



EMPLOYMENT TRIBUNALS

Claimant: Mr Michael Johnstone
Respondent: Econ Engineering Limited

AT A HEARING

Heard at: Leeds **On:** 3rd and 4th June 2019
Before: Employment Judge Lancaster

Representation

Claimant: Mr Morgan Brien, counsel
Respondent: Mr Roger Quickfall, counsel

JUDGMENT

1. The Claimant was unfairly dismissed.
2. The Claimant was wrongfully dismissed.
3. Remedy is adjourned to a date to be fixed if not agreed. The parties are to provide their availability for a 2 hour remedy hearing within 14 days of receipt of this judgment and notice of hearing will follow in due course.

REASONS

1. The case was heard over 2 days and adjourned at the close of evidence and submissions to await a reserved decision. Written reasons are therefore required

The Claims

2. This is a claim for unfair dismissal. The stated reason for dismissal was related to conduct, which is, of course a potentially fair reason under section 98 of the Employment Rights Act 1996.
3. It was confirmed at the outset by Mr Brien that this is not a claim of automatically unfair dismissal. It is , however, part of the factual background to the case that the Claimant, together with 18 others, had commenced ACAS early conciliation on 11th July 2018 in respect of an allegation that the Respondent had infringed their statutory right to holiday pay. A claim of unauthorised deductions from wages subsequently brought by 7 remaining claimants, including Mr Johnstone, succeeded in the tribunal and is currently awaiting a remedy hearing.

4. It is common ground between the parties therefore that this is a “classic” case of a misconduct dismissal and that the principles in British Home Stores v Burchell [1980] ICR 303 are to be applied.
5. It is for the Respondent to show what was the reason, or if more than one, the principal reason for dismissal. That is a set of facts known to the Respondent at the time. Whether or not that factual matrix was sufficient to justify dismissal will then depend upon whether or not, applying Burchell, the employer entertained a reasonable suspicion in the guilt of the employee so as to amount to a genuine belief, formed upon reasonable grounds and after as much investigation as was reasonable in the circumstances. If at each stage the Respondent acted within the band of reasonable responses open to a reasonable employer and the sanction imposed was similarly within that range of responses the dismissal will be fair. I remind myself, as I must, that it is not for me to substitute my own view for that of a reasonable employer, even if I would in the circumstances have reached a different conclusion.
6. Because the Claimant was summarily dismissed, there is also a claim of wrongful dismissal. Irrespective of whether the dismissal was fair the Respondent will be in breach of contract unless it can prove, on the balance of probabilities that the Claimant in fact committed misconduct that warranted dismissal without notice, ordinarily referred to as “gross misconduct”.

The Facts

7. The Claimant had worked for the Respondent for 35 years and had a completely clean disciplinary record.
8. The Claimant was a machine charge hand. That meant that he had supervisory responsibility in the workplace for 7 people, although he did not line a manage them. His immediate supervisor was Eddie Heron and above him was the works manager, Colin Trehwitt. In this role the Claimant was one of no more than 50 people, approximately 20 per cent of the total workforce who had access to a works computer. The Claimant has access to a works email address (HFC@econeng.co.uk) which is used for communications to and from the machine shop. The HFC part of the address refers to the original workshop site at High Common Farm and this address, which originally depended upon external internet access, was carried across when the business relocated.
9. Access to the computer in the machine shop, which was primarily but not exclusively for the Claimant’s use, was password protected. The Respondent has an email and internet policy but no separate policy on computer use or confidentiality. Within the email and internet policy it states that the unique password must not be divulged to any other person and that you must only log on to the system using your own password. In reality the Claimant’s password was known to and was used by a fellow employee, Neville Hutchinson, and was also known to Eddie Heron. Although Mr Heron had his own password and his own computer he, with the full knowledge of the Respondent, would log on to the machine shop computer using the Claimant’s password. That password consisted of a word, which did not change, followed by a number which was periodically updated. The current number was kept displayed next to the computer, so that neither Mr Hutchinson nor Mr Heron would need to be specifically told whenever the password had been changed.

10. There is a very short list of folders in the drop down menu on the machine shop computer under an icon "quick access". Two of these folders labelled "CT" and "COLINWO" respectively in fact relate to Mr Trehwitt. There is no evidence as to what is in the whole of these folders, nor as to when any documents contained there were created and whether or not they are still current. There are no other personal folders appertaining to an individual employee within this list. There is no evidence as to who "pinned" these two folders to this particular PC. I accept the Claimant's evidence that it was not him. Access to these folders is not password protected.
11. The alleged misconduct in this case relates to alleged misuse of the computer and unauthorised access to confidential material, particularly some documents contained within the CT folder. There is, in fact, no reliance placed upon any alleged opening of files in the COLINWO folder.
12. The Claimant went on leave from 24th July 2018. On that day he attended a family funeral. He was due to return on 10th August 2018. Therefore on 26th July 2018 Mr Heron accessed the works computer, logging on as the Claimant. He did this in order to access the "Steel Supply Template", a spreadsheet that was used in the machine shop.
13. Within the list of recently opened Excel Files Mr Heron noticed that the Claimant had accessed documents titled "Alarm System- User Codes" and "Responsibilities Listing for Colin Trehwitt". He reported this to Mr Trehwitt who in turn reported it to the Respondent's IT manager, Wayne Tench. The Respondent's evidence both for the disciplinary investigation and for this tribunal hearing comes primarily from Mr Tench who, acting on the instructions of Beverley Shepherd the Finance and HR Director, interrogated the Claimant's work computer and took screenshots of his findings.
14. It is a misnomer to describe the access to these files as "recent". They are in fact recorded as "older" activity within the list of Excel Files and date respectively from 14th October 2017 and 14th September 2017. It is right for Mr Brien to observe therefore that this information would have already have been accessible to anyone using this computer at any time in the previous nine or ten months. I have, however, no reason to doubt, despite my not having heard directly from either Mr Heron or Mr Trehwitt (neither of whom made any recorded statement within the disciplinary inquiry either) that this matter came to light as a result of an observation by Mr Heron made in the ordinary course of his work.
15. The actual content of these two files has not been put in evidence. Nor was it introduced at any disciplinary hearing. I repeat that I do not know, therefore, and nor does the Respondent it seems whether even at the time these files were opened in September and October 2017 they contained any up-to-date information.
16. In the course of the investigation Mr Tench produced a spreadsheet which is the key document in this case (page 90 in the bundle). This identifies some 36 different dates with a period going back to June 2016 when, in the opinion of Mr Tench, any documents had been accessed which did not obviously relate to the Claimant's work. He was tasked by Mrs Shepherd to investigate whether the Claimant was actually at work on these dates, which he confirmed he was, and whether the computer activity was during normal working hours or overtime.

17. Mr Tench was also tasked with carrying out an investigation into whether or not the Claimant may have sent information off site. This he did by interrogating the Sophos log which records access to external websites from the computer and by using the search term “log.in live” which he asserts would necessarily identify usage of a personal email account, though he cannot say what email address was being accessed. As a result of this exercise Mr Tench identified 6 days when he considered that there had been both a viewing of non-work related material on the computer and also, at some point in that day, open access to an external email account.
18. Having discussed Mr Tench’s findings with him, Mrs Shepherd together with a director, Jonathan Lupton, concluded that the Claimant should be suspended. Consequently a letter, into which Mrs Shepherd apparently had no input, was then sent by the other director, and company secretary, Andrew Lupton. That letter is dated 8th August 2018, shortly before the Claimant was due to return to work. Although sent by mistake to his parents’ address he did receive it almost immediately and so did not come back after his holiday. As well as suspending him the letter served as an invitation to a meeting with Mrs Shepherd on 20th August 2018. Mr Tench’s spreadsheet and screen shots were attached to the letter but there was no explanation, let alone any investigation outcome report.
19. The terms of that letter are ambiguous. Whilst it might be construed as an invitation to a disciplinary meeting it could equally be understood as notice of an investigatory meeting or simply as a summons to a discussion. I accept the Claimant’s evidence that, after consultation with his trade union representative, he genuinely concluded that this was only an informal and preliminary meeting to discuss the Respondent’s concerns.
20. The letter states that “there may have been a number of breaches of confidentiality.” The only specific breach of confidentiality identified relates to “confidential files that have been accessed from the folder of our Fabrication manager, Colin Trew hitt.” There is also an allegation that there are “logs of internet access from corresponding days showing browsing of sites not related to work tasks and logging onto a private email account.”
21. There is, I am satisfied, no way in which the Claimant could have identified from the content of this letter and the accompanying documentation that he was being accused of having used a private account to email any documents, confidential or otherwise, from the works computer.
22. The meeting was held on 20th August 2018. It was chaired by Mrs Shepherd. Mr Tench was also in attendance to explain his documents and answer any technical questions. The Claimant chose not to be represented.
23. Mrs Shepherd subsequently made a note of the meeting. This is clearly only a summary. Mr Tench has also produced a typed 8 line note of the meeting. The only contemporaneous note of what was said is a hand-written annotation by Mrs Shepherd that is made on a print out of a document called “Book 13”, and which was included within the documentation provided in advance of the meeting.

24. "Book 13" is an excel document prepared by the Claimant and originating from about January 2016. I accept his evidence that in 2016 he worked on this document at home and during his lunch hour. It contained financial information about the company's turnover, profits, assets and staff and directors; salaries for the financial years 1997 to 2015. All this information was publicly available and was in fact obtained from the Companies House website. It was submitted by the Claimant to the works council with the intention that it be used in wage negotiations with the company, to support a lifting of a pay freeze that was in place at the time. Although it was not in fact relied upon by the works council at the time, the Claimant subsequently updated it to include the results for financial year 2016. The last time the spreadsheet was accessed on the works computer was 4th September 2017. It had never been amended to include the figure for 2017, which would have become available in about January 2018.
25. The hand-written annotation on this document reads: "made excel document at work, email document to private email, emailed back from home to work." Mr Tench's very brief note is similar. He records: "confirmed he had emailed docs into work and out – Book 13".
26. The typed note of Mrs Shepherd reads: "MJ confirmed that he did the document at home. I questioned why then it was on his work computer and he said he emailed it to himself to work on at work? I then asked if he emailed it back home and he said no but then changed his mind and said yes he had but it was his private document and therefore there was nothing wrong with this. When I explained I was confused as he had previously confirmed he hadn't emailed anything to and from his work computer? MJ then became nervous and changed his story a few times before confirming he had emailed this document backwards and forwards." Earlier in the meeting the Claimant had categorically denied that he had emailed anything from work to a private email address, but I am satisfied in context that this was in relation to the allegation that he had sent accessed confidential files on the shared drive of the works computer and copied those documents.
27. In the dismissal letter it is stated: "You have confirmed in the meeting that you have emailed information and spreadsheets (sic) from Econ to your home email address."
28. The way in which this exchange regarding "Book 13" is progressively reported by Mrs Shepherd in my view confirms the Claimant's account of how the meeting was conducted. I accept his evidence that the principal focus of Mrs Shepherd throughout the meeting was her assertion that he had been sending confidential work documents to his private email, and that although he repeatedly denied this she said that she did not believe him. I accept the Claimant's account that it was only at the end of the meeting when he was asked if he had ever sent anything from work to home that he pointed to "Book 13" as an admitted instance of his having done this. Any emailing of this document, "Book 13" to or from work was using the works email only. I note that any reference to what precisely the Claimant did in respect of the creation of "Book 13" will have been his recollection of events in January 2016, over 2 ½ years earlier and some hesitation or lapse in memory would be perfectly understandable. I accept that by this time, the end of the meeting, Mrs Shepherd had "become very short tempered and snappy" and that upon his then having referred to emailing "Book 13" she said "that will do" and started picking up her paperwork. She was, I am afraid, only looking for confirmation of her already formed view that the Claimant was guilty of emailing confidential documents. That is the only explanation for her apparently regarding the

limited and specific admission to having emailed "Book 13" between home and work as confirmation of his having emailed unspecified "information" and "spreadsheets", in the plural.

29. It is common ground that the Claimant was questioned about selected documents identified on the spreadsheet (page 90) as being allegedly unrelated to his work. There is no record of any specific questions or answers about any particular document except "Book 13". With the exception of a document titled "Arkadiusz Machiewicz - Statement of Events 09-01-2017", which he does not remember ever having opened, the Claimant accepts that he looked at the documents in question (though not necessarily on all of the dates alleged). This statement, which is said to relate to the investigation of some disciplinary incident, was accessed on 24th May 2017 (though the spreadsheet incorrectly dates it at 2nd May 2017).
30. The most recently accessed document referred to on the spreadsheet is a download of tax rates and allowances. A previous version of this government information had been opened on 23rd June 2017. I accept the Claimant's account that this was a legitimate document for him to refer to as he would often be asked for help by other employees, particularly the Polish workers, in understanding their pay slips.
31. The next most recent documents are a series of JPG's which are photographs of an accident at work some years earlier involving a cement mixer. These photographs were in fact taken by the Claimant himself and uploaded by him onto the works computer. These photographs were last looked at on 28th June 2018. Whilst not relevant to any current issue at work at that date they are not in any way confidential: they are in fact the Claimant's own documents.
32. The next most recent documents accessed before that are photographs of the former workplace at Palace Road and date from 2011. These were also in fact taken by the Claimant himself. These were looked at on 5th June and 30th May 2018. They were also opened on 26th February 2018, 26th January 2018 and 13th October 2017. I accept that these were kept on the computer for use as a reference and are not in any way sensitive.
33. The first items on the spreadsheet that are properly described as in any way containing confidential information are two references for former employees, D Herlihy and D Lupton. Mr Lupton is the brother of the directors, Andrew and Jonathan Lupton. A reference for Mr Herlihy was accessed on 22nd March 2018 ("002 Reference Letter .doc"). The reference for Mr Lupton and another reference for Mr Herlihy ("reference Letter.doc") were also accessed at the same time two days earlier on 20th March 2018. The reference for Mr Herlihy had also been opened on 17th August 2017. Other employee reference letters had also been opened on 14th September 2017, 30th August 2017.
34. These were factual references which will therefore have contained the dates of employment and details of attendance records. This is of course personal information about an individual, though the primary duty to protect such data lies with the employer.
35. I accept the Claimant's account given in evidence that he accessed Mr Herlihy's reference in March 2018 in order to ascertain his leaving date so as to fix the date

when his replacement started. I also accept his explanation that he opened Mr Lupton's document by mistake when looking for that of Mr Herlihy. Although this is not an appropriate way of obtaining this information I find it a plausible account of what actually happened.

36. The other documents apart from references that are relied upon in the spreadsheet and which may, from their titles, potentially contain confidential information apart from those I have already referred to (paragraphs 13, 14 and 29 above) are: an invoice for work done in 2015 and opened on 14th September 2017; the "Herman Leach Employment Letter" and the "Ayton Consulting Contract Termination 002.doc" both opened on 6th June 2017, and; the "Alarm Systems User Codes" opened first on 25th May 2017.
37. The "HFC Graffiti Damage photographs" also viewed on 25th May 2017 relate to an incident involving Mr Brian Lupton, father of the present directors, spray painting equipment as part of a protest. As the Claimant was perfectly familiar with the details this incident there is nothing obviously confidential about these images.
38. Some documents do appear to be private matters concerning the Claimant rather than work related (such as hotel vouchers). These are explained by the fact that he does not have a printer at home and there is no specific complaint that this use of the company printer for limited purposes constitutes actual misconduct. In relation to these holiday documents identified as being accessed on 23rd May 2018 I note that these are within the Claimant's normal lunch time of 12.30 to 1pm. Incidentally, I do not therefore understand the entry in the spreadsheet which describes them as being both I working hours and during overtime: they are on the face of it during neither.
39. Other documents which appear on the spreadsheet are either unidentified or do, I accept include matters which will in fact be work-related or are entirely innocuous (such as screen -saver photographs).
40. I accept the Claimant's evidence and therefore find as a fact that the explanation that he has given throughout for accessing any of the potentially confidential information is genuine. That is that he was acting purely out of curiosity. Apart from finding his account, even under careful and vigorous cross examination, to be both consistent and credible I also consider that it is entirely plausible given the pattern of computer usage that appears from the Respondent's own documents. The suspect documents are so far as I can see all opened at the same time as a number of other documents which are not similarly regarded as unrelated to work. The emerging pattern is therefore that on a relatively small number of occasions when the Claimant was using the works computer legitimately he also clicked to browse in other folders or documents.
41. There is no evidence that any of the documents accessed were ever in fact used inappropriately by the Claimant, nor disclosed by him to any other person.
42. I also find as a fact, on the evidence before me, that the Claimant did not access his personal emails from the work computer over the protracted periods alleged by the Respondent. The Claimant has given evidence, which I find persuasive, that he did not do this, although he accepts that he did on occasions at lunchtime access his own emails by going onto the MSN website and accessing Microsoft outlook.

43. On the other hand there is, of course, the evidence of Mr Tench where he asserts categorically that the Sophos logs where he has ran the search under login.live can only be evidence of personal email usage and not, as the Claimant believes, of access to the works email. It is somewhat surprising that this evidence by assertion only arose by way of permitted supplemental questions at the start of his evidence. No comparative research to show how company email usage is in fact recorded on the systems has been produced. Nor is there any explanation of the Sophos logs for 28th June 2018 which show, in addition to the alleged access to personal emails via login.live.com, activity in the middle and at the end of the day where he appears to have been a separate log in to microsoftonline .com. Mr Tench's evidence is entirely technological in nature but he has not provided any supporting technical information to substantiate his assertion.
44. Also the Sophos log for 24th July 2018 is relied upon as demonstrating personal email activity via login.live .com between 8.47 am and 8.52 am and 12.27am and 12.28 pm. The Claimant was not working on 24th July 2018. It was the first day of his holiday and he was in fact attending a family funeral on that day. I do not accept Mrs Shepherd's hypothesis that he may nonetheless in fact have come into work on his day off. That is an assumption based on one other instance where he apparently came in on a day off, the circumstances of which have not been explored at all. There is no evidence of anyone having actually seen him on this day. There is no evidence of any other computer activity on that day. It does not seem inherently plausible that the Claimant would come into work on his day off simply to access his personal emails when he could of course have done that from home. This evidence strongly suggests that the Sophos logs which are relied upon as conclusively demonstrating personal email usage by the Claimant whilst at work are not necessarily reliable. The alternative explanation would be that another person had used this computer to access a personal email on this date, and there is no evidence to suggest that that is at all likely.
45. Mrs Shepherd, was of course, already aware that the Claimant was on holiday on 24th July 2018. Whilst it is right that the Claimant did not say anything about this on 20th August he was not asked about this date. The Sophos log for this day was in the documents but it was not specifically referred to. Until the hearing itself the Claimant was, of course, unaware of the purported significance of the Sophos logs and what they were supposed to demonstrate about personal email use. Conversely Mrs Shepherd knew in advance of the meeting what these logs were alleged to show and she did not investigate further the fact that one of the documents put before her as demonstrating the Claimant's alleged email use was for a date when she knew that he had not been signed off on annual leave.
46. Accepting, however, the assertion of her IT manager that the computer records did demonstrate that a personal email account had been accessed, Mrs Shepherd then assumed that this also indicated that the Claimant had emailed documents to himself.
47. There is however no direct correlation in time between the accessing of any document and any activity recorded on the alleged external email account. Nor was there any specific questioning of the Claimant as to whether or why he had in fact emailed any particular identified document to himself. The spreadsheet indicates that out of the six occasions when external email usage was identified on days when questionable documents were also opened for related to photographs. Three of these (5th June , 30th May and 26th February 2018) relate to the same set of pictures, those of the Palace

Road Workshop. No questions were asked as to why the Claimant would have sent copies of his own photographs to himself on three separate occasions.

48. There was admittedly some conversation at the meeting on 20th August about possible confidential information about the Lupton family that the Claimant had obtained during his many years of work in in the business. I do think it matters whether something was said at the start of the meeting as well as at the end. I prefer the Claimant's account of the context in which he made any such remarks That is that he was seeking to address the overarching allegation that he had breached confidentiality by pointing out that he had had ample opportunity to disclose or use personal and confidential information which he had gleaned over the years working for Mr Brian Lupton, but had not done so.
49. I do not accept Mrs Shepherds version of this exchange, or exchanges. I do not accept that the Claimant, by way of some sort of threat, said words to the effect that he had information about Andrew or Jonathan Lupton that he could use if he needed and which he was sure they did not want to get out. I am satisfied that Mrs Shepherd had in fact gone into the meeting with a preconceived view that the Claimnt bore a hostile animus towards the business and that this has coloured her account of the conversation, so that it is not accurate.
50. I find that Mrs Shepherd was pre-disposed to think badly of the Claimant because of his critical stance on health and safety issues where she had come into conflict with him previously. I am also satisfied that she was, at least in part, influenced by the fact that he had joined in criticism of the Respondent's refusal to pay holiday pay except by reference to basic salary, which is the complaint that she knew was then before ACAS and which has subsequently led to a tribunal decision in his favour.
51. The stated reasons for dismissal in a letter dated 21st August 2018 refer to "the serious breach of confidentiality including unauthorised access of computer and personnel records, taking company information offsite, unauthorised use of your computer both during working hours and during overtime hours, and using your pc to look at personal files and emails during worktime and during overtime hours." The stated conclusion is "You have confirmed in the meeting that you have emailed information and spreadsheets from Econ to your home email address. You have also accessed files that were not required as part of your job and looked up company information on the server, whilst the Sophos log has shown at the same time you were on your own personal emails, leading me to believe that you have emailed this information to yourself. It is also apparent that you have been wasting company time and using the working day to carry out these offences."
52. No detailed findings of fact are made in respect of any of these alleged reasons for dismissal.
53. Mrs Shepherd has given evidence that she dismissed the Claimant because he accessed these files and showed no remorse for doing so". She also places reliance on the fact that in her view "he had not properly read the documents and he was blasé in his attitude."
54. There was an unsuccessful appeal against dismissal which was heard by Andrew Lupton. Again no detailed conclusions were reached. The basis of the decision was

that "I thought he was doing things he should not have done." The assertion that the Claimant had been sending material off site was simply accepted as a given without any further inquiry.

Conclusion

55. I conclude therefore that the principal reason for dismissal was the same as the principal focus of the meeting. That is Mrs Shepherd's belief that the Claimant had been emailing unspecified documents from work to his own personal email address.
56. That means that the dismissal was necessarily procedurally unfair because the Claimant was not informed in advance that this was an allegation against him.
57. That failure to provide sufficient information in advance of the meeting to enable the Claimant to prepare to answer the case against him is a breach of provision 9 of the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015). Coupled with the fact that it was not made sufficiently clear in the letter of 8th August 2018 that this was to be disciplinary hearing rather than an investigative meeting, that failure to comply with the Code of Practice is unreasonable.
58. My provisional view, though without as yet having heard any submissions on the point, is that this should lead in an uplift on any award of compensation of 10 per cent.
59. There is, however, a possibility that had an impartial and proper investigation been carried out Mrs Shepherd might still have concluded that the evidence of Mr Tench still established that the Claimant had indeed been accessing a personal email during work time which allowed for the possibility of his having sent documents out of the business for some reason.
60. There remains the fact that the Respondent had no actual evidence of any confidential documents actually having been sent off site and the Claimant had very long, and loyal service with the Respondent. I cannot therefore assess the probability that the Respondent might nonetheless have reasonably come to the view that it was fair to dismiss in these circumstances at higher than 25 per cent.
61. However the Claimant has also accessed some documents which on their face contained information which may have been sensitive. His actions have to an extent therefore caused or contributed to his dismissal. It would in my view be just and equitable to reduce his compensatory award, under section 123 (6) of the Employment Rights Act 1996, by a further 10 per cent. That is a cumulative reduction of 35 per cent.
62. Similarly the basic award for unfair dismissal will fall to be reduced by 10 per cent under section 122 (2). The Claimant's conduct would certainly have warranted some disciplinary warning and it is not just and equitable that he should receive the full basic award.
63. The Respondent has not, however, proved that the Claimant has committed gross misconduct of a type that would disentitle him to full payment in lieu of notice. It has certainly not proved that he did in fact email out nor make any use of any company documents he may have opened. I find that the Claimant has, out of misplaced curiosity, availed himself of the opportunity readily available to him of looking at

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documents which he had no need to open but that that is not properly described as “a serious breach of confidentiality”.

EMPLOYMENT JUDGE LANCASTER

DATE 18th June 2019

JUDGMENT SENT TO THE PARTIES ON

19 June 2019

AND ENTERED IN THE REGISTER

E Mahon

FOR SECRETARY OF THE TRIBUNALS

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