THE EMPLOYMENT TRIBUNALS

Claimant: **Mr F Gallagher**

Respondent: **British Telecommunications Plc**

Heard at: **Teesside Justice Hearing Centre** **On:** **Tuesday 9th July 2019**

Before: **Employment Judge Johnson**

Members:

Representation:

Claimant: **In person**
Respondent: **Mr S HALL – (SOLICITOR)**

JUDGMENT

The claimant`s complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

1. The claimant conducted this Hearing himself. He gave evidence himself, but did not call any other witnesses. The respondent was represented by its solicitor, Mr Hall who called to give evidence, Mr R Hussain, Mr. S A Rigby and Mr. T Evatt. The claimant and the three witnesses for the respondent had all prepared typed and signed witness statements which were taken "as read", subject to questions in cross-examination and questions from the Tribunal Judge. There was an agreed bundle of documents marked R1, comprising an A4 ring binder containing 155 pages of documents.

2. By a claim form presented on 11th March 2019 the claimant brought a claim of unfair dismissal. The respondent defended the claim. The claim arises out of the claimant's dismissal on or about 31st January 2019 from his position as an incident controller for the respondent. The claimant had originally been suspended and disciplined and ultimately issued with a final written warning for an act of alleged gross misconduct. When senior management found out immediately thereafter that the claimant had not been dismissed (as they had expected) the claimant was again suspended and ultimately dismissed for "some other substantial reason", namely that the respondent had lost all trust and confidence in him following the finding that he had committed the alleged act or acts of gross misconduct. The claimant alleged that the decision to dismiss him amounted to "double jeopardy" in that he had already been given a final written warning for the misconduct (which he had admitted) and therefore it was unfair of the respondent to revisit that sanction and increase it to one of dismissal.

3. Throughout the hearing, Mr Hall on behalf of the respondent maintained that the claimant had not been dismissed for the original act of misconduct, but because the respondent had completely lost trust and confidence in him due to the serious nature of the original incident, the claimant's alleged lack of remorse and reluctance to acknowledge the serious nature of his conduct and particularly because of the damage (or potential damage) to the reputation of the respondent.

4. The claimant was employed by the respondent from July 1998 until the end of January 2019, over 20 years of service. The claimant's role was that of an incident controller in which capacity he was required to monitor and manage system outages and faults. As part of his role, the claimant had access to the respondent's "Blarney" system. This is a T-Mobile legacy system, which can identify which cell site a mobile device is connecting to at any one time. This can be used to identify and help resolve connectivity issues. The Blarney system holds significant amounts of customer data, much of which is extremely personal or sensitive. In particular, the information on the Blarney system and tools within it, permit the operator to track a customer's location through their mobile phone.

5. In or around October 2018, the respondent received a complaint from a customer (Miss K) alleging a data privacy breach on her account with the respondent. Miss K was a former partner of the claimant and believed that he was monitoring her whereabouts by a misuse of the Blarney system. Miss K alleged that she was being "stalked" by the claimant, had reported the matter to the police and also to the Information Commissioners Office (ICO).

6. The respondent investigated the complaint and discovered that the claimant had been using the Blarney system to access a number of customers` personal data, including that of Miss K, over a significant period of time and had been looking at their accounts in order to gain information about their whereabouts. Miss K had alleged that these other persons were friends of hers who had noticed that the claimant or his friends seemed to turn up unannounced at places where Miss K and her friends were located.

7. By letter dated 31st October 2018, following a meeting the same day, the claimant was suspended pending investigation into the allegations. The letter of

suspension dated 31st October 2018 appears at page 37-38 in the bundle, and states "it is alleged that you used your ex-partner's mobile phone number on the Blarney system without authority".

8. During the investigation, the claimant readily admitted using the Blarney system to gain access to his former partner's whereabouts and those of persons she associated with. The claimant had carried out at least 16 data privacy breaches by those means. The only explanation he was able to give to the respondent during the investigation, was that he had simply been testing the Blarney system.

9. By letter dated 5th December, the claimant was invited to attend a disciplinary hearing on 14th December to answer allegations that he had used the Blarney system between 4th December 2013 and 25th April 2018 to gain the whereabouts of a customer, their ex-partner and that of their mother. The letter states that the claimant's actions were a breach of the respondent's Standards of Behaviour policy and that it could amount to gross misconduct, namely "a serious offence which leads to a breakdown of the trust which we've placed in you as an employee. It's a breach of your contract of employment. It also includes serious misconduct which is likely to have a negative impact on our business, brand or reputation. Acts of gross misconduct may lead to summary dismissal".

10. The claimant attended the meeting on 14th December, which was conducted by Mr C Hunt. At the end of the hearing the claimant was told by Mr Hunt that he was being issued with a Final Written Warning. That warning was not confirmed in writing until 9th January 2019 (page 112-114) in which the letter states:-

> "Following your disciplinary meeting held on 14th December 2018, where you chose not to be accompanied, I am writing to confirm that I am issuing you with a final written warning in line with the company's disciplinary policy. This warning will be placed on your personal file for a period of eighteen months.
>
> Reasons for the Warning
>
> This warning has been issued due to your conduct in the role of incident controller. Specifically, the reasons for the warning are:-
>
> i) you admitted to accessing our internal Blarney system on a number of occasions between the period of the 4th December 2013 to the 25th April 2018 to gain the whereabouts of a customer, their ex-partner and that of their mother.
>
> ii) you have manipulated your ability to use our internal systems for your own use.
>
> iii) you have breached the Standards of Behaviour policy."

11. On the second page of the letter, under the heading "required improvement and duration of the warning", the letter states:-

> "In order for you to maintain the improvement you'll need to adhere to the following:-
>
> review and adhere to all company policies
>
> your manager will review the necessary improvements with you on an ongoing basis and failure to maintain the necessary improvements may also result in further disciplinary action. This warning will remain live for eighteen months from the date your outcome was delivered."

12. The claimant's evidence to the Tribunal was that he accepted the final written warning, did not intend to appeal against it and thereby considered the disciplinary process to be at an end.

13. The evidence of the respondent's 3 witness was that they and more senior management (including the head of security) were alarmed at the outcome of the disciplinary hearing. Whilst no particular criticism was made of Mr Hunt, senior management were quite incredulous that the claimant had not been dismissed for what he they considered to be an extremely serious act of gross misconduct. Of particular concern to senior management was that the incident had to be reported to the Information Commissioner`s Office, who had power to impose substantial financial penalties upon the respondent for what was a serious breach of the Data Protection legislation. An example of the Information Commissioners Office's powers was referred to at the Tribunal hearing, as only days previously British Airways had been fined a sum in excess of £1m due to an inadvertent data breach which led to the disclosure of personal information relating to hundreds of customers.

14. The view of the respondent's security team and senior managers was that they did not see how it could possibly continue to employ the claimant after he had admitted using the Blarney system for such purposes on so many occasions over a lengthy period of time.

15. Mr Hussain spoke at length to the respondent's head of security, Mr Steve Perriman and both agreed that the claimant's position would have to be urgently reviewed and that he should be suspended again, whilst that review was carried out. The claimant was told by Mr David Hoult (Incident Manager) on 21st December that he was again being suspended in a review of his position. The letter of suspension appears at page 104-106 in the bundle. Under the paragraph headed "reasons for suspension", the letter states:-

> "I am writing to let you know that from 21st December 2018 you are suspended from work until further notice whilst investigations are carried out into allegations of misconduct. In particular, it is alleged that you used your ex-partner's mobile phone number on the Blarney system without authority and following further review, we believe there is a significant risk to the business and brand."

The claimant was equally alarmed to learn that he had again been suspended and would be likely to face further disciplinary action in respect of the allegations

which he believed had already been brought to an end with the implementation of the final written warning. The claimant instructed his trade union representative, who wrote to the respondent by letter dated 3rd January 2019 (page 109-110), stating:-

> "I am Fraser's union representative and I am hoping you can add some clarity to his recent enquiries. He has advised the following to me, that he was invited to a formal disciplinary hearing on the 14th December 2018 to discuss alleged misconduct. The outcome of that meeting was an 18-month final written warning and the suspension was lifted, allowing him to return to work on the 17th. He was then taken into an informal one-one the 21st December which confirmed another suspension. I'm pretty sure Fraser is mistaken somewhere as this simply cannot happen. If the new suspension is indeed related to the original allegation of misconduct then with that matter closed (subject to right of appeal) the current suspension should be again lifted and Fraser allowed to return to work for his next available shift. If there is any new allegation of misconduct then a fact-finding interview should take place without delay and any allegations and evidence be put to him as part of a formal investigation."

16. By letter dated 4th January 2019 (page 111) the respondent replied, stating:-

- "You are correct that Fraser has been given an 18-month final written warning in relation to his disciplinary case. This was confirmed by Chris Hunt at the disciplinary meeting on 14th December and will be confirmed in writing in due course. This concludes the matter from a disciplinary perspective – subject to any appeal by Fraser, which of course he is entitled to do.

- This notwithstanding, as a separate matter, the business has become extremely concerned at the impact and potential consequences of Fraser's actions. In particular, the individual concerned has made a complaint about EE to the ICO in relation to Fraser's actions – this matter is ongoing and the ICO has made clear that they are treating the issue very seriously.

- In short, Fraser's actions have exposed EE to a significant amount of risk both in terms of potential penalties from the ICO and in terms of our brand risk and reputation – and the business is concerned about its ability to continue to employ Fraser going forward. It is this which has led to the opening of a further HR case for Fraser, and to his latest suspension.

- The next step will be for Fraser to be invited to a meeting to discuss matters in greater detail. In particular, consideration will be given as to whether EE can continue to employ in the circumstances – or whether it may be necessary to terminate his employment with notice for loss of trust and confidence (IESOSR) as a result of his actions.

- We are keen to resolve the matter without any unnecessary delay, and so will aim to send this invitation out shortly. Fraser will be entitled to be

> accompanied by you or another rep/colleague in the normal way, and will be given the chance to put forward his views on the matter before any decision is taken."

17. By letter sent later that day on 4th January the claimant raised a formal grievance (page 111 a-b) in the following terms:-

> "Please consider this correspondence to constitute a formal letter of grievance. I am raising this as I believe I am being unfairly treated. I was suspended on the 31st October and after investigations were completed I was invited to a formal disciplinary hearing on the 14th December 2018 with Chris Hunt to discuss the alleged misconduct. The outcome of that meeting was an 18-month final written warning and suspension lifted allowing me to return to work on the 17th. I was then taken into an informal 1.1 with Dave Hoult on the 21st December who confirmed another suspension with the opportunity to consider a settlement agreement to terminate my employment with EE. Initially I was told that no information would be provided regarding the suspension, the investigation or any pending meeting but subsequently have been advised that someone senior in HR is unhappy with the original outcome of the meeting and I can only assume is looking to move for dismissal. I have sought support from the CWU and they have advised me that new suspension and review of the previous outcome by someone senior in HR is not only outside policy, it is unlawful. I would like to request a face to face hearing with a manager independent from anyone currently involved in the ongoing process or from my line of business."

18. Mr Hussain discussed the matter with a number of his senior colleagues, including the head of security, the head of ethics and compliance and other senior managers. Their general opinion was that the general situation in which the claimant's actions had left the respondent and its business could not be ignored and needed to be addressed. The claimant was invited to a meeting before Mr Stuart Anthony Rigby, the head of the respondent's security and crisis management team. The meeting took place on 17th January 2019. Mr Rigby was accompanied by Miss Gemma Woods as note-taker. The claimant was accompanied by his trade union representative. Mr Rigby's evidence is set out in paragraphs 23-30 of his witness statement. Mr Rigby describes how the claimant attended the meeting "casually dressed" and made it clear that he was "very angry at having to do the review meeting". Mr Rigby described it as "not a particularly easy meeting" and that "it was clear to me by the time of the meeting that he (the claimant) had a strong dislike for BT/EE and did not want to work for us anymore." Of particular concern to Mr Rigby was that the claimant was either reluctant or unwilling to acknowledge how serious his position was and how serious the potential harm to the respondent as a result of his activity. Mr Rigby specifically referred to the following exchange at the meeting:-

> "SR – lets turn it round. How would you feel if your data was used by a company and what action would you like to happen on the back of it?

> FG – I'd be disappointed with no action really, what can you do when its done?
>
> SR why wouldn't you want any action taken?
>
> FG depends on the scale. What if Barclays did this to thousands of customers including me? Its thousands of people. I'd probably only want further action if I lost any money."

19. Mr Rigby described himself as "really shocked at this reaction". Mr Rigby was satisfied that the claimant was fully aware of the importance of data protection, as he had been fully trained in such matters. Mr Rigby was surprised and disappointed at the claimant's "casual attitude" and was worried that the claimant seemed unable to correlate his lax attitude to data protection with what had happened, in terms of the serious data breaches he had committed. Mr Rigby was further disappointed that the claimant did not attempt to apologise and did not appear in any way to be embarrassed at the nature of the accusations against him. Mr Rigby goes on to state as follows:-

> "The key question for me was whether Fraser understood what was required of him to keep this data secure and the importance of doing so from a customer and brand perspective. I was looking for him to say that he knew and understood his obligations – that he'd made a terrible mistake and for him to convince me that he'd learned from this and that it wouldn't happen again. However I didn't get this reassurance from Fraser, nor any sense of remorse nor an appreciated of the severity of what had happened. Instead I felt that Fraser was simply very angry both at the situation and at the business and almost seemed to be placing the blame on us."

20. The claimant challenged the fact and extent of when and how the matter had been reported to the ICO. The respondent had in fact formally notified the ICO on 31st October 2018 and had filed a comprehensive report with the ICO. As at the date of the first disciplinary hearing and the review meeting, the respondent had not heard anything back from the ICO.

21. The claimant's evidence about this meeting was little difference to that of Mr Rigby. The claimant readily conceded that, part of the way through the meeting he had been asked by Mr Rigby if he was able to demonstrate the assurances that were required by the respondent to enable him to retain his position. The claimant replied:-

> "I don't want to work here. I don't want three months pay. I don't want it in the public domain and I think my twelve months request was reasonable, based on my years of service."

22. Mr Rigby's evidence about that was that he considered the risk to the business of the claimant returning to his role to be extremely high, based upon his lack of reassurance and the resentment he was displaying towards the company. Mr

Rigby quickly formed the opinion that he did not think the claimant could be trusted as an employee of the respondent.

23. By letter dated 29th January, Mr Rigby informed the claimant that his employment was being terminated with notice "on the grounds of loss of trust and confidence". Mr Rigby stated that "the risk to BT and EE is too great for you to continue in your role where you will still have access to sensitive customer data."

24. The claimant was advised of his right to appeal. The claimant submitted an appeal by letter dated 1st February (page 137) in which he asked for a face to face meeting as soon as possible. The appeal meeting was arranged to take place on 20th February and was conducted by Mr Simon Thomas Evatt. Mr Evatt's role within the respondent is one of crisis management and incident management. Mr Evatt confirmed that he had been broadly aware of the issues when the claimant's conduct was first identified in late 2018. Mr Evatt had learned in December 2018 of the outcome of the original disciplinary process, namely that the claimant had been given a final written warning. Mr Evatt accepted that he had been "very surprised" to find this out. Mr Evatt was honest enough to state, "he found it very difficult to reconcile where the decision had left Fraser and the business, because the default result was that Fraser would now return to his role and expose the business (and be exposed) to the same risks as had led to this situation. The reason why I was so concerned about this was because Fraser's actions were extremely serious. If we were going to continue to employ him, we needed to have confidence that we could trust him. Other areas of the business such as the privacy and ethics teams had expressed similar concerns about the situation with Fraser.

25. The appeal meeting took place on 20th February and the claimant was again accompanied by a trade union representative. Mr Evatt's evidence to the Tribunal as set out in paragraph 16 of his statement, was that he was "essentially looking at Mr Rigby's assessment that the business could not be confident with having Fraser working in the business going forward. Mr Evatt did not see the original outcome letter by Mr Hunt, nor the disciplinary investigation report. Mr Evatt spoke to Mr Rigby before he met with the claimant and was told that Mr Rigby had been very disappointed with the claimant's responses and attitude at that meeting. Mr Evatt described his meeting with the claimant as "fairly short" and that he considered his purpose to be simply to consider whether there had been a breakdown of the relationship between the claimant and the respondent.

26. Having considered the matter, Mr Evatt was satisfied that the previous disciplinary case had been properly completed in accordance with the respondent's procedures and could not be reopened. However, he considered that the situation with the claimant was somewhat unique and that there was undoubtedly a need for the business to address the situation so as to ensure that it had confidence in the claimant, going forward. Mr Evatt was immediately satisfied that it was appropriate for the business to review the claimant's case. The claimant's actions were considered by Mr Evatt to have been extremely serious and something which could not be ignored by the business. Mr Evatt accepted that by undertaking a further review of the claimant's case, it was something which was

unusual but he was satisfied that the circumstances were so unusual so as to justify the respondent doing so.

27. Mr Evatt concluded that the respondent could not properly and fairly undertake the risk of allowing the claimant to return to work. Mr Evatt considered everything which the claimant had to say, including the points he had raised in his grievance letter. Mr Evatt concludes that the company had genuine and reasonable grounds for taking further action against the claimant, "given the continuing impact and risks that these were posing the business and its brand". Mr Evatt believed that there had not been a process which covered this situation. He was satisfied that there had been a complete and irrevocable breakdown of trust between the company and the claimant. The appeal was dismissed. The letter confirming the outcome was sent to the claimant on 26th February 2019. The letter confirmed that there had been a complete breakdown in trust and that it would not be reasonable for the respondent to continue to employ the claimant.

28. The claimant presented his complaint to the Employment Tribunal on 7th March 2019.

THE LAW

The relevant statutory provisions engaged by the claim presented by the claimant are set out in the Employment Rights Act 1996.

Section 94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.
(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

Section 98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)--

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) 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.

29. At no stage in these proceedings has the claimant challenged the fairness of the procedure followed by the respondent in the original disciplinary proceedings which led to him being issued with a final written warning. Insofar as it is relevant, the Tribunal is satisfied that the respondent held a genuine belief that the claimant had committed the act/acts of misconduct which formed the subject matter of the original allegation. There were reasonable grounds for that belief, namely their detailed investigation and the admissions made by the claimant during that investigation and at the disciplinary hearing. The Tribunal was satisfied that the activities of the claimant were fairly and reasonably categorised by the respondent as “gross misconduct”. In his evidence to the Tribunal, the claimant readily accepted that he could have been dismissed for that misconduct at the end of the original disciplinary process. When it was put to him at the Employment Tribunal hearing that he had “dodged a bullet” when he had only been given a final written warning, the claimant readily agreed.

30. The claimant’s complaint was that once those disciplinary proceedings had been concluded with the issue of the final written warning, it was unfair for the respondent to seek to re-open those proceedings so as to impose the ultimate sanction of dismissal. The claimant’s case was that was obvious and abundantly clear that those in positions senior to that of Mr Hunt who had imposed the final written warning, considered that Mr Hunt had got it wrong and that the claimant should have been dismissed at the end of the original disciplinary proceedings.

31. Mr Hall for the respondent maintained throughout the hearing and in his closing submissions that the claimant had not been dismissed for misconduct, but

because the respondent had lost trust and confidence in him due to the nature of the allegation, the claimant's attitude generally throughout the process and more importantly the risk of reputational damage to the respondent's brand caused by the claimant's behaviour and the involvement of the ICO.

32. One of the grounds put forward by the respondent as a substantial reason for dismissing the claimant, was because of the potential damage to the reputation of the respondent, caused by the claimant's activity. The Tribunal accepted the evidence of the respondent's witnesses, to the effect that the allegations against the claimant were of a really serious nature, which required the respondent to report them immediately to the ICO, and which could have had the most serious consequences for the respondent in terms of sanctions, particularly a hefty financial penalty. The claimant's former partner had reported these matters to the police, and this also could have easily tarnished the respondent's reputation in the eyes of the public. The claimant had readily admitted using the Blarney system for his own purposes, which could fairly be described as wholly improper. The Tribunal accepted the evidence to the respondent's witnesses about the claimant's attitude during the disciplinary process which led to the final written warning and the subsequent investigation into the impact of the claimant's behaviour on the respondent's reputation. The Tribunal found that the respondent's witnesses genuinely believed that there was a real and genuine risk of damage to the respondent's reputation.

33. The Tribunal further accepted the evidence of the respondent's witnesses to the effect that they genuinely believed that they could no longer have trust and confidence in the claimant in his performance of his duties. The claimant had undertaken his abuse of the Blarney system over a considerable period of time and had even involved other members of the respondent`s staff in so doing. The claimant had not displayed any genuine remorse for his actions and had been unable to satisfy the respondent that he truly acknowledged the serious nature of his actions so that he would be unlikely to repeat that kind of behaviour.

34. The Tribunal found that these beliefs held by the respondent amounted to a substantial reason (ie neither whimsical nor capricious) for the claimant's dismissal. The Tribunal accepted the respondent's evidence that the claimant's activities made it impossible for the respondent to continue to employ him in all the circumstances of this case. The Tribunal found that the respondent had genuinely and on reasonable grounds lost confidence in the claimant as its employee.

35. The Tribunal rejected the claimant's allegation that dismissing him for that reason amounted to a breach of the principle of "double-jeopardy", by which the claimant meant that he was effectively being tried and sentenced on a second occasion in respect of allegations which had already been dealt with by means of a final written warning. TheTtribunal found that the implementation of the final written warning at the end of the first set of disciplinary proceedings did not prevent the respondent in these circumstances from further investigating whether it could retain sufficient trust and confidence in the claimant so as to retain him as an employee.

36. For those reasons the tribunal find that the claimant's complaint of unfair dismissal is not well-founded and is dismissed.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
27 August 2019