**Case Number: 2405100/2017**

***JB***

# THE EMPLOYMENT TRIBUNAL

**BETWEEN**

| **Claimant** | **and** | **Respondent** |
|---|---|---|
| **Mr M Burton** | | **Mitie Cleaning & Environmental Services Limited** |

**Held at London South** **On 23 & 24 April, 8 May 2018**

**BEFORE: Employment Judge Siddall (Sitting Alone)**

**Representation**

**For the Claimant:** **In Person**

**For the Respondent:** **Ms A Smith, Counsel**

## JUDGMENT

The Judgment of the Employment Tribunal is:-

1. The claim for unfair dismissal is not well founded and it does not succeed.

2. The provisional remedy hearing scheduled to take place on Monday 2 July 2018 is vacated.

## REASONS

1. This is a claim for unfair dismissal brought by the Claimant in relation to his dismissal with effect from 18 May 2017. I heard evidence from the Claimant and from two witnesses, Mr Edward Fuentes and Mr Alex Gavrilovic on his behalf. For the Respondent I heard evidence from Mrs Gill Steel, Investigating Officer, from Mr Chris Rugg who heard the Claimant's appeal against the

outcome of his grievance and from Mr Tim Howell who heard the Claimant's appeal against dismissal. I was handed a written witness statement for Ms Zara Shabin who was employed in the Human Resources Department of the Respondent and Mr Martin Fitch, the dismissing manager. I was told that Ms Shabin would not be attending the hearing but that Mr Fitch had been asked to attend and had declined. Mr Fitch's witness statement had only been served on the Sunday before the hearing was due to commence. The Respondent applied for a witness order in relation to Mr Fitch. This was a very late application but I understood that there had been problems in contacting Mr Fitch and I took the view that the Respondent would be prejudiced if the application for a summons was refused. On 23 April I issued a witness summons for Mr Fitch to attend the following day, the 24 April but he did not do so. He emailed the Tribunal citing work commitments. This was not an acceptable response to an order from the Tribunal and I reissued the witness summons requiring Mr Fitch to attend on a new date 8 May 2018, which he did.

2. The claim for unfair dismissal is governed by section 98 of the Employment Rights Act 1996. The first matter for me to consider is the reason for dismissal. The respondent says that the Claimant was dismissed because of his misconduct which is a potentially fair reason for dismissal. The test which I must apply is that set out in the case of *Burchell v British Home Stores*, namely did the Respondent have a genuine belief that the Claimant had committed misconduct and was that belief based on reasonable grounds after reasonable investigation? If so I must go on to consider whether dismissal was within the range of reasonable responses to the conduct complained of.

3. The facts I have found and the conclusions I have drawn from them are as follows.

4. In the middle of February 2017 an email that the Claimant had sent to Mr Alex Gavrilovic was received by Phillipa Rees. Mr Gavrilovic had resigned from his employment with the Respondent and had been placed on garden leave. A forwarding system had been set up so that emails sent to Mr Gavrilovic would be referred to Ms Rees. As a result, an email that the Claimant had sent

containing information about a grievance made by Mr Gavrilovic had been received by Ms Rees and she reported this to the Respondent. This resulted in an investigation being carried out into the Claimant's emails.

5. As a result of the investigation, the Respondent uncovered the following information:-

    1. On 6 February the Claimant had sent an email to Mr Gavrilovic to which he attached a document entitled "Alex Renewal".

    2. On 16 February the Claimant had sent a document called "Open Sales Force Data" to Edward Fuentes, to which Mr Fuentes had responded that this was a mistake and the Claimant had asked him to delete the document.

    3. On 11 February the Claimant had forwarded to Mr Fuentes a document entitled 'Copy of SP4MBM-Alex's Data' which the Respondent says was a comprehensive database containing highly sensitive client information.

    4. On 15 February 2017 the Claimant had sent Edward Fuentes a PowerPoint presentation relating to a proposal for casual periodic cleaning that the Claimant was presenting to senior management of the Respondent.

6. Later the Respondent also discovered that the Claimant had prepared a reference for a Mitie member of staff, Bertha Salinas dated 13 February 2017 in which Ms Salinas is described as an "Event Organising Administrator". In fact, the Respondent says that she was a Cleaning Manager.

7. The Respondent also discovered numerous emails between the Claimant and Mr Edward Fuentes, who was not an employee of the Respondent, relating to work to be carried out for the Respondent by what was described as the "Periodic Cleaning Team". It is asserted that Bertha Salinas, the Supervisor of that team, is the wife of Edward Fuentes. The emails contained personal data

about employees of the Respondent who formed part of this team including details of their hours and rates of pay.

8. On 22 February 2017, the Claimant was suspended on the basis of allegations of a serious breach of data protection and alleged fraudulent activities, a serious breach of trust and confidence and breach of his employment terms.

9. The Claimant was asked to attend an investigation meeting with Gill Steel on 8 March 2017 which he did. Ms Steel put to him that he had emailed the above documents to Mr Gavrilovic and Mr Fuentes, and he agreed that he had but he did not accept that he had done anything wrong. Handwritten notes taken by the notetaker during the course of that meeting were signed by all present at the conclusion of the meeting. Ms Steel later produced a typed version of the notes but the Claimant maintained that these differed substantially from the handwritten notes.

10. During the meeting the Claimant agreed with Ms Steel that he would resign and be paid until the end of March but he later received a letter in which his resignation was rejected and the investigation continued. He later withdrew his resignation.

11. The Claimant was invited to a second investigation meeting on 21 March but this did not take place. On 20 March the Claimant raised a grievance about how Ms Steel had conducted herself in the investigation meeting, stating that she had questioned him aggressively and pressured him to resign. He also complained about the date and timing of meetings and about the fact that his resignation had been rejected.

12. The grievance was considered by the Respondent but was not upheld. An appeal to Mr Rugg against the grievance outcome was not successful. However, as a result of the grievance it was decided that Ms Steel would be replaced as investigator by Mr Luis Lopes, Operations Director. He invited the Claimant to attend a further investigatory meeting on 30 March.

13. On 30 March the Claimant withdrew his resignation. The investigation hearing fixed for 30 March was postponed at the request of the Claimant. It was rescheduled for 10 April 2017.

14. On 7 April the Claimant wrote to Mr Lopes to state that he was unable to attend the investigation meeting on 10 April because his chosen colleague was unable to attend on that day. He asked if the hearing could take place on 18 April. The Respondent declined and Mr Lopes went on to consider the available evidence on 10 April. He decided that there was a case to answer.

15. On Tuesday 11 April Mr Martin Fitch sent the Claimant an invitation to attend a disciplinary hearing on 13 April. This invitation was sent by email and the evidence which the Respondent wished to discuss was attached to that email, but it amounted to a large number of pages and the Claimant was not able to print these out. It seems that the Respondent did not get a hard copy of the documents into the post that day.

16. The Claimant attended the hearing with Mr Fitch on 13 April but he handed him a letter at the outset of the hearing indicating he had taken advice from ACAS. He had not had sufficient time to consider the documents or prepare for the hearing and he wanted an adjournment. He also asked for a copy of his contract of employment and a copy of the policies that he was said to have breached.

17. Mr Fitch closed the meeting and sought advice. The Claimant appeared to be under the misapprehension that a disciplinary hearing had taken place and that he should expect a decision in relation to the allegations. In fact, Mr Fitch discussed the matter with Human Resources and decided to reconvene the disciplinary hearing for 3 May 2017. The Claimant was just about to go on holiday to Australia and the hearing was to take place after his return. The Claimant agrees that a hard copy of the evidence pack was received by him by post on 18 April before he went away.

18. Mr Fitch then discovered he could not conduct a hearing on 3 May and a new invite was sent out asking the Claimant to attend on 5 May 2017.

19. A second invitation letter was sent out dated 13 April 2017 which again set out the allegations of serious breach of data protection, alleged fraudulent activities, serious breach of trust and confidence and breach of employment terms. That letter contained a warning that if the Claimant did not attend, the hearing may be conducted in his absence and that one of the outcomes could be dismissal.

20. A further letter of invitation was set out, wrongly dated 28 May and corrected to 28 April, confirming the new date for the disciplinary hearing of 5 May.

21. The Claimant attended on 5 May. However, he queried the nature of the meeting. He wanted to know whether the hearing was a second disciplinary hearing or whether the first meeting had been reconvened. He stated to Mr Fitch that he had been expecting to receive an outcome from the first hearing which took place on 13 April and he was confused to receive the invitation to a further hearing for the 3rd and then the 5th May. The Claimant wanted confirmation that this was a second disciplinary meeting and not a reconvened meeting. Mr Fitch adjourned the meeting to take advice from Human Resources. Mr Fitch sought to clarify the situation with the Claimant but he was not satisfied. Mr Fitch invited him to put forward his defence to the allegations but ultimately the Claimant declined to engage with the meeting and Mr Fitch brought it to an end.

22. The evidence of Mr Fitch is that following the meeting on 5 May, he sat down with Human Resources and went through the evidence that had been presented to date. This included the handwritten notes and the typed notes of the grievance meeting with Gill Steel on 8 March. Mr Fitch says that he referred to the typed notes as he believed that these would be the final definitive version of what happened at the meeting. He had been given the batch of emails between the Claimant and Mr Fuentes about the periodic cleaning team. He was not shown any of the attachments to the emails sent to Mr Gavrilovic and Mr Fuentes, but he was advised by Zara Shabin from Human Resources that these attachments contained client and confidential information

belonging to the Respondent. I note that Ms Shabin's written statement does not contain any details of any such assertions.

23. Following that discussion, Human Resources drafted a letter confirming that the Claimant would be dismissed with effect from 18 May 2017. Mr Fitch found that:-

    1. The Claimant had sent contract renewal data that belonged to Mitie to Mr Gavrilovic although he was aware that Mr Gavrilovic was on garden leave.

    2. That the Claimant had sent a database to Mr Fuentes and that the Claimant had engaged in activities with parties not related to his work during his contracted hours with Mitie.

    3. That the Claimant had shared confidential personal data with Edward Fuentes who was not employed by the Respondent. He rejected the Claimant's assertion that he had been corresponding with Edward as his wife (Bertha Salinas and the cleaning team supervisor employed by the Respondent) had poor English and was busy with their kids.

    4. That the Claimant had issued a false reference for Bertha Salinas.

24. Mr Fitch noted that Edward Fuentes was a Director of his own cleaning company. His evidence was, and I accept, that he made contact with Bob Freestone of the Respondent to find out more about Mr Fuentes. He discovered that he was a former employee of the Respondent and was now a sub-contractor, although he was not sub-contracted in relation to the activities of the periodic cleaning team who were the subject of the emails in question.

25. Mr Fitch concluded that the Claimant had provided no satisfactory explanation about the relationship between himself and Mr Fuentes and that Mr Fuentes was acting as more than an alleged translator. He was concerned that the email exchanges contained information that would not usually be found in communications with a sub-contractor. He found that a false employment reference relating to Bertha Salinas had been issued. He noted that the

Claimant had admitted sending data to the personal email address of Alex Gavrilovic despite knowing that he was on garden leave. Finally, he concluded that there had a been a loss of trust and confidence and that the Claimant had "breached your terms and conditions of employment by engaging in activities with parties not related to Mitie during your contracted hours with Mitie, mainly Edward Fuentes".

26. In conclusion, Mr Fitch took the decision that the Claimant should be summarily dismissed on the basis of gross misconduct.

27. The Claimant appealed against his dismissal by letter dated 31 May 2017. He provided a detailed 7 page document setting out points in support of his appeal. In relation to the confidential data allegedly sent to Mr Gavrilovic and Mr Fuentes, the Claimant asserted that this information was in the public domain and that he had sent it to them in order to progress the business of the Respondent. He asserted as he had only been dealing with Edward Fuentes for the purposes of the work done by the periodic cleaning team for the Respondent, a team in which Mr Fuentes' wife Bertha was employed; that he had not overstated Ms Salinas' position in the draft reference; and he alleged that there were numerous procedural deficiencies.

28. Mr Howell conducted the appeal hearing on 14 June. It is not in dispute that this was a fairly short hearing. Mr Howell invited the Claimant to add to the lists of points set out in his appeal document, and the Claimant did make some points about the notes of the grievance meeting and the hearing of the grievance. The Claimant also referred back to his detailed appeal document. It was the decision of Mr Howell not to uphold the appeal and he wrote to the Claimant on the 19th June 2017 to confirm this. In giving evidence Mr Howell confirmed that he had looked at all the available notes of meetings but that he too had not considered the attachments to the emails sent to Mr Gavrilovic and Mr Fuentes.

**Decision**

29. The first question for me to decide is whether the respondent had a genuine belief that the Claimant had committed misconduct, following a reasonable investigation.

30. The Claimant makes many complaints about the process followed by the Respondent. He was particularly concerned about the production of typed notes following the first grievance meeting with Ms Steel. I have to agree with him that the two sets of notes do contain significant differences. The note taker did not record any of the questions on the handwritten notes – these were added later. It was also clear that Ms Steel and the notetaker had added in additional words not recorded on the handwritten notes. The typed notes had not been sent to the Claimant until a month after the grievance hearing. Nevertheless, when conducting the disciplinary hearing Mr Fitch had ignored the handwritten notes (which I have to say are rather poor and are difficult to read) and had relied on the typed notes. I have formed the view that based on the Claimant's evidence the typed notes cannot be treated as a reliable note of what was said at the grievance hearing on 8 March in their entirety. I have therefore referred to the handwritten notes where appropriate, particularly in relation to what the Claimant is recorded at saying at that meeting as he has stated that the handwritten notes are accurate.

31. That said it is clear even from the handwritten notes that the Claimant agrees that he had sent the "renewal" document to Mr Gavrilovic and that he had sent the client database information and the PowerPoint presentation to Mr Fuentes.

32. The Claimant complains that he was not given sufficient notice of meetings that he was invited to, that he was denied an opportunity to attend a further investigation meeting and that the disciplinary hearings had not been conducted appropriately.

33. I have given careful consideration to this question. I note that the Claimant had an opportunity to attend an investigation meeting with Ms Steel on 8 March. He later complained about the way in which that meeting had been conducted, but his grievance was not upheld. In giving evidence Ms Steel stated that she had

questioned the Claimant firmly about the allegations but she denied that she had been aggressive. She was clear that she had discussed the various attachments with the Claimant. He produced a copy of the 'Alex renewal' document at the meeting and she showed him copies of the database and presentation which it was alleged that he had sent to Mr Fuentes. The Claimant did not deny emailing any of these documents. She had also checked and been advised that the attachments contained Mitie client data and confidential information. However, she was then removed from the investigation.

34. The Claimant was given a further opportunity to attend investigation meetings with Mr Lopes but for a variety of reasons he was not able to attend meetings fixed for 30 March and 10 April. It is true that some of the investigation meetings appeared to have been arranged at short notice, but each time the Claimant protested, the meeting was adjourned and a new date offered. The only exception to this was the final investigation meeting conducted by Mr Lopes on 10 April 2017. That investigation meeting had already been postponed once at the request of the Claimant. In all the circumstances I find that the Respondents had given him a reasonable opportunity to attend a second investigation meeting with a new investigator, despite the fact that his grievance against the original investigator had not been upheld.

35. The Claimant was also given an opportunity to attend two disciplinary hearings with Mr Fitch. He was only invited to the first meeting on 11 April and at that point he did not have a hard copy of the pack of evidence which the Respondent relied upon. He raised legitimate concerns about this with Mr Fitch on 13 April. As a result of that Mr Fitch sought advice from HR and reconvened the meeting which ultimately took place on 5 May.

36. I can understand that the Claimant may have been confused as to what was going to happen following his first meeting with Mr Fitch on 13 April and he may not have appreciated that the meeting had been adjourned after he raised concerns about the short notice. However the situation should have been clear to him after he received the pack of evidence and an invitation to a further

meeting on 5 May. I do not understand the Claimant's concern about whether this second meeting was described as a reconvened meeting or a second disciplinary hearing. The important factor is that, the Claimant having complained he had not had time to prepare his defence, he was given a second opportunity to present his case at the hearing on 5 May. The matters to be considered at that meeting were set out very clearly in the Respondent's two invitation letters dated 13 and 28 April. It seems that the Claimant took the view that the Respondent had "burned their boats" by trying to conduct a disciplinary hearing on 13 April when he had not received sufficient notice, and that by calling a second meeting on 5 May was somehow improper. In fact, it seems to me that the Respondent was acting entirely reasonably. Mr Fitch went to some lengths to try and reassure the Claimant about the purpose of the second meeting but despite that the Claimant refused to engage with the meeting and did not present his defence to the allegations to Mr Fitch. Mr Fitch was then forced to reach a decision on the basis of the evidence presented to him, including copies of the emails (but not the client and prospect data and PowerPoint presentation) and the handwritten and typed notes of the investigation meeting with Gill Steel.

37. The Claimant was also given an opportunity to appeal. He set out his points of concern in some detail in his appeal document which was considered by Mr Howell. The Claimant was also given an opportunity to add to that written document at the appeal hearing.

38. In all the circumstances I find that the process followed by the Respondent was fair and reasonable.

39. I then come to the substance of the allegations. It is necessary for me to reach a view as to whether the Respondent had formed a genuine belief that the Claimant had committed gross misconduct on reasonable grounds and after a reasonable investigation.

40. This task has been made more difficult for me by the fact that the attachments which the Respondent says was sent to Mr Fuentes and Mr Gavrilovic were

only contained in the Bundle in heavily redacted form. Whilst there may have been sound commercial reasons for such redactions, this made it harder to understand what information the attachments contained and why the Respondent was so concerned about them.

41. It is very difficult to understand why the key decision managers who were conducting the disciplinary and appeal process where not given access to the confidential data which the Claimant was alleged to have sent to Mr Gavrilovic and to Mr Fuentes. Mr Fitch confirmed that as a manager within the Respondent he was entitled to see that information. He made it clear that he relied upon the advice of Human Resources as to what the attachments contained. It is difficult to understand why Human Resources were trusted to provide the definitive view on the nature of the documentation that related to customers and prospects. It is also significant that Ms Shabin does not deal with this aspect of her involvement in the investigation in her written witness statement. In summary, the evidence presented by the Respondent in relation to what the Claimant is alleged to have sent to Mr Gavrilovic and to Mr Fuentes is highly unsatisfactory.

42. As a result, the oral evidence of Mr Fitch becomes crucial.

43. The evidence of Mr Fitch as to what view he formed about the allegations made against the Claimant is as follows:-

    1. He had a real concern that information about Mitie clients and prospects that belonged to the Respondent had been sent to a Senior Sales Director who was on garden leave.

    2. Having checked he understood that Mr Fuentes was a sub-contractor of Mitie, but not in relation to the periodic cleaning team. He was concerned that the Claimant had shared with Mr Fuentes significant personal data relating to payroll and costs which could be used by someone to build an alternative pitch for the work. He was aware that Mr Fuentes operated his own cleaning company.

3. He was concerned that the Claimant had supplied a reference himself without going through Human Resources, as should be standard practice.

4. He took the view based on the investigation notes, that the Claimant had sent what has been described as “pipeline” data to Mr Fuentes.

44. In reaching these conclusions Mr Fitch had seen the exchanges of emails between the Claimant and Mr Fuentes, and he had seen the reference prepared for Bertha Salinas, but he had not seen any of the database or prospect information, or the PowerPoint presentation which the Respondent says (and the Claimant agrees) was sent to Mr Gavrilovic and Mr Fuentes. He was relying solely upon what Human Resources told him was contained in the databases.

45. In giving evidence today Mr Fitch was referred to the redacted attachment documents. In relation to the document entitled “Alex Renewal” he expressed the view that this would have contained both information relating to Mitie clients and information relating to new prospects (although it is not possible to tell that from the redacted version in the Bundle). The Claimant’s case is that any information relating to Mitie clients had been removed.

46. The case of **Sainsburys Supermarkets Limited v Hitt** [2002] EWCA 1588 states that the ‘reasonable range of responses’ test applies to the investigation carried out by an employer into allegations of misconduct; it is not for the tribunal to substitute its own view of the investigation it would have undertaken. The question is whether the investigation carried out is reasonable in all the circumstances. Has that standard been met in the present case?

47. There was certainly information seen by Mr Fitch, in the form of numerous email exchanges, from which he could come to the reasonable conclusion that the Claimant was communicating inappropriately with a third party, Mr Fuentes, about persons who were directly employed by the Respondent. Mr Fitch was entitled to conclude that the Claimant should not have been communicating with Mr Fuentes, who was not an employee of the Respondent and was not a sub-contractor in relation to the periodic cleaning team, about the hours, rates

of pay and working arrangements of members of that team. Mr Fitch was entitled to reject the Claimant's suggestion that he was only dealing with Mr Fuentes because his wife did not speak good English and was "busy with the kids". This did not amount to an adequate explanation of why the Claimant had been dealing with someone who is not a member of Mitie staff and who in fact operated a competitor cleaning company.

48. I also find that Mr Fitch was entitled to conclude that the Claimant had mis-described Ms Salinas role when supplying a reference for her, and that a supply of that reference may have been in breach of Mitie's standard policy. However, I do not find that this action on its own would amount to gross misconduct.

49. The most difficult questions relate to the information sent to Mr Gavrilovic and Mr Fuentes about the Respondent's clients and prospects, as neither Mr Fitch nor Mr Howell reviewed these documents.

50. Having reviewed the evidence of Ms Steel and the Claimant's own evidence, the conclusion I have reached is that in fact the content of the information provided to Mr Gavrilovic is only in dispute to a very limited degree.

51. During cross-examination the Claimant was taken to the redacted client database that he was alleged to have sent to Mr Fuentes. Ms Steel put to him that he had sent client data to Mr Fuentes and he confirmed that he had (page 130 of the notes). He agreed that the document would have contained client information, although he argued that the information was in fact of limited value. He said that he saw nothing wrong in sending the database to someone who was not an employee of the company. He said that he 'owned' the data. He agreed that he had sent Mr Fuentes the internal PowerPoint presentation about a proposal for the periodic cleaning team.

52. There is some dispute about the document entitled 'Alex Renewal'. The Claimant agreed that this contained details of prospects and contract renewal dates. He denied that it would have contained any information about existing

clients, as this would have been removed. Ms Steel had formed the view that it did. In any event, the Claimant argued that this information was in the public domain and that he 'owned' the data.

53. It should be noted that when the Claimant sent Mr Gavrilovic the "renewal" document, Mr Gavrilovic was still an employee of the Respondent. However, the Claimant was aware that Mr Gavrilovic had resigned his employment and had been placed on garden leave, and that he had brought a grievance against the Respondent. Mr Gavrilovic also confirmed that the Claimant was aware that he was leaving to join a different company that was involved in cleaning services. Mr Gavrilovic stated that this was why he had been placed on garden leave.

54. I therefore conclude that there was sufficient evidence from the evidence of the first investigation meeting with Gill Steel, for Mr Fitch to conclude that the Claimant had admitted sending databases to Mr Gavrilovic and to Mr Fuentes. This is apparent even from the handwritten notes of that meeting. The Claimant asserted that the information was in the public domain. In relation to the database sent to Edward Fuentes the Claimant argued that he owned the data. It had been put to him by Gill Steel that he had put the database together on Mitie time.

55. Mr Fitch did not accept the Claimant's assertions about the nature of the documents that he had sent to Mr Gavrilovic and Mr Fuentes. He formed the view that the Claimant had acted inappropriately in sending documents that were the property of the Respondent and which contained confidential and sensitive information, first to a member of staff who was on garden leave and second to someone who was not employed by the company at all.

56. In this situation a dismissing manager might be expected to satisfy himself about the nature of the information that he says was disclosed inappropriately. It is very surprising first, that Mr Fitch was not sent the information to enable him to make a decision and secondly that he did not ask to see it. However, in a situation where the Claimant admits that he sent out the information, and

where the Claimant and were in agreement as to what that information was that Mr Fitch was entitled to conclude that the Claimant had sent out confidential information inappropriately and that he was guilty of gross misconduct.

57. It is therefore my conclusion based on all the circumstances of this case that the investigation carried out by the Respondent just falls within the range of reasonable responses that is open to an employer when an allegation of this type comes to light. I therefore conclude that the dismissal was fair. If I am wrong on that and the Respondent did not act reasonably, because it failed to carry out sufficient enquiries and by not sending the relevant information to Mr Fitch, I nevertheless find that the Claimant, based on his own evidence, acted highly inappropriately by sending out database information and staff information to persons not employed by Mitie. Therefore, if I had found the dismissal to be unfair I would have found that the Claimant had contributed to his dismissal up to the level of 100%. Therefore, no basic award and no compensatory award are due.

58. The provisional remedy hearing listed for 2 July 2018 need not take place and is vacated.

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Employment Judge Siddall
Date: 14 May 2018.