Case Number: 2500521/2017

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr P Burnip	**AND**	**Department for Work & Pensions**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On: 20 December 2017**

Before: **Employment Judge Pitt (sitting alone)**

Appearances

For the Claimant: **Mr J Cole**
For the Respondent: **Mr A Webster of Counsel**

JUDGMENT

The claimant was not unfairly dismissed.

REASONS

1 This is a claim by Mr Paul Burnip date of birth is 8 November 1981. He was employed by the Respondent from 17 May 2005 until 17 January 2017. At the effective date of termination he had 11 years complete service, he earned £2,400 per month gross, £1,600 per month net. At the time of these events he was employed primarily as a trainer. He makes one claim for unfair dismissal, the claims for disability discrimination having been dismissed at a public preliminary hearing.

2 I heard evidence from the claimant, Mrs Jacqueline Gibbins, Mr Ian Gibbins, Mr Craig Binns, the claimant himself and I read a witness statement of Mr Ben Railton who had previously worked with the claimant.

The facts

3 The facts are these: The respondent is a government organisation. In July 2016 the claimant's wife gave birth to their third child. Following this she had substantial problems medically which eventually meant that she sought treatment from a psychiatrist. The burden of caring for the family therefore fell upon the claimant's shoulders.

4 In August of 2016 the claimant's brother went missing and was sought by the police as a missing person. He was missing for approximately 7 days. When he was found he was arrested by the police and was imprisoned for criminal matters. As a result of his behaviour the claimant was affected as was the extended family. The claimant tells me that his mother was suicidal and made attempts to take her own life.

5 The claimant described during the public preliminary hearing how this affected him and how eventually in December of 2012 he went to see his doctor and was diagnosed with a depressive illness.

6 Between 2 September 2016 and 30 November 2016 the claimant made nine applications for promotion within the civil service work. It is accepted by the claimant that he asked for assistance from a colleague on competencies. A colleague sent his own competency examples to him and the claimant accepts that he cut and pasted those into the application forms. The claimant was not successful

7 The job application 1073 of 16 which was submitted on 7 November came to light because his colleague also applied for the job and an investigation was commenced. Mr Burnip and the other employee, named Employee 1, were both interviewed and the investigating officer was satisfied from the evidence she was given that Employee 1 was blameless in these matters and considered that Mr Burnip was blameworthy. However her position as to where it stood in the misconduct matrix changed from gross misconduct to serious misconduct because of the circumstances surrounding the claimant's depressive illness.

8 The matter was passed to Mr Gibbins who conducted a disciplinary hearing with the claimant. During that he asked the claimant whether or not he had had any other such applications and Mr Burnip said, "I've applied for a few, I can't remember, I used my own competencies".

9 The hearing was adjourned for further discussions about other applications. As a result of that the claimant sent two applications CSR2435 of 16 and CSR2631 of 16 were sent to Mr Gibbins. Mr Gibbins also uncovered a further six applications the claimant had made which he had not disclosed. Of those further six number 2693 of 16 one answer was copied from the claimant's colleague, and slightly

reworded, application number 3163 one answer had been copied and application 3258 two answers had been copied.

10 During the course of the disciplinary hearing the claimant raised the issue of his ill health, "There's a lot of things going on, and things are getting worse. I've seen my GP been diagnosed with depression, I'm really struggling". At that time Mr Gibbins did not take that issue any further.

11 Mr Gibbins did not reconvene the disciplinary hearing. He made his decision based on what he had already heard and seen and the further application forms he was given. He also had reference to an occupational health report which had been sought by the claimant's line manager Mr Edgar, which refers to Mr Burnip suffering from symptoms of stress, anxiety and depression. The report says, "His symptoms remain significant as he continues to experience symptoms of low mood, poor concentration, disturbed sleep, increased fatigue, raised anxiety and lack of self confidence and motivation". It does say however that he is fit to remain in work on his full hours and duties as he reports to be managing these at this time. The report did recommend that the claimant may benefit from regular breaks saying "It's beneficial for psychological conditions as this will help him to manage his symptoms of poor concentration and increased fatigue more effectively at this time". There was also a suggestion that his workload and targets should be reviewed to help him manage his symptoms while accessing further medical treatment.

12 Mr Gibbins concluded that the claimant had deliberately submitted the applications with the copied competencies and acted dishonestly in doing so in part because the claimant consciously failed to disclose the additional documents to him. In cross-examination on those matters Mr Gibbins said that one would approach the civil service website and there would be a list contained within all applications, it is an easy matter to simply post them all onto him. As the ones that the claimant submitted were those that had no errors he formed the view that the claimant was being dishonest and in particular because one had been reworded that the claimant was being dishonest. He did not reconvene the disciplinary meeting because he formed the view that he would not need one. He felt he had enough to base his evidence upon.

13 The claimant was dismissed and the claimant appealed.

14 The appeal was heard by Mr Binns on 15 February; the basis of the appeal was insufficient weight had been given to the claimant's state of mind, it was a human error not a deliberate act and he was a valued member of staff with an unblemished record. Mr Binns during the course of the appeal hearing addressed the issue of the claimant's his ill health, and although briefly about the application forms. it is conceded by the claimant that in his appeal letter whilst he accepted that he had filled in the forms incorrectly it was submitted that his focus was impaired and his general state of mind such that aberrations would be understandable. The claimant accepts that he applied for the vacancy but was not able to recall much because of a loss of concentration, he was not concentrating on the task in hand and made a simple mistake.

15 During the hearing Mr Binns asked the claimant to provide more detail and any further mitigation. Mt Binns indicated he had spoken to Adam Edgar, the claimant's line manager, Mr Gibbins and Jackie Gibbins and understood the case through the paperwork. First of all discussed were the issues that Mr Burnip was having at home and the advice he had taken from his GP and specifically whether or not he had been advised to take time off. Mr Binns then said, "I briefly want to touch on applications not declared". The claimant's response was, "I thought there was one application I didn't realise I'd done it before I never checked. There wasn't any dedicated time to do applications. I was doing them during training and not paying attention when putting them in". At the end of the meeting Mr Binns asked the claimant, "Is there anything you wish to add", the claimant replied "There was no intent to do anything wrong. I wouldn't have put my job in jeopardy. I've never been in both for 12 years. It was a lack of concentration".

The issues

16 the ET1 was originally framed the issues solely related to the range of reasonable responses. However it became clear during cross-examination by Mr Cole that he was also alleging some breaches of procedure. I invited him to consider whether he wanted to amend the application to write those applications down for me and I would listen to such an application. The amendments Mr Cole wishes to make were:

16.1 Neither the IODM or AO consulted expert Domain, occupational health assist concerning mitigating factors.

16.2 There was no evidence of Mr Gibbins having disclosed mitigation to HR expert when seeking advice on penalty.

16.3 No evidence of Ian Gibbins asking HR whether it was appropriate to reconvene on receipt of previously undisclosed evidence and I added in and then not reconvening the disciplinary hearings.

The application to amend

17 Mr Cole told me that he accepted that he did not raise those issues in the ET1, the ET1 was completed by him on behalf of the claimant. He felt it would have been in broader terms clearly isn't. Mr Cole himself has been absent from work for 10 weeks, he was not aware that he could raise any issues with the ET1 but it is pertinent to the case, he is concerned that evidence may not have been given to HR and that the Tribunal should hear all the evidence in the case.

18 In response Mr Webster said that these issues have never been raised before and the respondent will be fundamentally prejudiced. In relation to amendment 1 that it may make a difference to contribution if we get that far. Amendment 2, undisputed but this would not have any impact on the claim at all and therefore should not be allowed in. Amendment 3, there may be an issue as to whether or not the case was convened, the prejudice to the respondent is in effect the late application.

19 I concluded that it was just and equitable to allow the amendment. , there had been a delay by the claimant's representative in raising it with me. I took account of the fact that he is a lay trade union representative. I took account of the fact that he has been absent through ill health. I also took account to the availability of the evidence to rebut these suggestions made by Mr Cole. I balanced the prejudice to the claimant which was that his case would not be fully presented against that to the respondent which is in effect that they are ambushed although their evidence is here, and concluded that amendment 1 and amendment 3 would be permitted in the terms that they are written on my paper, that number 2 would not be admitted because it has no merit within it.

20 That changes the complexion of the case and it becomes what is usually known as a classic **Burchell** case in this way. The case of **British Home Stores v Burchell [1980] ICR 303**, did the respondent have a genuine belief in the guilt of the misconduct of its employee? Did it have in mind reasonable grounds to sustain that belief at the time and had it carried out such investigation as was appropriate for that issue and finally did dismissal fall within the range of reasonable responses?

Discussion and conclusion

21 I make it clear here that what I am determining is not what I think about the case but what how the respondent handled the dismissal. Did Mr Gibbins have a genuine belief in the misconduct of the claimant? No evidence has been adduced before me to suggest that there was an ulterior motive. Therefore I am satisfied that Mr Gibbins had such a genuine belief. Did he have grounds upon which to sustain that belief based on such investigation as was necessary?

22 Turning to the investigation first, Ms Gibbins did all that was required of her at the time because she only had one application to deal with and came to the conclusion that this was serious misconduct rather than gross misconduct. Mr Gibbins having asked the claimant whether he had done this before was alerted to the fact there may be other applications. As a result he asked the claimant to forward the applications to him. He did not receive all of them, he received two applications. He then uncovered a further six applications. It seems to me an error by Mr Gibbins not to then reconvene his disciplinary hearing and invite the claimant's comments upon those particular aspects. First of all, why did he only disclose two when they should have been available on the civil service jobs website and then having disclosed only two why did he fail to disclose six, four of which had apparent errors within them? To me this is the actions of a reasonable employer and to that degree there is a flaw in the process. Having also obtained the occupational health report provided by the respondent it may also have been appropriate to then invite the claimant to comment upon that as well. Having said that the conclusions that Mr Gibbins drew were as follows – that the failure to mention another eight applications had a feeling of dishonesty, a failure to disclose all of those applications appeared dishonest and that a fact that one application had not just been copied and pasted but amended.

23 Taking those factors into account it seems Mr Gibbins concluded that the claimant was guilty of dishonesty these were not human error but that the claimant acted deliberately. Although he said he paid attention to the claimant's OH report and the fact that he was at work, I am not entirely persuaded of that at this time. His decision was to dismiss for gross misconduct, this being a matter of dishonesty.

24 I turn to the issue of whether or not his appeal rectified any issues in Mr Gibbins' approach. Clearly at this time the claimant was aware that nine applications were the subject of disciplinary proceedings; during the course of an appeal hearing he was invited to comment upon them. The claimant accepts before me that his explanation would be the same for each one. He did not realise he had done it, it was an error. Mr Cole on his behalf says in the hearing, "Although there's been repetition it was a matter of cut and paste. With regards to his state of mind there's potential for irrational behaviour. It's whether we believe the acts were deliberate or human error". Mr Binns, as his colleague did before him concluded that the errors were intentional, this was not a case of human error. He concluded this for the following reasons – the number of times it happened, i.e. there are nine applications of which four contain misinformation. Those four applications actually contain within them six errors; the claimant failed to mention the number of applications at the original hearing, this was repeated behaviour, the occupational health report clearly said that although the claimant had symptoms of stress, depression and anxiety but the claimant was at work and able to carry out his role. Mr Binns opinion, which is not challenged by the claimant was this is a demanding role as a trainer and if he was able to carry out that he did not understand why he could not carry out these documents. I am satisfied therefore that Mr Binns had a genuine belief in the guilt of the claimant and that the errors which had previously been identified were put right by Mr Binns.

25 That brings me to the crux of the matter and the penalty which was imposed of dismissal. Again when I look at whether or not the dismissal was fair or unfair what I am looking at not what I think as an Employment Judge but what a reasonable employer might do. That is to say was it outside of the range of reasonable responses to dismiss? I have to take into account that the penalty must be commensurate to the misconduct of the employee and the risk of it being a fundamental breach of the trust and confidence terms. Without any mitigation such actions as the respondent found would clearly constitute gross misconduct and immediate dismissal. The question is whether the mitigation of the claimant was such that the respondent could step back from that.

26 That mitigation is twofold; First the length of service, secondly the claimant's mental health at the time. As Mr Webster pointed out to me length of service will frequently not save an employee who has committed gross misconduct, especially when it is a matter of dishonesty. I looked at the level of dishonesty, that is to say whether or not because of the type i.e. the fact that the claimant did not actually gain anything, would make a difference. However, if the employer has concluded that this is an intentional act then it does not matter how much or how little the claimant would achieve as a result if successful.

27 turning to the medical evidence; It is clear that during this period of time the claimant had had a tragic set of circumstances commencing with the happy event of his daughter's birth which quickly led to his wife's ill health, through a summer of further family tragedies. I had concluded in the public preliminary hearing that although stress and depression do not appear fully formed the claimant was probably suffering from stress and depression from about October or November of 2016 although he did not go and see his GP until December. I asked myself are those circumstances and his depressive illness which only falls short of being a disability because of the length of time from which he suffered from it such that a reasonable employer would not dismiss.

28 Whilst it may be that some employers might not dismiss I take account of the organisation for which the claimant was working, namely an organ of the state in the Department for Work and Pensions. This Civil Service has its own separate standards of behaviour for its employees because of the nature of the work which it carries out as a civil servant. Even with the mitigation which the claimant produced before the respondent it is still possible that a reasonable employer would have dismissed him. That is not to say that all employers would but that it fell within a range of reasonable responses and for that reason his claim fails.

29 The claimant was not unfairly dismissed

EMPLOYMENT JUDGE PITT

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
8th January 2018