



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4102858/2019**

**Held in Dundee on 9 & 10 December 2019**

**Employment Judge M Sangster**

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**Mr P Mitchell**

**Claimant  
Represented by:  
Miss L Campbell  
Solicitor**

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**Dundee City Council**

**Respondent  
Represented by:  
Ms M Geddes  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Tribunal is that the claim of unfair dismissal does not succeed and is dismissed.

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### **REASONS**

#### **Introduction**

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1. The claimant presented a complaint of unfair dismissal. The respondent admitted the claimant was dismissed, but stated that the reason for dismissal was gross misconduct, which is a potentially fair reason. The respondent maintained that they acted fairly and reasonably in treating misconduct as sufficient reason for dismissal.

E.T. Z4 (WR)

2. The respondent led evidence from three witnesses: Eileen Christie (**EC**), formerly Housing Asset Manager for the respondent, Gordon Birrell (**GB**), formerly Housing Service Manager for the respondent and David Simpson (**DS**), Head of Housing.
- 5 3. The claimant gave evidence on his own behalf and led evidence from Kevin Jamieson (**KJ**), formerly a Project Officer with the respondent and now retired.
4. A joint set of productions extending to 199 pages was lodged. The claimant also lodged a schedule of loss, with supporting documents.

### Issues to be determined

- 10 5. Was the reason for the claimant's dismissal a potentially fair reason, within the meaning of s98(1) or (2) of the Employment Rights Act 1996 (the **ERA**)?
6. Was the claimant's dismissal for that reason fair in all the circumstances, in terms of s98(4) ERA?
7. If the claimant's dismissal was unfair, should he be reinstated/re-engaged?  
15 Failing which, what compensation should be awarded?

### Findings in Fact

8. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
9. The respondent has a Personal Harassment Policy, which states that all forms  
20 of personal harassment are unacceptable. Personal harassment is defined in the policy as *'improper, offensive and/or humiliating behaviour, practices or conduct, which may threaten a person's job security, create an intimidating, unwelcoming, hostile and stressful work environment, or cause personal offence or injury.'* The policy states that there are many forms of harassment  
25 and provides a non-exhaustive list which includes the following examples
  - a. Offensive language, including innuendo, mockery, ridicule and obscenity;

- b. Offensive jokes, verbal and practical;
- c. Printed and handwritten offensive material, such as posters, calendars, cartoons; and
- d. Offensive material and text messages on computers and mobile phones.

- 5 10. The claimant was employed by the respondent as a Project Officer within the Housing Asset Management Unit. His employment commenced on 31 August 2015.
- 10 11. On 7 August 2018, one of the claimant's colleagues, who worked in the same team as the claimant (referred to in this judgment as Employee A (**EA**)), complained to her line manager that, while legitimately reviewing one of her colleague's emails, during his absence on holiday, and on reviewing documents stored on the respondent's computer system, she had seen information which upset and offended her. She provided copies of the offending emails and a document, which she understood had been written by the claimant. She was provided with a copy of the respondent's Personal Harassment Policy and informed of the routes open to her under the respondent's policies for raising any concerns. She indicated that she would reflect on how she wished to proceed. Having done so, she confirmed she wished to make a complaint under the formal 'complaints stage' of the respondent's Personal Harassment Policy.
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- 20 12. A formal statement was taken from EA on 13 August 2018 by the Housing Asset Manager and a Senior HR Officer.
13. It was determined that a formal investigation should be conducted into the complaint received from EA. This was conducted by EC, who was supported throughout by one of the respondent's Senior HR Officers.
- 25 14. The claimant was suspended on 17 August 2018, pending the outcome of the investigation.
15. EA was certified as unfit to work due to stress from 28 August 2019, for a period of 6 weeks.

16. In the course of her investigation, EC took the following steps:

a. She reviewed the emails and document provided by EA. These consisted of the following:

5 i. A number of emails between Iain Dick (**ID**) and the claimant which contained comments about EA's use of language;

10 ii. An email exchange, dated 18 July 2018, involving the claimant and ID entitled '*Monitor Meeting*' in which the claimant, in response to comments from ID about a meeting chaired by EA, suggests '*BTW if you have savings a hitman might be a good investment right now...*'. The further email exchange is then forwarded by the claimant to KJ suggesting he could carry this out. KJ responds stating '*I recommend Sheila for the dirty deed. No one would suspect...*'; and

15 iii. A document with a photograph of EA at the top, with the caption under being '*Is that a red dot on my forehead?*' (the **Assassin/Psycho Document**). The document was in the format of a weekly update re achievements and priorities which was usually circulated within the team. Under the photo and the caption was a heading: '*Achievements & Priorities – Assassin/Psycho Edition*'. Under a further heading of '*Achievements for week ending 27 July 2018*' the first point was a reference to a discussion on how to commit the perfect murder, the second stated '*Paul got a lift from [EA] on Tuesday, and pulled the handbrake on at 30mph so she could see what a REAL f@cking dashboard looked like*'. Under '*Priorities for week beginning 23 July 2018*' the following were listed: meat cleaver, visqueen, biohazard suit & gloves, pig farm, bonfire, stolen van. It concluded with the phrase '*If you have any questions or queries please ask your most psychotic Team Leader - [Employee B (EB)]!*'

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b. She reviewed the statement provided by EA. This stated that she had initially found the email referencing finding a hitman, in response to

5 comments about her. She was upset having done so. She was then  
away from work for a few days. On her return to work she found a  
document entitled 'July v2' on the team's shared drive. She opened it  
and found the Assassin/Psycho Document. She stated that *'When I  
10 opened it I found a picture myself - it had been taken when I was on  
holiday and he must have got it from Facebook although we are not  
friends on Facebook. I was shocked and sickened by that. Then I read  
the contents and became really upset. The professional challenges in  
that job have been bad enough but this was so personal... I have been  
15 very upset. To produce the document, Paul had intentionally gone  
looking for a photo of me, and then the stuff about a red dot and hitman  
make me feel awful. There have been discussions and disagreements  
about the 'dashboards' I introduced and we use for recording work. I had  
given Paul a lift that week and then found the bit about smashing my  
head on the dashboard – it was so upsetting. I felt violated.'*

c. On 27 August 2018, EC interviewed the claimant. He accepted his  
involvement in the emails, stating that these were banter and no offence  
was intended. He accepted that he had produced and circulated the  
Assassin/Psycho Document, which was a continuation of the joke in the  
20 'Monitor Meeting' email. He stated that he had created similar 'spoof'  
documents in the past. He stated that the Assassin/Psycho Document  
was meant as a joke, to help people let off steam as they work in a  
pressured environment. He had no intention of offending or upsetting  
anyone. He would like to apologise if he had done so. He has a robust  
25 sense of humour and it was an error in judgement. He felt, having  
reflected on things, that he may be suffering from stress.

d. On 27 August 2018, EC interviewed KJ. He accepted that he had  
engaged in the email exchange entitled *'Monitor Meeting'* stating this  
was *'childish humour'*. In relation to the Assassin/Psycho Document he  
30 stated that he had seen it, but had no involvement in producing it. He  
received a copy on his return from holiday, looked at it and put it back  
on Paul's desk, face down and without comment.

e. On 27 August 2018, EC interviewed ID. He accepted his part in the emails, but stated he had not seen the Assassin/Psycho Document or anything like it previously.

5 f. On 5 September 2018, EC interviewed EB, who had seen the document when it was emailed to her job-share partner (who EA raised her concerns with). She was surprised and shocked by the content, especially the picture of EA. She then looked for it and found it on the team's drive on the respondent's computer system. She asked other Project Officers if they had seen it and they confirmed that they had. She  
10 was upset at being called a 'psycho' in the document and felt that people in the workplace who had seen it were laughing at her. She stated that she did not think of the document as being light-hearted and that she was not aware of any other similar documents being circulated.

15 g. On 5 September 2018, EC interviewed Fiona Duff who stated that she had been shown the document by EB who had stated to her *'it was disgusting'* and who *'seemed upset and to my mind did not find it funny'*. She stated she was not aware of any similar documents being circulated previously.

20 h. EC also reviewed the respondent's computer drives and folders, to see if she could locate any similar documents, created by the claimant or anyone else, but found nothing.

17. Statements, reflecting what was discussed at each meeting, were typed up and provided to each individual to review for accuracy and sign.

25 18. The conclusion of EC's investigation was that there was no disciplinary case to answer by anyone other than the claimant. EC prepared an investigatory report in relation to her findings, which recommended a disciplinary hearing be convened to consider allegations that the claimant breached the respondent's Personal Harassment Policy by:

30 a. Creating an intimidating, unwelcoming, hostile and stressful working environment, causing personal offence to a colleague; and

b. Creating and storing offensive material on the respondent's computer systems.

19. Appended to the investigation report were the emails, the Assassin/Psycho Document, the statements prepared during the course of the investigation and the respondent's Personal Harassment Policy.
20. By letter dated 19 September 2018, the claimant was invited to a disciplinary hearing on 26 September 2018 to discuss the allegations. He was provided with a copy of the investigation report, as well as all the appendices. He was informed of his right to be accompanied and that a potential outcome was dismissal.
21. The disciplinary hearing was delayed at the request of the claimant and ultimately took place on 24 October 2018. It was chaired by GB, who was accompanied by one of the respondent's HR Officers. The claimant was accompanied by his trade union representative, Jim McFarlane (**JM**). EC attended to present the investigation findings and EA attended as a witness.
22. At the disciplinary hearing, EA stated that *'she felt physically sick as she saw a photograph of herself with a red dot on it and then read details where it said 'Assassin/Psycho Edition'...it made her feel very frightened at the time and even now rationally with time having passed she still felt frightened...it was a huge shock and the photograph was a personal one which had been displayed on her own facebook page so she was scared it had been taken without her knowledge...she felt personally violated and fearful when she read the graphic terms of smashing her face off the car dashboard, the committal of the perfect murder, and the details of the equipment to be used such as a meat cleaver.'* EA was very tearful and shaking throughout the hearing.
23. The claimant acknowledged that he had written and circulated the Assassin/Psycho Document, but had not provided it to EA as *'he knew she probably wouldn't appreciate it'*. He apologised to EA for having done so. He stated that he could see now that it was not funny and that there was no way that she could view this as a joke. It was wrong to do it. It was an error of

judgement and there were no excuses/no defence. He was however experiencing stress at the time, and it was a misplaced attempt to let off steam.

24. GB adjourned the hearing to deliberate. He took into account the fact that the claimant had apologised to EA and accepted the mitigation put forward by/on behalf of the claimant, namely that there was no intention to cause offense, that the claimant had been under stress, that the claimant was seeking to lighten the mood in the office and that the claimant had a dark sense of humour. He also accepted that the claimant was an effective member of the team and there were no issues with his work performance. Notwithstanding this, he noted that the claimant's actions, in preparing and circulating the Assassin/Psycho Document, were a very serious breach of the respondent's Personal Harassment Policy and had had a significant impact on EA. He concluded that the claimant's actions, in preparing and circulating that document, and storing it on the respondent's computer system, amounted to gross misconduct. Having considered a range of potential sanctions, he determined that summary dismissal was the only appropriate sanction in the circumstances.

25. GB informed the claimant of his decision following an adjournment of the disciplinary hearing.

26. A letter was sent to the claimant on 26 October 2018, confirming that GB found that the allegations, namely that the claimant breached the respondent's Personal Harassment Policy by creating an intimidating, unwelcoming, hostile and stressful working environment, causing personal offence to a colleague and storing offensive material on the respondent's computer systems, had been substantiated. The letter included the following *'I acknowledged your mitigation that you were feeling stressed at the time and that your error of judgement was a poor 'spoof' joke which was intended to lighten the mood in the office. I recognised your remorse and the apology provided to [EA] at the hearing. It was however particularly clear at the hearing how this has badly affected [EA] and how she had felt violated by your actions. Your actions, regardless of your intentions, cannot be condoned or tolerated and constitute gross misconduct'*. The letter also informed the claimant of his right to appeal.



27. On 12 November 2018 the claimant confirmed that he wished to appeal against the decision to terminate his employment.
28. The appeal hearing ultimately took place on 9 January 2019, having been delayed at the request of the claimant. It was chaired by DS and he was accompanied by one of the respondent's HR officers. The claimant was accompanied by JM.
29. The only ground of appeal was that the sanction of dismissal was too harsh. It was expressly stated at the outset of the hearing that the claimant took no issues with the investigation process. The claimant's position was that he should have been offered retraining and potentially moved to another position, given that this was a first offence. When questioned about why EA had not been 'in on the joke' the claimant stated that he thought she wouldn't really get it. Following an adjournment in the appeal hearing, DS confirmed that he had considered all of the information presented and the mitigation put forward, but felt that it didn't outweigh the claimant's actions, the severity of which meant that dismissal was appropriate.
30. A letter was sent to the claimant dated 10 January 2019 confirming DS's decision and the claimant's further right of appeal.
31. EA resigned from her employment with the respondent in April 2019, citing the events in August 2018, and the ongoing process, as a significant contributory factor.
32. The claimant thereafter submitted an appeal to the respondent's Personnel Appeals Sub-Committee, consisting of three Elected Members. That appeal hearing took place on 20 August 2019 (this was delayed at the claimant's request). In his personal statement the claimant raised a number of new issues which had not previously been raised at the investigation, discipline or appeal stages. The conclusion reached was that the appeal was not successful.

## Submissions

### *Respondent's submissions*

33. Ms Geddes, for the respondent, provided a written submission. She referred to s98 ERA and the Burchell tests, which she stated were satisfied. She highlighted that the claim of unfair dismissal was based on assertions that dismissal was too harsh a sanction and the respondent had dealt with others inconsistently.
34. In relation to the sanction of dismissal, she referred to the impact of the claimant's actions on EA and the fact that the claimant, throughout the proceedings, has continued to refer to the Assassin/Psycho Document as a joke/jape/spoof, demonstrating a complete lack of awareness of the impact of his actions on others. Harassment and intimidation of colleagues can have very severe consequences and it must be within the band of reasonable responses for an employer to dismiss an employee where conduct of this nature is established.
35. On inconsistency, she referred to the case of ***Hadjionannou v Coral Casinos Ltd***, 1981 IRLR 352 for the assertion that valid arguments related to disparity only rarely arise, where there are truly similar circumstances. The claimant himself accepted that his circumstances were not the same as that of KJ or ID as they had not been involved in the creation or circulation of the Assassin/Psycho Document.
36. In the event that the dismissal was found to be unfair, there should be a significant reduction to compensation, on the basis contribution.

### *Claimant's submissions*

37. Miss Campbell stated that the claimant's principal challenge was to the severity of the sanction imposed. The claimant accepted that he was the author of the document and that EA was offended by this, but did not accept that dismissal as an appropriate sanction for doing so. A lesser sanction should have been

imposed, particularly in light of the mitigation put forward. There was however no real consideration of alternatives, other than dismissal.

38. She stated that the claimant had not been treated fairly, when compared to the fact that KJ and ID were not disciplined. There was a clear disparity in the treatment of the three individuals.

39. Dismissal was completely outwith the band of reasonable responses open to the respondent in the circumstances.

40. If the dismissal was found to be unfair, no reduction should be made for contributory conduct.

#### 10 **Relevant Law**

41. S94 ERA provides that an employee has the right not to be unfairly dismissed.

42. In cases where the fact of dismissal is admitted, as it is in the present case, the first task of the Tribunal is to consider whether it has been satisfied by the respondent (the burden of proof being upon them in this regard) as to the reason for the dismissal and that it is a potentially fair reason falling within s98(1) or (2) ERA.

43. If the Tribunal is so satisfied, it should proceed to determine whether the dismissal was fair or unfair, applying the test within s98(4) ERA. The determination of that question (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.”*

44. Where an employee has been dismissed for misconduct, **British Home Stores v Burchell** [1978] IRLR 379, sets out the questions to be addressed by the Tribunal when considering reasonableness as follows:

- i. whether the respondent genuinely believed the individual to be guilty of misconduct;
- ii. whether the respondent had reasonable grounds for believing the individual was guilty of that misconduct; and
- iii. whether, when it formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

45. In determining whether the employer acted reasonably, it is not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law as the Tribunal would have 'substituted its own view' for that of the employer. Rather, the Tribunal must consider the objective standards of a reasonable employer and bear in mind that there is a range of responses to any given situation available to a reasonable employer. It is only if, applying that objective standard, the decision to dismiss (and the procedure adopted) is found to be outside that range of reasonable responses, that the dismissal should be found to be unfair (**Iceland Frozen Foods Limited v Jones** [1982] IRLR 439).

46. Equity means that similar cases should be dealt with in a similar manner. Valid arguments in relation to inconsistency of treatment however only arise in limited circumstances, such as where employers have previously treated similar matters less seriously, leading employees to believe that such behaviour is condoned or to an inference that the asserted reason for dismissal is not the real reason, or where employees, in truly parallel circumstances arising from the same incident, are treated differently (**Hadjioannou v Coral Casinos Limited** [1981] IRLR 32, approved by the Court of Appeal in **Paul v East District Health Authority** [1995] IRLR 305).

### Discussion & Decision

47. The Tribunal referred to s98(1) ERA. It provides that the respondent must show the reason for the dismissal, or if more than one the principal reason, and that

it was for one of the potentially fair reasons set out in s98(2). At this stage the Tribunal was not considering the question of reasonableness. The Tribunal had to consider whether the respondent had established a potentially fair reason for dismissal. The Tribunal accepted that the reason for dismissal was the claimant's conduct – a potentially fair reason under s98(2)(b). No other reason has been asserted.

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48. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason as shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources the employer is undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited*** that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent. There is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another would quite reasonably keep the employee on. If no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable employer might reasonably have dismissed, the dismissal is fair.

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49. The Tribunal referred to the case of ***British Home Stores v Burchell***. The Tribunal was mindful that it should not consider whether the claimant had in fact committed the conduct in question, as alleged, but rather whether the respondent genuinely believed he had and whether the respondent had reasonable grounds for that belief, having carried out a reasonable investigation.

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*Did GB have a genuine belief?*

50. The Tribunal concluded that GB did have a genuine belief that the claimant had committed the gross misconduct detailed in the dismissal letter.

*Did GB have reasonable grounds for his belief?*

51. The Tribunal considered each aspect of the reasons for dismissal in turn

a. **Breaching the respondent's Personal Harassment Policy by creating an intimidating, unwelcoming, hostile and stressful working environment, causing personal offence to a colleague.**

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The claimant accepted that he had created the Assassin/Psycho Document. It contained a picture of EA with a caption under it stating *'Is that a red dot on my forehead?'* It went on to talk about committing the perfect murder and the equipment which may be required for this. It mentioned the claimant being in a car with EA and pulling on the handbrake at 30mph. It referred to his team leader as psychotic. The claimant accepted he had circulated this document to colleagues, but not to EA or EB. In relation to EA he indicated that he had not done so as he knew she probably wouldn't appreciate it. EB indicated that she was upset by the document and did not consider it light-hearted. EA was significantly affected by it: it made her upset, scared and frightened. She was signed off work for a period as a result and remained visibly upset at the time of the disciplinary hearing, 2 months later. GB accordingly had reasonable grounds for his belief that, by creating and circulating the Assassin/Psycho Document, the claimant had breached the Personal Harassment Policy by creating an intimidating, unwelcoming, hostile and stressful working environment and causing personal offence to colleagues.

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b. **Storing offensive material on the respondent's computer systems.**

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The claimant accepted that he had created the Assassin/Psycho Document on the respondent's computer system and stored it on the team's drive. It was found there by EA and EB. Both found the document to be offensive. GB accordingly had reasonable grounds for his belief that the claimant had stored offensive material on the respondent's computer systems.

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52. Having reached these findings, the finding that the claimant's conduct amounted to gross misconduct, was open to GB in the circumstances and fell within the band of reasonable responses. The Tribunal did not accept that there was an unjustified disparity in the treatment of the claimant in comparison with the treatment of ID and KJ. The circumstances of ID and KJ were entirely different to those of the claimant. ID and KJ had not created or circulated the Assassin/Psycho Document. The three individuals were not therefore in truly parallel circumstances. The argument in relation to consistency was accordingly not relevant.

53. Having reached the conclusion that the claimant had committed gross misconduct by his actions, GB concluded that the claimant should be summarily dismissed. GB took into account and accepted the mitigation put forward by the claimant when reaching that conclusion, as well as the apology given by the claimant to EA. GB felt however that, given the admitted conduct, which was a very serious breach of the respondent's Personal Harassment Policy, the only appropriate sanction was summary dismissal. It cannot be said that no reasonable employer, faced with these circumstances, would have dismissed the claimant. GB's conclusion accordingly fell within the band of reasonable responses open to GB in the circumstances.

*Was there a reasonable investigation?*

54. The respondent conducted a thorough investigation. They interviewed all the individuals who were potentially implicated, and reviewed all the material available. Having done so, EC concluded that there was a disciplinary case to answer by the claimant. There were no further steps which should, reasonably, have been undertaken.

*Procedure*

55. The respondent investigated the allegations. The claimant was invited to a disciplinary hearing and provided with a copy of the investigation report completed by EC and all appendices. He was given the opportunity to respond to the allegations at the disciplinary hearing and provided with the opportunity

to appeal. He was informed of his right to be accompanied at all stages and exercised the right to do so. The respondent followed their internal procedures.

56. The Tribunal find that the procedure adopted by the respondent was fair and reasonable in the circumstances.

5 *Conclusions re s98(4)*

57. For the reasons stated above the Tribunal conclude that the respondent acted reasonably in treating the claimant's conduct as a sufficient reason for dismissal.

58. For these reasons, the claim of unfair dismissal is dismissed.

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**Employment Judge:**  
**Date of Judgment:**  
**Date sent to parties:**

**Mel Sangster**  
**20 December 2019**  
**20 December 2019**

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