Case Number: 3327686/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Hicks	v	Atlantic Pacific Global Logistics Limited

Heard at: Watford **On**: 22 January and 5 February 2021

Before: Employment Judge Hyams, sitting alone

Appearances:

For the claimant: Mr P Mckenna, representative
For the respondent: Ms J Williams, solicitor

RESERVED JUDGMENT

The claimant's claim of unfair dismissal does not succeed. The claimant was not dismissed unfairly.

REASONS

Introduction; the claim and the parties

1 In these proceedings, the claimant claimed that he had been dismissed unfairly within the meaning of section 98 of the Employment Rights Act 1996 ("ERA 1996"). While the claimant was dismissed by the respondent for what the respondent termed gross misconduct, the respondent paid the claimant notice pay. As a result, the question whether the claimant had in fact done something which, at common law (i.e. the law contract), justified the respondent in dismissing the claimant without notice or pay in lieu of notice, did not arise. Therefore, the only issue which required my determination was whether or not the claimant's dismissal was unfair.

2 The ET1 claim form was presented on 18 December 2019. The claimant was dismissed (the parties agreed) on 25 September 2019, and the claimant had obtained an early conciliation certificate from ACAS. Accordingly, the claim was

made in time after the requirement to obtain an early conciliation certificate had been satisfied.

3 However, the claimant had made his claim against “Atlantic Pacific Global” and not Atlantic Pacific Global Logistics Limited, which, I ascertained at the start of the hearing on 22 January 2021, is the proper name of the respondent. By agreement with the parties, I ordered that the name of the respondent was changed to the latter name.

<u>The evidence which I heard and the procedure which I followed</u>

4 The case was originally listed to take place on 21 and 22 January 2021. However, because of a lack of judicial resources, it could not start to be heard on the first of those days. It was, instead, listed to be heard by me on the second of those days in order to ensure that the hearing commenced, and on the basis that if more than a day was in fact required for the hearing, then it could be adjourned and resumed within a relatively short period of time. A day was indeed insufficient, as I had time only to read the witness statements and as many of the bundle pages to which I was referred by the witnesses as I could, and then to hear oral evidence. The hearing was then adjourned by agreement to 5 February 2021, although the claimant subsequently sought its relisting in March 2021 because of difficulties caused to his employer by the new laws on importing and exporting resulting from the exit of the United Kingdom from the European Union on 31 December 2020. However, by agreement with the parties, instead of postponing the resumption of the hearing I directed the exchange of written skeleton arguments at 4.00pm on 4 February 2021 and resumed the hearing at 12 noon on 5 February 2021 in order to hear oral submissions. I then reserved my judgment on liability, agreeing with the parties a provisional remedy hearing date, i.e. a date for the resumption of the hearing for the determination of the remedy which the claimant should receive if the claim succeeded.

5 On 22 January 2021, I heard oral evidence from the claimant on his own behalf and, on behalf of the respondent, from the following witnesses:

5.1 Mr Kevan Childs, who was at the time of the claimant’s dismissal the respondent’s General Manager (and who at the time of the hearing before me was a Director of the respondent);

5.2 Mr Philip Braunton, the respondent’s Information Technology Manager; and

5.3 Mrs Jackie Hutchinson, who is the respondent’s Company Secretary and a Director of the respondent.

6 The respondent also put before me a witness statement of Mr Ashley Nichols, the respondent’s Managing Director, but Mr Nichols did not give oral evidence. A bundle of 190 pages was put before me. Any reference below to a page is, unless otherwise stated, to a page of that bundle.

The issues and the relevant case law

7 The claimant accepted that the reason for his dismissal was his conduct (i.e. within the meaning of section 98(2)(b) of the ERA 1996) and he accepted that he could not complain about the procedure followed in dismissing him. His case was that his dismissal was unfair because it was outside the range of reasonable responses of a reasonable employer to dismiss him in the circumstances which I describe below. I return to the submissions made on behalf of the claimant in the following section below.

8 It was nevertheless necessary for me to decide for precisely what the claimant was dismissed and a number of aspects of the factual background. That is because the question whether or not an employee's dismissal was outside the range of reasonable responses of a reasonable employer has to be decided by reference to (a) the reason for which the employee was dismissed, and (b) the circumstances in which that reason was relied on in dismissing the employee, including the things that, on the facts as found by the tribunal, the claimant either knew or could reasonably have been expected to know might lead to his dismissal. Those circumstances are relevant not least because of the wording of section 98(4) of the ERA 1996, which remains determinative despite the "range of reasonable responses of a reasonable employer" test, and is this:

> "Where the employer has fulfilled the requirements of subsection (1) [which the claimant accepted was the case here, since the claimant accepted that the reason for his dismissal was his conduct], 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."

9 In addition, on reflection it seemed to me that the circumstances may at least in some cases include the reasonableness of the conclusion that the employee had committed the misconduct for which he or she was dismissed. In any event, my factual inquiry was only marginally reduced by the implicit acceptance of Mr Mckenna on behalf of the claimant that (1) the claimant was dismissed for his conduct, (2) there were reasonable grounds for concluding that the claimant had committed the conduct for which he was dismissed, and (3) the respondent had carried out a sufficiently fair investigation (i.e. one which it was within the range of reasonable responses of a reasonable employer to carry out) before concluding

that the claimant should be dismissed for his conduct.

10 In deciding for precisely what the claimant was dismissed, I took into account the very helpful statement concerning what constitutes "the reason" for a claimant's dismissal made by Cairns LJ in *Abernethy v Mott Hay and Anderson* [1974] IRLR 213, [1974] ICR 323, 330B-C:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

11 Paragraph DI[821] of *Harvey on Industrial Relations and Employment Law* helpfully states the manner in which those words have been approved and applied in subsequent case law:

> "These words, widely cited in case law ever since, were approved by the House of Lords in *W Devis & Sons Ltd v Atkins* [1977] AC 931, [1977] 3 All ER 40 and again in *West Midlands Co-operative Society v Tipton* [1986] AC 536, [1986] IRLR 112, HL where the rider (important in later cases) was added that the 'reason' must be considered in a broad, non-technical way in order to arrive at the 'real' reason. In *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401, [2017] IRLR 748, Underhill LJ observed that Cairns LJ's precise wording in *Abernethy* was directed to the particular issue before the court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which causes them to take the decision – or, as it is sometimes put, what 'motivates' them to do what they do."

<u>The claimant's submissions on the fairness of his dismissal</u>

12 Mr Mckenna's helpfully succinct and focused written submissions stated this under the heading "Summary of reasons", i.e. for saying that the claimant's dismissal was outside the range of reasonable responses of a reasonable employer.

> "3. Allegations of misconduct should not have been treated as being sufficient reasons for dismissal. The existence of a first warning did not alter this as the first warning stated that the consequence of further misconduct would be a final warning.
>
> 4. Excessive use of the internet was wrongly categorised as gross misconduct. This was in contradiction of the respondents own policy which refers to excessive use as a potential disciplinary matter but does not include excessive use in the list of activities related to the internet which are classed as gross misconduct."

13 Mr Mckenna's written submissions expanded the second of those two paragraphs

in the following subsequent paragraphs:

"13. The claimant accepted that his internet use was excessive and put forward in mitigation ... that this was due to work being slow. The respondent did not accept this explanation. The respondent concluded that the claimant could have at least spent his time checking and completing databases that had missing entries, in particular those that have been identified under the allegation [of] failure to follow procedures.

14. Generally employers treat personal internet use pragmatically allowing a certain amount of use. The respondent's internet policy reflects this wider approach: bundle pages 35 to 37

15. This pragmatic approach makes distraction from work by the internet analogous to chatting with colleagues about non-work matters. Employers want such distractions to be kept to a minimum and usually all it takes is a gentle reminder to get back to work. However employers do have the option to invoke disciplinary proceedings for persistent offenders. No reasonable employer would consider this to be gross misconduct for a first offence. Furthermore such an approach would be in keeping with the provisions of the respondents internet policy. Employees are warned that excessive use may lead to disciplinary action.

16. Excessive use of the internet is not included in the list of matters that the respondent considers could amount to gross misconduct: Paragraph 30.31 of the policy. As is often the case the list is stated to be extended to include serious matters that may not have been anticipated. This reasoning does not apply to excessive use. Excessive use is specifically referred to in the policy and clearly anticipated as a possible problem. If the respondent wished to categorise excessive internet use as gross misconduct the policy was the place to do this. Employers should make it clear in advance which activities it considers so serious that it will be not exhaustive. This is to allow the list to be extended to include treated as gross misconduct particularly if the activity is not of the kind like theft, assault etc that is not obviously serious misconduct.

17. The claimant gave evidence that the longest he would be on the internet any one time would be 20 minutes. This is credible particularly taking into account Ms Hutchinson's comment in the disciplinary hearing notes that she had identified a 25-minute period on the 30th of July 2019 when a game was being played when the clicks were in the thousands bundle page 145. The majority of Internet visits show far fewer clicks on this which suggests very short visits. The evidence of excessive activity was for the period 23rd July to 30th of August 2019. Had there been evidence of excessive use prior to this no doubt it would have been included in the disciplinary allegations.

18. Ms Hutchinson erroneously concluded that the claimant was watching racing during work time and using the internet for gambling. These conclusions were not based on evidence. Ms Hutchinson concluded that a race referred to as occurring at 8:45 occurred at 8:45 a.m. It is likely these matters influenced Ms Hutchinson to treat the excessive internet as more serious than could be justified by the evidence. Furthermore these matters were not included in the allegations set out in the letter of the 9th of September 2019 bundle page 137

19. It would be against the evidence for the respondent to make too much of the link between excessive internet use and [p]erformance issues. The allegation of failure to follow client Sop [i.e. standard operating procedure] related to the weekend of 3rd and 4th of August. The internet logs show no activity by the claimant on those dates. The failure to follow procedures allegation refers to incomplete records in 2018 when according to Ms Hutchinson the claimants internet use was not as substantial as in July August 2019: [p]aragraph 23 statement of Jackie Hutchinson."

<u>The factual background to the claim</u>

The parties and the claimant's role with the respondent

14 The respondent describes itself as a freight forwarding operator. At the time of the claimant's dismissal, the respondent's main office was at Basildon, in Essex. The respondent had in addition a small office at Heathrow, at which three employees worked. The claimant was the manager of that office, and was employed as a Customer Services Manager. He was the line manager of the other two members of the respondent's staff who worked at that office. The claimant was line managed by Mr Peter Reynolds, who reported to Mr Childs.

Relevant parts of the respondent's staff handbook

15 There were at pages 31-37 extracts from the respondent's staff handbook. On page 31, in paragraph 2.1, this was said:

> "This Staff Handbook sets out the main policies and procedures that you will need to be aware of while working for us. You should familiarise yourself with it and comply with it at all times. Any questions you may have with regard to its contents or what you have to do to comply with it should be referred to your manager."

16 Paragraphs 30.24-30.32 of the staff handbook, copied on pages 35-37, stated a number of things about use by employees of the internet. Paragraphs 30.24 to 30.26 were under the heading "Personal use of systems" and were of particular importance. They were in these terms:

> "30.24 We permit the incidental use of internet, e-mail and telephone

systems to send personal e-mail, browse the internet and make personal telephone calls subject to certain conditions set out below. Personal use is a privilege and not a right. It must be neither abused nor overused and we reserve the right to withdraw our permission at any time.

30.25 The following conditions must be met for personal usage to continue:

(a) use must be minimal and take place substantially out of normal working hours (that is, during lunch hours, before 9 am or after 5.30 pm);

(b) use must not interfere with business or office commitments;

(c) use must not commit us to any marginal costs; and

(d) use must comply with the policies set out in this handbook including the Equal Opportunities Policy, Anti-harassment Policy, Data Protection Policy and Disciplinary Procedure.

30.26 Staff should be aware that personal use of our systems may be monitored and, where breaches are found, action may be taken under the disciplinary procedure. We reserve the right to restrict or prevent access to certain telephone numbers or internet sites if we consider personal use to be excessive."

17 Under the heading "Inappropriate use of equipment and systems", this was said (on page 36):

"30.30 Access is granted to the internet, telephones and other electronic systems for legitimate business purposes only. Incidental personal use is permissible provided it is in full compliance with our rules, policies and procedures (including this policy, the Equal Opportunities Policy, Anti-harassment Policy, Data Protection Policy and Disciplinary Procedure).

30.31 Misuse or excessive use or abuse of our telephone or e-mail system, or inappropriate use of the internet in breach of this policy will be dealt with under our Disciplinary Procedure. Misuse of the internet can, in certain circumstances, constitute a criminal offence. In particular, misuse of the e-mail system or inappropriate use of the internet by participating in online gambling or chain letters or by creating, viewing, accessing, transmitting or downloading any of the following material will amount to gross misconduct (this list is not exhaustive):

(a) pornographic material (that is, writing, pictures, films and video clips of a sexually explicit or arousing nature);

(b) offensive, obscene, or criminal material or material which is liable to cause embarrassment to us or to our clients;
(c) a false and defamatory statement about any person or organisation;

(d) material which is discriminatory, offensive, derogatory or may cause embarrassment to others;
(e) confidential information about us or any of our staff or clients (which you do not have authority to access);

(f) any other statement which is likely to create any liability (whether criminal or civil, and whether for you or us); or

(g) material in breach of copyright.

Any such action will be treated very seriously and is likely to result in summary dismissal."

The evidence before me, and so far as necessary my findings of fact, concerning the events which preceded the proposal to dismiss the claimant

18 On 7 May 2018 Mrs Hutchinson held a meeting with the claimant after which she sent him the email at page 42, of 8 May 2018. The first half of the email was material. So far as relevant it referred to the fact that the respondent had found that the claimant had been using the internet for non-work purposes excessively and warned him that "a repeat of such activity will lead to disciplinary action". However, no formal warning was given in that regard in the light of the claimant acknowledging his fault and expressing a clear intention to stop his excessive use of the internet for non-work purposes.

19 On 17 September 2018, the claimant was given the "First written warning" of which there was a copy at pages 47-48. It was for two things, neither of which related to excessive use of the internet.

20 During the spring and summer of 2019, Mr Reynolds and Mr Childs had growing concerns about the claimant's work and his approach to work. It is not necessary to go into those in detail here, except to say that to the extent that the claimant sought to show that those concerns were not objectively justified, I was satisfied on the balance of probabilities that they were objectively justified.

21 On 1 August 2019, Mr Reynolds sent the claimant the email at page 76 which referred to what was in effect, if not in fact, a new software programme which was to be applied in managing at that time imports, but which was intended also to cover exports in the future. The first paragraph was of particular importance and was in these terms:

> "As discussed when I came over last week, we have set up dashboards to see the status of import jobs at a glance and this will be rolled out to cover exports in due course. I have shown you where you can access this but as a reminder the button is under utilities on the main FCL screen. If you click on the report at the moment it brings up jobs going back to January and these need to be cleared before it can be used properly. Any jobs that don't have the shipping terms entered will have to [be] gone into and have these entered manually. To clear the other fields you can send an email to IT confirming that they have all been checked and then Phil [i.e. Mr Braunton] will run a report closing these off. You can do this quick fix for any jobs booked up to the end of June but must include the date on the email you send to Phil."

22 On the next day, two shipments were collected from one of the respondent's major customers. They were shipments of high value. They were given the wrong labels: one was meant for Havana and the other for Manila, and each had the other's label attached. Once the first shipment had been sent on an aeroplane to the wrong destination, there was a window of opportunity to prevent the second one from being sent incorrectly also. It was the claimant's evidence that nothing could have been done to prevent the second shipment from being also sent to the wrong destination, but I accepted on the evidence that I heard that the claimant or a member of his team could be seen objectively to have been at fault in that if the claimant or his team (properly managed) had done their job(s) properly, then the shipment would have been prevented from being sent to the wrong destination. Both shipments were retrieved and eventually ended up at the right destinations, but days late in a highly competitive commercial environment, thereby putting at risk a considerable portion of the respondent's future business.

23 I understood that the relationship with the customer was repaired subsequently. One issue which was initially pursued on behalf of the claimant was the proposition that his dismissal was predetermined by reason of a desire to show to that customer that action was being taken to put right the cause of the failure to attend to the customer's best interests with sufficient alacrity. That was done by reference to the email at page 59B, which was sent by Mr Reynolds to the customer on 16 August 2019. The relevant part was in these terms:

> "I am carrying out a thorough investigation which has raised some questions that I am looking into in greater detail. To be candid, this includes looking into certain individuals performance and is likely (I think you know what I mean by that!) to escalate to a disciplinary level. This is the reason that this is taking longer than expected to come back with full details so I would appreciate it if you could bear with me for a short while. I assure you that procedures will be reinforced and that service levels will return to the standards you have come to expect over many years."

24 Mr Childs' witness statement contained the following passage, which I accepted as a true account of what then happened.

"18. Then on 27th August we became aware from contacting the office to speak to Simon, he wasn't at work. He had taken a day off but had not sought permission to do so. When I work a weekend, I must still get permission to have a day off. There may be reasons why that day off has to delay until Tuesday, for example. It may be others are off. This ensures smooth running of the work flow. So, even though he was a customer services manager, he did not have the authority to have the day off. Peter Reynolds felt the same so I looked at our holiday system (Selima) see page 122. That literally records if a day off is approved. There was no entry for 27th August.

19. It was at that point that Peter Reynolds and I felt we had to investigate what was happening with Simon and potentially the office. In accordance with our processes, I was not able to simply get access to Simon's emails and had to seek approval. I went to our IT manager, Phil and explained we were investigating issues. Phil then said he would need Jackie's approval but once Phil had spoken to her and she gave her permission Phil proceeded to assist with the investigation.

20. Phil contacted me and allowed me access to Simon's emails. Peter and I then collated a number of emails that are in the bundle that focused on the issues as set out above. I also received an internet search Phil had done on Simon's internet activity. That was a real turning point as it showed he was actually accessing gaming sites when he should have been working. That search is at pages 106-109.

21. At that point I really did feel it was unlikely we could avoid a disciplinary and it looked very serious. There was internet activity from a customer service manager at 9.40 am on a work day on 30th July and our hours are 9 to 5.30 so there were loads outside working hours. Even allowing a flexible lunch hour, Simon was accessing these sites repeatedly.

22. I was shocked.

23. I, together with Peter Reynolds met with Simon on 3rd September 2019. After the meeting I typed up very rough notes and these are at pages 124 and 125. I put the issues to him and he kept answering points with totally different issues, like a politician's answer. It made it quite difficult. We had a meeting which lasted for about one and a half hours, as I recall. He asked me if I was trying to get rid of him. I wasn't on any campaign to get rid of him but I did say, it was a disciplinary process and he might have no action against him or he might face disciplinary action.

24. I explained he was being suspended on full pay and that this was to allow an investigation to take place. I asked for his laptop and mobile. We got distracted so when he left I hadn't realised we had not taken the phone. Peter then went after him and when Peter returned to the office with the

mobile, he said that he thought Simon was deleting things when he left the office and we looked at the safari browser and the whole history was deleted. So, I asked Phil to recover any deleted history. What he found was photographed at pages 110 to 114. It showed he was using company property to place bets on gambling site. That is not permitted.

25. As part of the investigation myself and Peter printed out emails relating to the allegations that are mentioned above and which we have already looked at but I hadn't been printing them as we went along. Then more arose as Scott Showell from Killick Martin was chasing Simon for missing invoices (page 126).

26. Peter then emailed me on 5th September as can be seen at page 127 because he established that Simon had sent out a package in Thursday but hadn't told the client until the Saturday so the package sat in storage at a cost of NZ$800. These were added to the papers for the investigation bundle."

25 Mr Childs' notes of his and Mr Reynolds' meeting with the claimant of 3 September 2019 at pages 124-125 contained this passage on the second page:

"KC then challenged Simon on his internet usage specifically the Golf game during office hours on a regular basis he said everyone is doing it, and he only just logged in and left it logged in during the day! KC also advised he had been visiting a betting site in July and he said he had not done that for months, when I said the example time period was July he did not challenge again."

26 There was in addition documentary evidence before me (at pages 90-93 and 99-109) and oral evidence from Mr Braunton that the "dashboard" referred to in the email of 1 August 2019 from Mr Reynolds to the claimant part of which I have set out in paragraph 21 above required actions to be done by the claimant during August 2019 but which the claimant, for no good reason, did not do. The claimant strenuously denied that there were such actions, asserting that he was reliant on customers or suppliers coming back to him with answers to queries which had been raised with them some time before.

The claimant's suspension and the disciplinary hearing which led to his dismissal

27 The claimant's suspension by Mr Childs was followed by Mrs Hutchinson sending the claimant the letter dated 4 September 2019 at page 129, which "confirm[ed]" that the claimant was "suspended on full pay pending an investigation into various accounts of Misconduct". Mrs Hutchinson then sent the claimant the letter dated 9 September 2019 at pages 137-138. So far as material, in it she said this:

"In accordance with the Employer's disciplinary rules and procedures I write

to confirm that the investigation is now complete. It has been decided you should face a disciplinary. You are required to attend a disciplinary hearing on Friday, 13th September 2019 at 10 O'clock at the Basildon office. The hearing will take place in the Ashley's office.

The disciplinary hearing is being called in relation to the investigation into gross misconduct for:

1. Excessive personal internet usage (pages 1-9)

2. Unauthorised absence from work 27th August 2019 (pages 10-11)

And misconduct for:

1. Failure to follow company procedures (pages 12-48)

2. Disrespect of senior managers (pages 49-52)

3. Failure to satisfactorily communicate with his [sic] Manager (pages 53-65)

4. Failure to follow Client SOP's and unsatisfactory service levels (pages 66-77)".

28 The disciplinary hearing was then put back to 25 September 2019. Notes of the hearing were made by Mrs Hutchinson's usual note-taker at disciplinary hearings. They were at pages 144-157. After hearing from the claimant, Mrs Hutchinson decided that he should be dismissed with immediate effect, although Mrs Hutchinson also decided that the claimant should as a matter of what she termed "[her] discretion" be given notice pay. There was at pages 158-159 a typed document which had as its first text: "Statement to Simon Hicks at Conclusion Meeting re Disciplinary 25th September 2019". The reasons for Mrs Hutchinson's conclusion that the claimant should be dismissed were recorded in that document. Towards the end of the document, this was said:

"I believe your excessive internet usage has infected all areas of your work."

29 Mrs Hutchinson then sent the claimant the letter dated 27 September 2019 at pages 160-162, stating the reasons for the claimant's dismissal in writing. The first three reasons given were these.

29.1 "Excessive internet usage" which caused the claimant to have "lack of focus and a complete distraction". The first paragraph under the heading "Excessive internet usage" summarised Mrs Hutchinson's finding in this regard, in the following way:

"Contrary to our policies you consistently accessed the internet to play

games during working hours for such a significant period that you were effectively on unauthorised absence whilst in the office. You did not dispute this allegation but sought to mitigate it by saying others did that same and named Andrew as one such person. I do not accept that would have been sufficient excuse for you given your seniority. Incidentally, our IT department carried out a check of the online activity of Andrew and could find no such activity."

29.2 The claimant in addition "failed to follow" some "procedures" which had been "set for some time now" as "processes for all managers" to follow. They were stated in the final two paragraphs on page 160 and the first paragraph at the top of page 161, in this way:

"Regarding month-end, I find there was no thorough review carried out by you. The file checking was not completed, invoice and costing was not done on a timely basis.

Regarding invoice queries these were not dealt with on a timely basis and your dashboard was not reviewed.

Regarding deferment, you claimed you had put in place a new procedure as far back as August 2018. I have concluded that if you had, then errors would have stopped, yet they continued. There is no evidence of a new procedure within your dept and having checked your managers and team are not aware."

29.3 The claimant had failed to follow the standard operating procedure applicable to the job to which I refer in paragraph 22 above, where one of the shipments (the second one) which went astray could have been stopped from being sent to the wrong destination.

30 On page 161, Mrs Hutchinson summarised the position by saying that the claimant was "being dismissed for gross misconduct for excessive internet use and not following company procedures".

31 I accepted that the letter accurately stated Mrs Hutchinson's reasons for dismissing the claimant. I also accepted her evidence (in paragraph 52 of her witness statement) that she did not dismiss the claimant to any extent because there was in place a "live" written warning. She did, however, say that if she had not considered that the claimant was guilty of gross misconduct then the claimant "would still have been dismissed with notice because he already had a first written warning and this was at a minimum a serious misconduct issue, especially for someone at his level of seniority". I accepted that evidence of Mrs Hutchinson's.

32 Both parties clearly regarded the time when the claimant was supposed to be at work, i.e. his actual working hours, as being of considerable importance. That can be seen from paragraph 18 of the submissions advanced on behalf of the claimant,

set out in paragraph 13 above, and paragraphs 21 and 22 of Mr Childs' witness statement, which I have set out in paragraph 24 above. Mrs Hutchinson in addition said in answer to a question from me that it would not have affected her conclusion that the claimant should be dismissed if the claimant had outside normal working hours done work on the dashboard to which she referred in her written reasons for the claimant's dismissal as set out in paragraph 29.2 above.

33 The respondent's disciplinary procedure conferred on the claimant a right of appeal against the decision to dismiss him, and Mrs Hutchinson informed the claimant of that right and the time limit in accordance with the respondent's procedures for exercising that right. Since the claimant did not complain about the procedure followed in dismissing him, it is not necessary to say much about the possibility of appealing. For the sake of completeness, I record here that an appeal had to be made in writing, stating the grounds in full, to the respondent's Managing Director, Mr Nichols, by 4 October 2019 and that the claimant did not exercise that right within that time period. The claimant did not do anything in regard to exercising that right until 25 October 2019, when he contacted Mrs Hutchinson, saying that he wanted to appeal the decision. Mrs Hutchinson let Mr Nichols know that. As stated in paragraph 6 above, Mr Nichols had made a witness statement but did not give oral evidence. In his witness statement, he said this:

> "No reason was given as to why [the claimant] had not appealed in time. It wasn't a few days out of time but several weeks and by then we were firmly involved in recruiting his replacement. I took the view that he was too far out of time and told Jackie to inform him that he was out of time to appeal. I felt we had given him enough opportunity to appeal and he had failed to do so."

<u>My conclusions in relation to the claim of unfair dismissal</u>

34 Given my conclusions on the facts stated in paragraph 31 above, the key question here was whether the claimant knew or ought to have known that by spending any more than a minimal amount of time on the internet for example playing games such as the golf game to which Mr Childs referred in the investigatory meeting that he held with the claimant on 3 September 2019 as recorded in paragraph 25 above, he might be dismissed for gross misconduct. In other words, was it fair to dismiss the claimant for that conduct despite the fact that the respondent's staff handbook could be interpreted as lulling its employees into a false sense of security because (given the parts of the handbook set out in paragraphs 16 and 17 above) excessive internet use was not stated to be something for which an employee could be dismissed where that was the only misconduct of which the employee was guilty?

35 In that regard, I considered that the key passage in the handbook was paragraph 30.24 and the first part of paragraph 30.25, which I have set out in paragraph 16 above. That was because in that context paragraph 30.25's first two subparagraphs were in my view sufficient to put an employee on notice that internet usage "must be minimal and take place substantially out of normal working

hours (that is, during lunch hours, before 9 am or after 5.30 pm)" and "must not interfere with business or office commitments". The importance of working hours, and not just the completion of tasks, was in my judgment clear to the claimant, given the factors that I record in paragraph 32 above.

36 Here, the evidence before me showed (and I concluded) that Mrs Hutchinson had reasonable grounds for concluding that the claimant was neglecting the essential duties of his job when he was playing games on the internet. For example, I was satisfied that there were reasonable grounds (as shown by the evidence referred to in the first part of paragraph 26 above, which I concluded was not displaced for this purpose by what the claimant said in response as recorded in the second part of that paragraph) for Mrs Hutchinson's conclusion that the claimant was during August 2019 not doing things that were required in order to enable the dashboard referred to in paragraph 21 above to work effectively.

37 For the avoidance of doubt, I found that Mrs Hutchinson's decision to dismiss the claimant was based on the fact of his excessive internet usage during working hours for non-work purposes, and not the nature of that usage, i.e. the sites that he accessed during those hours.

38 If the claimant's work and that of his team had been completely up to date, so that there was nothing that needed to be done by any of them, then in my judgment it would have been incumbent on the claimant to let the respondent know that, so that the respondent could consider what, if anything, to do about that situation. If the work of the Heathrow office had been up to date and the claimant had informed the respondent that the staff of the office (including the claimant) were at times idle, then dismissing the claimant for excessive internet use might well have been outside the range of reasonable responses of a reasonable employer.

39 However, that was not the case here, and in my view in all of the circumstances, bearing in mind the claimant's position of responsibility with the respondent, both as a manager of staff and as Customer Services Manager, the claimant must have known that at least in the circumstances as they were in the summer of 2019 (if not in any event), the spending by him of any significant amount of time on the internet, playing games, in normal working hours, would be conduct for which he might be dismissed, whether or not summarily. Even if all that the claimant had done was spend (as he accepted he did) 20 minutes at most on the internet at any one time, there was in my judgment sufficient evidence before the respondent of repeated access by the claimant to the internet on such a scale that (a) Mrs Hutchinson's conclusion that the claimant was by reason of that access neglecting the essential duties of his job was based on reasonable grounds, and (b) the claimant must (or at least should) have known that by acting in that way, he was risking his dismissal, even though he had not been disciplined for that conduct before.

40 That conclusion was fortified by the fact that the claimant had deleted the history of his internet usage on the mobile telephone owned by the respondent but which

he used for work purposes as described in paragraph 24 of Mr Childs' witness statement, which is set out in paragraph 24 above. That deletion was in my view clear evidence of an awareness at that time of significant fault on the claimant's part. Furthermore, as recorded in the first sentence of the extract from Mr Mckenna's submissions set out in paragraph 13 above, the claimant accepted that his use of the internet was excessive.

41 In my judgment, therefore, the claimant's dismissal was not outside the range of reasonable responses of a reasonable employer. Accordingly, I concluded that the claimant was not dismissed unfairly.

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Employment Judge Hyams

Date: 20 February 2021

JUDGMENT SENT TO THE PARTIES ON
11 March 2021

FOR THE TRIBUNAL OFFICE