**Case Number: 3335316/2018 (V)**

# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| Mr T Ellis | **v** | ES Field Delivery (UK) Ltd |

**Heard at:** Bury St Edmunds **On:** 3 August 2020

**Before:** Employment Judge Laidler

**Appearances**
**For the Claimant:** In person (assisted by his mother, Mrs A Ellis).
**For the Respondent:** Mr R Kohanzad, Counsel.

**COVID-19 Statement on behalf of Sir Ernest Ryder, Senior President of Tribunals.**

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable in view of the pandemic and all issues could be determined in a remote hearing.

# RESERVED JUDGMENT

1. The claimant was dismissed by reason of conduct, a potentially fair reason for dismissal.

2. The respondent acted fairly in all the circumstances in treating that reason as one to justify the dismissal of the claimant.

3. The claim of unfair dismissal therefore fails and is dismissed.

# REASONS

1. This is the claim of Thomas Ellis issued on 11 December 2018 in which he brought claims of unfair dismissal and it appeared disability discrimination. At the case management discussion however held before Employment Judge Anstis on 1 October 2019 it was clarified that there was in fact no disability discrimination complaint and the matter has been dealt with purely as a claim of ordinary unfair dismissal.

2. In its response the respondent denied the claims stating that the claimant had been dismissed by virtue of conduct and that it had acted fairly in all the circumstances of the case.

3. Mr Terry Gray who heard the claimant's disciplinary hearing left the respondent's employment in December 2019. The solicitor dealing with the matter had believed it would not be possible to call Mr Gray to give evidence as he had left the organisation. After a recent conference with counsel it was determined it was appropriate to try and obtain Mr Gray's attendance and therefore a late witness statement was served from him and the respondent no longer intended to call Ms Suzy Eker. A copy of Mr Gray's statement was served on the claimant on 27 July 2020.

4. The claimant objected to the statement being permitted. It was served on him only 4 working days before the full merits hearing and there were matters in it which had not been raised before. This was particularly that there had been checks on laptops of other workers which the claimant had not heard about before. The claimant believed that the respondent had also been late regarding other deadlines in the case management orders.

5. Mr Ellis and his mother also took issue with the fact that the people attending this hearing were not who they had expected and they had expected Ms Marsh who represented the respondent at the preliminary hearing. The Judge explained that the respondent was perfectly entitled to instruct Counsel to attend which is what they had done on this occasion and Miss Ranson who was here but had not been at the preliminary hearing was merely an internal observer of the respondent.

6. The respondent was apologetic that the witness statement had been served so late but explained the position as set out above. It was concerned that the decision maker, once they had been able to make contact with him, be called to give evidence.

7. The Tribunal had to weigh up the very valid points the claimant made about late service of statement with the fact that the decision maker was now here. Albeit served late the claimant had had time to consider Mr Gray's statement. The Judge determined that it was in accordance with the overriding objective to allow the witness statement to stand and for Mr Gray to give evidence. It was important for the Tribunal to hear from the decision maker and the issue about other people's laptops having been checked whilst of relevance was not determinative of the issue.

8. The claimant had produced witness statements from Mr Peter Lewis who attended the disciplinary hearing with him and from a former colleague, Mr James Pearson but neither of those attended to give evidence and no weight has been given to their witness statements as they were not present at the hearing to be cross examined upon them.

9. The Tribunal therefore heard from: -

   9.1 Mr Terry Gray;

   9.2 Mr Philip Adams; and

   9.3 The claimant.

10. The Tribunal also had an electronic bundle of documents running to 340 pages. From the evidence heard the Tribunal finds the following facts.

**Findings of Fact**

11. The claimant was employed from 1 October 2012 until his dismissal on 5 September 2018. He was employed as a technical remote specialist based at the secure site of one of the respondent's clients, Atomic Weapons Establishment (AWE) which is part of the UK Ministry of Defence and responsible for the design, manufacture and support of war heads for the UK's nuclear weapons. Given the nature of the client, working on its business required high level security clearance.

12. The respondent provides IT support services for AWE. The claimant's role included diagnosing infrastructure issues, troubleshooting, resolving laptop issues, reviewing laptops for inappropriate use and considering the security and integrity of software systems at AWE. Employees carrying out work on the AWE account are required to undergo enhanced security clearance which is more rigorous than required for any other account. This is known as Developed Vetting (DV). It is the most detailed and comprehensive form of UK security clearance. It can involve interviews with the individual and family members although the claimant in evidence stated he did not believe his family members or friends were in fact interviewed.

<u>Relevant Policies</u>

13. There is no dispute that the claimant was subject to the Employee Handbook of the respondent. This expressly provides as follows with regard to inappropriate conduct: -

> "What follows below are examples of the type of conduct the FDS deems to be improper and inappropriate use of the internet and are therefore prohibited. It is not intended to be a comprehensive listing. Individuals with internet access ARE NOT permitted to engage in the following activities: -
>
> …

> Downloading or exchanging screen savers, games, entertainment software or other large non-business files (including video or audio materials for personal use) or playing games against opponents, wagering or gambling over the internet.
>
> …
>
> Downloading any type of software. All requests for additional software to run on employees' company PCs must be submitted on a non-inventory order request via purchasing. If software installation services are required then these should be arranged with the IT department by the helpdesk. Failure to adhere to these restrictions could result in the propagation of harmful computer viruses, copyright violations and expose FDS to civil and criminal liability.
>
> **Non-compliance with policy**
>
> Any breach of the provisions outlined in this policy is considered to be a serious matter and constitutes a violation of FDS policies and procedures. Failure to adhere to the provisions if this policy may result in loss of internet and/or email access, the initiation of criminal or civil proceedings and may result in disciplinary action up to and including termination of employment."

14. Under the respondent's disciplinary procedure is a list of matters which could result in summary dismissal. These included at paragraph 5.4 of the policy: -

> "Inappropriate or excessive use of the internet/company email not associated with the job role together with downloading, forwarding or saving inappropriate material."

15. The claimant accepted that he was aware of these policies, had been trained on them, and accepted they set out inappropriate conduct.

16. The claimant was diagnosed with clinical depression in March 2015 and was signed off in April 2016 for 18 months. He returned to work in October 2017. His line manager had changed to Derek Williamson. As the claimant's security clearance had lapsed, he initially continued to work in the software support team for approximately 6 months but only doing about 50% of the work he was normally required to do.

17. In April 2018 the claimant was moved to the IT warehouse.

18. In or about July 2018 the claimant's line manager believed that he was seeing the claimant using the work laptop too much during work time. The laptop was taken from the claimant so it could be audited. This led to the investigatory meeting which was held on 2 August 2018. It was held by Derek Williamson who had investigated the matter. Notes of it were produced which the claimant did not entirely agree with and the Tribunal saw in the bundle notes that he had added in handwriting with his amendments. The notes record that the claimant was told it was an investigatory meeting to find out facts about illegal software and misuse of the claimant's laptop but was not a disciplinary meeting. The claimant's amendments record that he reminded the meeting he suffered from depression and anxiety.

19. The claimant acknowledged at the meeting that he remembered doing the training courses on the internet user policy and that in relation to the internet and social media. He was aware of the escalation route if he found appropriate software on the system. He agreed that he should not download software that is not related to work.

20. The claimant was informed that they had analysed his laptop and found many downloads of films, games and online gambling. The memory on the laptop was nearly full. Mr Williamson handed a list to the claimant of the files they had found. There was also a crack file downloaded which is used for enabling someone to use the application illegally without buying a licence.

21. The claimant did not remember downloading the crack file. No one else had access to his computer.

22. The claimant acknowledged he had used it for gaming in the past. Mr Williamson gave a breakdown of what they had discovered as follows: -

> "Films – it is copyright and illegal.
>
> Gaming – not illegal games but against company policy.
>
> Online gaming – should not be used on one of our laptops.
>
> Crack software"

23. The claimant was asked why this inappropriate and illegal software was on the laptop.

24. The claimant explained that a lot of it was downloaded whilst he was off on long term sick leave. He did not know what to say but the laptop was his only way of accessing the internet except his phone. He said he realised it was not appropriate to do it and was a security breach. He accepted that again in evidence at this hearing.

25. The claimant was also reminded that during his DV interview he was asked whether he was downloading illegally and he is noted as stating to the interviewer that he had downloaded illegally but that he did not do so anymore. It was pointed out however that somethings had been downloaded in May since that interview took place. The claimant could not remember downloading them.

26. The claimant accepted it was not acceptable. He did not however have any knowledge as to why the crack file was there. He said that his laptop was his only means of accessing the internet but that did not excuse it.

27. The meeting concluded with Mr Williamson explaining that he would pass his investigation to the HR department and it would determine how to proceed.

Invite to disciplinary hearing

28. It was determined that the claimant would be invited to a disciplinary hearing due to the serious nature of the allegations which they had been obliged to report to the Security Officer. The claimant was suspended until the disciplinary meeting was concluded. By email of 17 August the claimant was invited to a disciplinary hearing scheduled for Wednesday 22 August 2018. In a separate letter dated 17 August 2018 it was confirmed that there were sufficient grounds to proceed to a disciplinary hearing under the disciplinary policy. The claimant was sent: -

    (i) The investigation notes;

    (ii) The training records;

    (iii) A copy of the employee handbook; and

    (iv) A list of downloads found on the laptop.

29. The claimant was advised that the outcome of the disciplinary hearing could involve disciplinary action up to and including dismissal. He was advised of his right to be accompanied.

The Disciplinary Hearing

30. The disciplinary hearing was initially scheduled for the 29 August 2018 but was postponed on the request of the claimant so he could be accompanied to the hearing. The claimant had been in correspondence with Suzy Eker, HR Business Partner in this respect. The meeting was scheduled for 5 September 2018 to be held by Terry Gray, Service Delivery Manager with Suzy Eker in attendance. This was confirmed in a letter to the claimant of 28 August 2018. The claimant was reminded of his right to be accompanied and also that a possible consequence arising out of the meeting was dismissal. The claimant was accompanied by Peter Lewis who described himself in his witness statement as a Team Leader at AWE and an unpaid Prospect Union Official. The Tribunal saw typewritten notes of the meeting which again the claimant had annotated and amended.

31. The minutes referred to the list of downloads that had been produced during the investigation meeting and the claimant explained that it came from a time when the laptop was the only means he had of accessing the internet. Mr Gray pointed out that the downloads were games and films. The claimant acknowledged he had broadband at home and a TV but had no access to the internet other than the laptop or his mobile phone.

32. The claimant is noted as stating that half of the people on the site including management download films and worse, and he had never known anyone to have their laptop searched. Mr Lewis suggested that perhaps the claimant's laptop had been looked at but no one else's. Mr Gray explained that the line manager had been concerned about the claimant's use of the internet which is why it was looked at.

33. Mr Gray pointed out to the claimant that there was one download in 2018 after he was back at work. The claimant said he had no memory of the downloads. The claimant said that there was no illegal software and he had no knowledge of the crack file. Mr Gray made it clear that the policy was that downloads should not happen. It was emphasised by Mr Gray that that claimant worked in IT and in view of his position at the respondent, and what he did for them he would surely have had knowledge of the crack file. The claimant maintained that the first time he knew about it was when it was shown to him.

34. The claimant was reminded that when he had his DV interview he was asked questions around downloads but some had been made after that interview. The claimant maintained he had said to the DV interviewer that he had downloaded things in the past but did not do so anymore. The claimant said his interview had been in January.

35. Mr Lewis brought up the fact that the claimant was covered by the Equality Act in view of his depression and that he had not been given reasonable adjustments. The claimant explained that his medication can throw his sleep pattern out and a few incidents where he was late in the doctor had said his start time should be put back. There had not been any real changes to his job in the past 18 months and no meetings to say what has been done to help him. Mr Lewis stated that the claimant had been put in the warehouse due to lack of security clearance but hated it. The claimant also stated that he believed his mental condition was a "mitigating" circumstance" in that you do not think straight and when the laptop is there you open it and there is a game to give you pleasure.

36. Mr Gray adjourned the meeting to consider everything and then gave his decision that the claimant's conduct was inappropriate and excessive use of the internet, company equipment and tools which is a breach of the internet and email policy for which the claimant was being dismissed for gross misconduct. This was confirmed in a letter to the claimant of 12 September 2018.

37. In Mr Gray's witness statement he explained that he took account of the claimant's assertion that other members of staff were downloading similar material onto their company laptops. He could not see that this in any way justified or mitigated the claimant's conduct given that any such conduct (regardless of how many employees were engaging in it) was wrong and contrary to well established policies, procedures, and principles. He was however concerned with the claimant's assertion and therefore after the hearing asked a colleague to investigate those allegations. The colleague

in question took a random selection of 12 employees and reviewed their laptops to check for inappropriate content or downloads and there was no such content on any of the 12 laptops that were reviewed.

38. After Mr Gray had given his evidence, he revealed to Counsel that there was an email to his colleague Drew Conlon of 6 September 2018 raising that point. He received a reply on the same date in which the names of the people whose laptops were checked was given and confirmation that there were no issues found. That email was then disclosed at this hearing. The Judge allowed it to be admitted and Mr Gray was recalled to answer further questions about it. It was what he called a "sanity check" to find out whether the practice of downloading games and films to the company laptops was prevalent as suggested by the claimant. This showed that it had not been.

39. What is particularly relevant is that the claimant did not at the time disclose the names of people who he alleged had been involved in this practice.

The Claimant's Appeal

40. By an undated letter the claimant submitted his notice of appeal to Mr Adams. He stated that: -

    (i) His mental health condition had been discussed but not been taken into account.

    (ii) He believed that the decision to dismiss had already been made before the disciplinary hearing.

    (iii) The notes of the hearing were filled with spelling mistakes and grammatical errors and he did not accept them as accurate.

    (iv) The investigatory meeting was flawed and discriminatory. The claimant had not been allowed a "supporter" at the meeting.

    (v) The claimant had not had reasonable adjustments on his return to work.

    (vi) Due to the delay in the claimant's security clearance being obtained and his move to the warehouse he believed that this had contributed to his actions. It had prevented him carrying out the role he was trained for.

    (vii) The use of IT systems for personal use was commonplace within the respondent. The claimant again said that half of the workforce on site regularly used their laptops for private use. No names were given.

41. The appeal hearing took place before Mr Adams but was conducted by telephone as it had not been possible to agree an appropriate time and place where the claimant could attend in person. It eventually took place on 1 November 2018 by way of telephone conference call and the claimant was again accompanied by Mr Lewis. Mr Adams was the hearing manager and he was accompanied by Caryn Pope, HR Business Partner. She took notes of the hearing.

42. The meeting started by discussing how the claimant said Mr Gray had failed to consider his mental health condition. He was asked why he believed that to be the case and he said that it was just the way Mr Lewis and he felt about it. Mr Lewis added that the claimant had really opened up at that meeting about his health and why it was a mitigating factor, but it was not given any weight and made them feel that the decision had already been made.

43. There was considerable discussion about the notes of the investigatory hearing.

44. There was discussion about how putting the claimant in the warehouse was detrimental to his health.

45. Again, the claimant said that the use of IT for personal use was widespread and people including management were all using it. The claimant was asked if he had evidence. He said, “I know a lot of them have left as half the workforce was turned around”. The claimant said he was not prepared to give names as a lot had left and he was not sure if they were asked to leave but they had gone.

46. Mr Lewis posed the question that they knew that the claimant had mental health issues yet they had let him keep his laptop and asked why he had been allowed to keep it. Mr Adams said they would not remove someone’s laptop just because they had mental health issues to which Mr Lewis said, “This should have been foreseeable”. Mr Adams was adamant that there was no reason to remove it unless something was brought to their attention. This is not something that was raised at this hearing.

47. The claimant explained that a lot of the downloads that were on there were done while he was off on long term sick leave. He was sat at home with depression and anxiety, he was not thinking straight and downloaded videos and games. He downloaded a couple of clients to enable him to play the games. It was difficult to explain what place you are in when this is happening. He was not thinking logically. The claimant was asked about the crack file and explained that he only knew about that at the investigatory meeting. He had no knowledge of why that file was there.

48. The claimant acknowledged there were two film downloads after he returned to work. He had no knowledge of downloading them and they were downloaded at 4am in the morning. He would not have been awake at that time and he had seen both the films legally so he was not sure why he would have done it.

49. The outcome of the appeal was sent to the claimant by letter of 8 November 2018. The claimant was advised that his appeal was not upheld.

**Submissions**

50. On behalf of the respondent it was submitted that at both the investigation and disciplinary hearings the claimant admitted he should not have downloaded the files. He admitted they amounted to security breaches. He accepted that he was warned during his DV interview not to do it anymore.

51. All the evidence suggests that conduct was the reason for dismissal. There was a reasonable investigation. The claimant accepts it was reasonable to dismiss him. He accepted he had training on the matter and is an IT specialist. Other than his criticism that others were doing it as well he has no criticism of the investigation. The Tribunal was invited to find that the reason was within the band of reasonable responses.

52. The claimant said others were doing this but never revealed who they were. For such an argument to be run by the claimant he would need to show identical conduct by a fellow employee but different treatment. There is nothing like that sort of comparison here because no one has been named and therefore they could not be investigated.

53. On behalf of the claimant it was submitted he could not believe that Mr Gray had been allowed to come forward now and also produce this email. He was disappointed that deadlines in the orders had not been adhered to on behalf of the respondent. The claimant believes that the respondent did know that others were using their laptops for personal use.

54. The claimant's mental health problems were documented and occupational health suggestions not followed up.

**Relevant Law**

55. The claimant claims he was unfairly dismissed and the burden is on the respondent to show that the reason for dismissal was a potentially fair reason falling within s.98 of the Employment Rights Act 1996. It relies upon conduct, a potentially fair reason.

56. The Tribunal must then apply the provisions of s.98(4) and determine whether in all of the circumstances of the case the respondent acted fairly in treating that reason as one to justify the dismissal of the claimant. It must look at all relevant circumstances and must consider what was within the band of reasonable responses and not submit its view for that of the employer.

57. In a conduct case the Tribunal should apply the guidance set out in British Homes Stores Ltd v Burchell [1978] IRLR 379.

58. It was stated in that case that there are three elements that must be established by the employer the fact of the belief in the misconduct, that the employer did believe it. Secondly it must be shown that the employer had in its mind reasonable grounds upon which to sustain that belief and thirdly, the employer at the stage at which it formed that belief on those grounds must have carried out as much investigation into the matter as was reasonable in all of the circumstances of the case.

59. Much has been made at this hearing of the claimant's belief that others were also downloading films and games onto their work laptops. No evidence of that has been provided and the claimant has never indicated the names of who that might be. The circumstances in which a Tribunal can consider inconsistent treatment is where an employee has been found to have committed the same or extremely similar misconduct but has been treated inconsistently with the claimant. That is not the case here. The Tribunal must give consideration to previously set out guidance in the case of Hadjioannou v Coral Casinos Ltd [1981] IRLR followed in Procter v British Gypsum Ltd [1992] IRLR 7. The case was also referred to by the Court of Appeal in Paul v East Surrey District Health Authority [1999] IRLR 305. Paragraph 25 of Hadjioannou it was stated: -

> "We accept that an analysis by counsel for the respondents of the potential relevance of arguments based on disparity. We should add, however, as counsel has urged upon us, that industrial tribunals would be wise to scrutinise arguments based upon disparity with particular care. It is only in the limited circumstances that we have indicated that the argument is likely to be relevant, and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or significantly similar to afford an adequate base for the argument. The danger of the argument is that a tribunal may be led away from a proper consideration of the issues raised by s.98(4) of ERA. The emphasis in that section is upon the particular circumstances of the individual employee's case. It would be most regrettable if tribunals or employers were to be encouraged to adopt rules of thumb, or codes, for dealing with industrial relations problems and in particular issues arising when dismissal is being considered. It is of the highest importance that flexibility should be retained and we hope that nothing that we say in the course of our judgment will encourage employers or tribunals to think that a tariff approach to industrial misconduct is appropriate."

60. The court made clear that it would endorse the guidance that ultimately the question for the employer is whether in the particular case dismissal is a reasonable response to the misconduct proved. If the employer has an established policy applied for similar misconduct it would not be fair to change the policy without warning. If the employer has no established policy but has on other occasions dealt differently with misconduct properly regarded as similar fairness demands that he should consider whether in all the circumstances including the degree of misconduct proved more serious disciplinary action is justified.

61. An employer cannot be considered to have treated other employees differently if he was unaware of their conduct. Even if there is clear inconsistency that is only a factor which may have to give way to flexibility. If an employer has been unduly lenient in the past he will be able to dismiss fairly in the future notwithstanding the inconsistent treatment.

**Conclusions**

62. The claimant was dismissed by reason of conduct. That is a potentially fair reason falling within s.98 of the Employment Rights Act 1996. It has never been disputed by him that that was the reason for his dismissal.

63. It is clear from the evidence that at the time of making the decision to dismiss there had been a reasonable investigation. The claimant's laptop had been checked and a printout of the downloads found was provided to him at the investigatory hearing. Whatever the claimant's criticism of the notes of that meeting he has never denied the downloads. He also accepts there was a security breach. The claimant was invited to and stated his position at a disciplinary hearing again at which he did not dispute that he had made the downloads and that there was a security issue. At this hearing when cross examined the claimant accepted that it was fair to dismiss him, but the unfairness was because they did not dismiss others.

64. As has been set out in the case law above the requirement of s.98 is to look at how the employer treated this employee. This employer acted fairly towards the claimant in the manner in which it conducted the disciplinary hearing against him. It did investigate whether others had downloaded material but as a random exercise for its own purposes. The claimant places far too much weight on the email which was disclosed at this hearing showing the names of those whose computers were checked. The claimant never provided evidence to the respondent of those who had material that they should not have on their company laptops. There has been no inconsistency of treatment because no one else was found to have committed the same misconduct.

65. It has never been disputed by the claimant at this hearing that dismissal was within the band of reasonable responses indeed he accepted that in his evidence.

66. The respondent's policy made it absolutely clear beyond doubt that this was a matter that they would consider as gross misconduct for which summary dismissal might be the outcome. Dismissal was therefore within the band of reasonable responses. The claimant was an IT expert working in a facility that required the highest level of security clearance. It cannot be in doubt that the downloading of films and games in this way presented a security breach.

67. The dismissal was a fair dismissal and the claimant's claims fail and are dismissed.

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Employment Judge Laidler

Date: 26 August 2020

Sent to the parties on: ...1st September 2020.....
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For the Tribunal Office