on appeal, the Court of Appeal's view was that it must be expressly provided for (per Underhill LJ at paragraph 71).

43. I accept that in ***Macmillan*** there was a contractual provision that meant that her sanction could not be increased on appeal, but the Court's observations nevertheless hold good in relation to the case before me. The respondent sought to distinguish ***Macmillan*** because her case the disciplinary sanction of a final written warning was increased to dismissal.

44. Mr Peacock for the respondent submitted that the claimant in this case was not worse off because of his appeal, because no more severe sanction was imposed. The claimant was dismissed by Mr O'Donovan and remained dismissed following his appeal to Mr Miranda. Thus, on the respondent's submission there was no graver or more severe sanction. I do not accept this submission. This goes back to the issue of the two charges, images and password sharing and the reason for dismissal.

45. Hand J at his paragraph 45 commented upon this:

> *"What causes me pause for thought, however, is that Mr O'Donovan would not have even on the factual material that he had considered password sharing to be so serious as to warrant dismissal. Can this be cured by Mr Miranda? One only needs to state that proposition to see that it is very odd. If there had been no appeal in this case, the Employment Tribunal, as it seems to me, would have been, without Mr Miranda's appeal hearing, in the position of having to hold the dismissal relating to the storage of the files to be unfair on the grounds that it did and would have been left with the circumstance that Mr O'Donovan would not have dismissed the Appellant. In those circumstances, the dismissal would simply have been unfair".*

46. As I have said above, I cannot and do not revisit the findings as to the rationale for Mr O'Donovan's decision that he did not consider password sharing sufficiently serious to warrant dismissal. Appealing to Mr Miranda meant that the claimant was seeking to overturn the decision to dismiss him on the images charge. Password sharing did not, on Mr O'Donovan's decision, merit dismissal. Thus, by appealing, he found himself worse off because Mr Miranda took a different and more stringent approach to password sharing.

47. As submitted for the claimant, which I accept, the disciplinary charge of downloading images falls away. The original tribunal found as a fact that there was not an appropriate or sufficient investigation into the issue of how the files came to be in the claimant's cloud account. The finding of fact (paragraph 32) was that there was very little about the technical nature of the files and their history which could have told anybody about how those files came to find their way into the cloud account to which the claimant had password access. The finding was that had the only basis for dismissing the claimant been the downloading issue, the tribunal would have found that this was an unfair dismissal and "that would have been the end of the matter" (paragraph 33).

48. The downloading issue therefore falls away on the finding that dismissal for this reason amounts to an unfair dismissal. We are left with the password sharing issue. I accept that ***Taylor v OCS*** provides that the process should be looked at as a whole, but this is more fundamental than process, it goes to the reason for dismissal. What Mr Miranda sought to do was to change the reason for dismissal because of his more stringent view of password sharing. As I have said above, I cannot and do not revisit Mr O'Donovan's reason for dismissal. He would not have dismissed for password sharing. I find that it was not open to Mr Miranda to impose a more severe penalty on password sharing.

Issue 3

49. The third question for my consideration was whether in all the circumstances, including further consideration of the Royal Mail Code of

Conduct, the ACAS Code and further evidence limited to these issues, the dismissal was fair in accordance with section 98(4) ERA.

50. On my finding the respondent is fixed with Mr O'Donovan's decision. As held by the EAT in ***Barchester Healthcare*** (above) if each charge stands on its own, they require separate consideration in determining whether it was reasonable to dismiss. The downloading issue amounted on the tribunal's original findings to an unfair dismissal. It did not pass the section 98(4) test. EJ Professor Neal found that there was little or no relevant evidence provided to the tribunal on the basis of which to properly form any technical view as to what may have happened (paragraph 11(24)). It was agreed that in relation to liability the tribunal would rely on the fact findings in the original ET decision, as clarified by the EAT.

51. The password sharing stands on its own and Mr O'Donovan would not have dismissed for this. As commented upon by Laing J in her decision at paragraph 49, this reason would not have passed the section 98(4) test on its own. I concur with this reasoning and find that Mr Miranda's increased penalty of dismissal for password sharing does not pass the section 98(4) test.

52. As a result of this, I find that the claimant's dismissal for password sharing was unfair.

Issue 4

53. This brings into play the fourth issue which is given the finding that the dismissal was unfair, should there be a reduction in compensation for contributory fault?

54. The respondent made submissions as to why they said that contributory fault was engaged. The factors which must be present for a reduction for contributory fault were correctly set out at paragraph 75 of the respondent's submissions:

- The claimant's conduct must be culpable or blameworthy
- It must have actually caused or contributed to the dismissal
- The reduction must be just and equitable

55. The second factor is absent. The claimant's conduct on password sharing did not, on Mr O'Donovan's rationale, actually cause or contribute to the dismissal. He was clear that although it was a serious matter, it was one which could be dealt with using action short of dismissal. I cannot and do not find that the claimant contributed to his dismissal by his conduct in password sharing. It had no causative impact on dismissal.

56. To the extent that the respondent submits that I am bound by EJ Professor Neal's comments at the end of his first decision that even if he had found

the claimant to be unfairly dismissed on password sharing, he would have made a significant reduction for contributory fault – even to the point of 100% - I find I am not bound by this. It is a remitted hearing where the issue of contributory fault is placed before me for consideration. I have found that the password sharing issue did not cause or contribute to the claimant's dismissal. The dismissing officer's view was that this was a matter which could be dealt with using action short of dismissal (dismissal rationale page 111).

57. I therefore find that there should be no reduction for contributory fault.

Remedy issues

58. In the light of the findings above, remedy became applicable. The claimant seeks reinstatement or re-engagement. Under section 112 ERA where a tribunal finds the complaint of unfair dismissal to be well-founded it shall explain to the claimant what orders can be made under section 113 – namely reinstatement or re-engagement. The claimant is represented by counsel who had plainly advised him in relation to this.

59. I had a witness statement from the claimant, which was not given in evidence at this hearing. The claimant said that in his view the respondent could easily find him a role on the same terms as he was on at the date of dismissal. He said he has tried to find suitable alternative employment but has been unable to find a job that matched his previous role.

60. He has found work and has been employed by Metroline since 12 June 2017.

61. The Schedule of Loss produced a sum of over half a million pounds, capped at £43,692 (page 253).

62. Despite remedy clearly being a matter which the tribunal may consider at this hearing, the respondent produced no witness evidence to assist the tribunal on the issue.

63. In exercising the discretion to order reinstatement re-engagement, the tribunal must take into account the matters set out in section 116 ERA. The factors are:

> (1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—
>
> (a) whether the complainant wishes to be reinstated,
>
> (b) whether it is practicable for the employer to comply with an order for reinstatement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

(3) In so doing the tribunal shall take into account—

(a) any wish expressed by the complainant as to the nature of the order to be made,

(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.

64. Practicability is probably the most important factor to take into account when considering whether or not make an order for re-employment and it is a question of fact for the tribunal. I had no evidence before me from the respondent on the issue of practicability and in those circumstances I could not see how I could give effect to the overriding objective, to deal with this matter fairly and justly, without evidence from a respondent that contests the application for reinstatement or re-engagement. I simply could not take this on the respondent's solicitor's "say so". It goes without saying that this is not evidence upon which to base a finding.

65. I also took account of Rule 76(3) which says where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if: (a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and (b) the postponement of that hearing has been caused by the respondent's failure, without special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed, or of comparable or suitable employment. No special reasons were put forward.

66. I drew to the parties' attention that Rule 76(3) says "shall" order the respondent to pay costs, and not "may".

67. As a result of the above matters I did not go on to determine remedy at this hearing. A case management hearing was held for remedy and dates were fixed.

68. The respondent confirmed at this hearing that it agreed that it is responsible for the statutory maximum amount of compensation, if no order is made by the tribunal for reinstatement or reengagement.

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Employment Judge Elliott
Date: 11 December 2018

Judgment sent to the parties and entered in the Register on: 12/12/2018

_____*Vanisha Patel*_____ for the Tribunals