



EMPLOYMENT TRIBUNALS

Heard at: Southampton (by video) **On:** 11 and 12 March 2021

Claimant: Mr Christopher Deary

Respondent: Ministry of Defence

Before: Employment Judge Fowell

Representation:

Claimant: In person

Respondent: Ms C Rooney instructed by the Treasury Solicitors

JUDGMENT

1. The claimant's dismissal was unfair.
2. The claimant is awarded damages of £32,398.97 comprising a Basic Award of £15,750.00 and a Compensatory Award of £16,648.97

REASONS

Introduction

1. These written reasons are given at the request of the respondent and follow an oral judgment given on the second day of the hearing. Some editing has therefore taken place to avoid repetition.
2. The circumstances are that Mr Deary worked for the MOD as a Signals Information Officer (SIO) until his dismissal on 31 January 2020. The MOD say that this was on grounds of gross misconduct. That conclusion related to two offences, one of showing an inappropriate video to colleagues at work on his mobile phone ("the mobile phone incident") and one of breach of the MOD IT Systems Security Operations Policy, known as SyOPs. This last offence ("the IT incident") was caused by plugging a USB device into a computer. I was not in fact provided with

a copy of that policy, or the disciplinary policy, but there is a record to show that Mr Deary signed it and that he had to do so every six months.

3. The sole complaint presented is therefore unfair dismissal under section 98 Employment Rights Act 1996. By section 98(4):

...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.

4. Two points immediately arise from that provision. The first is that the MOD is clearly a very large, public-sector, organisation and the so the highest standards of procedural fairness are to be expected. Secondly, it includes the term 'equity' which is important here. One of the obvious requirements of fairness is that two people who commit the same offence in the same circumstances should be treated in the same way. Mr Deary says that this was not the case here, and that the dispute which led to his dismissal arose from a row with a friend at work, referred to at this hearing only by the initials SDS.
5. Mr Deary's case is that he first raised concerns about SDS, that SDS retaliated with the allegations that led to his dismissal, and that SDS was equally guilty over the IT issue because he helped him resolve it at the time. Further, SDS was also disciplined over other matters but only received a final written warning.
6. There is no doubt that the reason for the dismissal was conduct, and indeed much of that conduct was admitted. As is well-established, the question of whether the dismissal was fair or unfair can be broken down further as follows:
- a. was there a genuine belief on the part of the decision-maker that Mr Deary did what was alleged?
 - b. was that belief a reasonable one?
 - c. was it formed after a reasonable investigation and procedure?
 - d. was it "within the range of reasonable responses" open to an employer in the circumstances?
7. This "range of reasonable responses" test reflects the fact that whereas one employer might reasonably take one view, another might with equal reason take another. Tribunals are cautioned very strictly against substituting their view of the

seriousness of an offence for that of the decision maker.

8. It has also been held in the case of **Sainsbury's Supermarkets Ltd. v Hitt** [2003] ICR 111, that:

“The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) apply as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason.”

Procedure and evidence

9. In addressing these issues I heard evidence from Mr Deary and on behalf of the MOD from:
- a. Mr Richard Rawcliffe, who was then Head of Operations at the School of Signals based at Blandford Camp in Dorset. (This delivers military IT and communications training to both service personnel and civilians.) He dealt with the early stages of the disciplinary process and would have held the disciplinary hearing but was replaced at a late stage.
 - b. Ms Emma Pickford, an MOD (Civilian) Staff Officer at Blandford, whose job title was SO1 Business Improvement – which I take to mean Staff Officer 1. She took over the disciplinary process from Mr Rawcliffe and took the decision to dismiss Mr Deary; and
 - c. Colonel Mike Morton, the Commander of the School, who held the appeal.
10. There was also a bundle of about 450 pages. Having considered this evidence and the submissions on each side, I make the following findings.

Findings of Fact

11. Mr Deary was with the MOD for over 40 years, the last ten of them at Blandford Camp. His job as an SIO involved training recruits on voice procedure, which is an important part of signals communications. It is not a particularly IT-based role but he is one of the teaching staff at the school.
12. On 29 April 2019 he made a report about his friend SDS, whom he concluded had been helping students unfairly to get through their exams. The issue arose over a re-test SDS had given to four students. All four of them had passed. Mr Deary came across the retest papers in question and was concerned with what he saw. He took the view that they had not been properly marked and the test had taken a much shorter time than it should. Ultimately SDS was held to be not to have committed any misconduct although the merits of that issue were not explored at this hearing. I am satisfied however that this was a matter of genuine concern on

Mr Deary's part, and I note that the students all had to be tested again.

13. This allegation then led to a complete breakdown in working relations between the two men, who shared a line manager - a Higher SIO, Mr Kevin Falconer. Each of them then bypassed Mr Falconer and went above his head to the next level of management, which was Mr Rawcliffe. SDS was the first. On 15 May he made allegations about Mr Deary – the allegations that led to his dismissal - and Mr Rawcliffe told him to put it in writing and go through the normal chain of command
14. The next day Mr Deary went to see him, indignant that the allegations about the retests had not been taken seriously by Mr Falconer. This time Mr Rawcliffe did not tell him to go to his line manager, since he had already done that, but he decided to appoint an investigation manager to look into it.
15. Following the instruction to put his concerns in writing, on 20 May, late in the evening, SDS sent a long and emotional email to Mr Falconer. He set out a long list of allegations. The first one was that an instructor – not named but in fact Mr Deary - had showed a “vile and disgusting video of a motorcyclist being killed and squashed under a lorry”.
16. The second was that the unnamed instructor had plugged a video headcam into the computer system an introducing a virus, in direct violation of SyOps and other policies.
17. The third was the instructor had taken a student out of a lesson and threatened him with violence. The fourth was about him sleeping in the afternoons. And so it went on, with nine such allegations in total.
18. Mr Rawcliffe received this in due course and asked another Higher SIO to investigate. That duty fell to a Mr Clive Knaggs. It seems that Mr Knaggs then had a meeting with SDS on 3 June to discuss his concerns, although there is no record of it.
19. On 6 June SDS sent an email to Mr Knaggs with four attached witness statements, and this is the evidence was then used to support the disciplinary allegations against Mr Deary. It follows that the evidence of alleged wrongdoing was not obtained by the investigating officer conducting interviews with those concerned. It all came from SDS. In fact he wrote two of the four statements himself. The other two were obtained from colleagues whom he approached and asked to put their recollections in writing.
20. The first of these is at page 88. It is one of those from SDS, and described the video incident in further detail. It states that Sergeant Netra told him about the death of the recruit in Nepal, in an accident with an articulated lorry, something SDS found upsetting. Then the next day Mr Deary came in to show them a black and white video on his phone. It showed CCTV footage of a main road with vehicles driving

along it. Then, into the shot came a motorcyclist, an Asian person riding with no helmet. He was riding next to a big truck. As they turned a corner he disappeared under the truck. You could see the impact, with blood coming out from the rear wheels. The next shot was in colour, showing the aftermath, with body parts being scooped up with shovels into bags. Mr Deary then showed the same footage to Sergeant Netra.

21. The second statement is from another member of staff who was present during this incident, SAS. His statement is much more brief. It says that he could remember being shown the video. Rather surprisingly it said that the video was of poor quality, making it almost impossible to identify anything in great detail, he did not find the video to be offensive and as far as he was aware no one else was offended either.
22. The third statement was from Sergeant Netra (p.91) and was also brief. He too could recall the incident, said it looked like a road traffic accident but did not know where it occurred. It looked like it was from an Asian country, not necessarily Nepal and said:

“To be honest I did not really pay attention to the video. I just gave a quick glance and moved on with my work. I think it was a few days after the incident happened in Nepal when one of our Gurkha family members lost his life while on leave, but the video was never related to that incident and I did not feel offended by the video at all.”

23. So, both of the independent witnesses took a much less serious view of this incident than SDS. These discrepancies were not explored further however, nor were they asked to comment on whether, as claimed by SDS, the footage changed to colour and showed body parts being shovelled up. A Mr Young was also said to be present but was never interviewed.
24. There is then the second statement from SDS (p.90), which concerned the IT incident. In this he said that Mr Deary approached him and told him that his Go-Pro helmet camera was playing up. It would not play the video back. SDS plugged it into his own laptop to see if there was an issue and this showed that the video files were only 1KB each. He unplugged it and took some more video footage, then plugged it back in but there was still only a file of 1KB. He did a scan of the camera and found the file in question, an .exe file with a photoshop icon. This was the virus. He found that it had replicated itself onto the C:\ drive on his laptop, so he removed it. He asked Mr Deary if he had plugged it in anywhere else and Mr Deary told him that he had tried it on one of the computers in the classroom, so they went over there to check if it was there too. SDS told him this was a problem. It was a breach of SyOPs. They should report it. But if they did that they would both be “f****d”. So, as before, SDS put the computer into Safe Mode and removed the file. They then went to Mr Deary’s house to do the same with the computer there. No report was made of the incident.
25. Having come into possession of these statements Mr Knaggs then handed over the

investigation to a colleague, Mr Raine, the third HSIO to become involved. This was on 27 August, over two months after the allegations were first made. During this time Mr Deary and SDS were not on speaking terms, and SDS continued to lobby Mr Rawcliffe by email about these, referring to Mr Deary as threatening to punch students in the face, putting viruses on MOD computers and showing disgusting videos. As often the case with emails, these comments were given a wider circulation than they ought, and other colleagues of Mr Deary got wind of them. He in turn raised a further complaint against SDS over breach of his confidentiality, all of which shows the level of ill-feeling between the two and the difficulty the MOD had in managing their relationship.

26. Mr Deary was finally interviewed about these allegations on 20 September 2019, a further month later. The records show that he admitted the IT issue straight away, said that it was inadvertent, and that he thought the computer he used in the classroom was a standalone system and so could not do any wider harm. That was not disputed further during the disciplinary process. It was in fact part of a network in that building with an on-site server, so other classroom computers might have been affected but were not.
27. The investigation report that led to the dismissal starts at page 80. Mr Raine sets out the four allegations he was asked to investigate. The first related to the mobile phone incident, the second was about bullying a trainee, the third was the video incident and the fourth was about harassment of SDS. He concluded that there was no evidence to support the second allegation, and the fourth one about harassment is subject to a separate procedure in the armed services, called JSP (Joint Services Publication) 763.
28. I should add by way of explanation that JSP 763 is the only means by which service personnel can pursue a complaint to an Employment Tribunal of discrimination. They need to raise the allegation internally first, and this is the prescribed process. Hence, it is standard practice that any allegations of bullying and harassment, which may or may not be acts of discrimination, are explored through this process. The result is that there were only the two remaining disciplinary allegations against Mr Deary.
29. Mr Raine summarised the evidence in his report, which comprised simply his interview with Mr Deary and the statements supplied by SDS. That report was provided to Mr Rawcliffe, who told Mr Deary on 6 September that the disciplinary process would be pursued. At that point Mr Deary became very agitated and made threatening comments against SDS, which Mr Rawcliffe took him to task for. Subsequently Mr Deary raised concerns about Mr Rawcliffe's involvement and asked Colonel Morton to appoint a different Deciding Officer for the hearing, something Colonel Morton agreed to do in order to avoid any possibility of bias or unfairness.

30. The matter was therefore handed over to Ms Pickford, who had no knowledge of Mr Deary or of the process followed so far. She held a disciplinary hearing, which followed after a period of sickness absence on the part of Mr Deary, on 22 January 2020 and it lasted around 30 minutes. Ms Pickford was accompanied by an HR advisor and a note taker. Mr Deary was on his own. As before he accepted that he had plugged his headcam into a work computer. He said that he had been on his way into work on his bike and had nearly been knocked down by a car. He wanted to see if the camera had picked up the registration number. He also accepted that he had shown a video on his mobile phone of a cyclist getting run over and had not asked their permission before doing so.
31. After some deliberation Ms Pickford wrote to Mr Deary on 30 January to confirm his dismissal. The letter relied heavily on his admissions and on his lack of remorse. He had not accepted that the video of the cyclist and the lorry was inappropriate and said that he would show it again.
32. I tried to explore her reasoning with her a little further. She said that plugging the USB device into a computer was a “massive no no”. That is rather vague however. It does not seem to me to mean automatic dismissal, regardless of circumstances. Indeed, she was then asked about this in re-examination and did not go so far as to state that this incident alone would have justified dismissal. More significantly, neither in her witness statement or oral evidence did she point to any disciplinary procedure or passage of the SyOPs or other policy to say that dismissal is the usual sanction, or that intent or knowledge of the potential for harm was irrelevant. She was also unaware of the fact, as she accepted, that Mr Deary had 40 years’ service with the MOD. She appears to have approached matters on the basis that she was asked to hold a disciplinary hearing, that she was advised by HR that if proved the offences were potentially dismissible, and they were admitted.
33. After his dismissal Mr Deary appealed and the appeal was dealt with by Colonel Morton. He was an impressive witness and it is clear from his outcome letter that he wrestled with the decision, conscious of Mr Deary’s length of service. He too had advice on the process and approached the appeal as a review, i.e. he was looking to see if there was any basis to come to a different conclusion.
34. This was clear when I asked him about the 40 years’ service and what effect it had on the outcome, since it was an indication that Mr Deary was not likely to repeat such a mistake with computers. He was not aware that length of service had not been taken into account in the original decision, and said that he was looking for a chink of light, something on which to base a decision on to depart from the decision of Ms Pickford. Given the lack of remorse, he felt that he could not do so.

Conclusions

35. I will start with the adequacy of the investigation. The key background fact here is that Mr Deary raised perfectly proper concerns about SDS which led to a hostile

reaction. The extent of that reaction and the somewhat overblown language used by SDS in his original email was never taken into account. Crucially, SDS was never even interviewed about these issues.

36. It follows that the investigation into both incidents was entirely inadequate, an extraordinary point, which is sufficient in itself to impugn the fairness of the dismissal. In fact there was scarcely an investigation at all. Mr Raine simply relied on the witness statements sent in by SDS. His desire for revenge over the re-testing issue does not appear to have been taken into consideration and given the changes in investigation officer it may be that Mr Raine was not even aware of it.
37. As to the video incident, the approach seems to have been taken that this was a potentially unpleasant video, from which someone might be offended, and that any context or justification put forward by Mr Deary was simply obfuscation. The focus of the investigation meeting, disciplinary hearing and even the appeal hearing was to try to strip out any such context and to reduce the question to whether he had shown a video to his colleagues. A similar approach was taken with the USB issue, which was readily admitted.
38. It is well established that where an employee admits misconduct and the facts are not in dispute, it may not be necessary to carry out a full-blown investigation at all. In **Boys and Girls Welfare Society v Macdonald** 1997 ICR 693, EAT, the claimant was employed as a residential social worker in a children's home. During an row, he spat at one of the children. He admitted doing so at the disciplinary hearing and was dismissed.
39. However, this is not a case like spitting or violence. The context is particularly important where it is not clear if the employee knew or thought that they were doing anything wrong at all. This should all have been explored, as should the very different accounts of SDS on the one hand and Sergeant Netra and SAS on the other. In fact, it seems that no one was offended other than SDS, and the MOD might reasonably have had some doubt over his motives in raising this, especially as he did not raise any concern at the time.
40. As to the IT issue, the context includes Mr Deary's belief that this was a standalone computer and could not affect others. There was no gain for him in plugging in his USB connection. He explained that he had nearly been knocked off his bike that morning and wanted to see the registration number. That is understandable, and does not appear to have been doubted. No IT investigation was carried out into whether there were any lingering effects as a result of this incident. It was simply accepted, on the basis of the evidence of SDS, that he had removed the virus.
41. So, I conclude not only that the investigation was inadequate into both offences but there were no reasonable grounds for the decision to dismiss. That follows from the lack of attention given to the explanations put forward by Mr Deary. It also follows from the lack of any written procedures to justify the decision.

42. The main offence here, relating to the IT issue, was one of inadvertence or negligence, potentially gross negligence, since it could have had serious consequences for the MOD, but it did not. Colonel Morton gave evidence about cyber security being part and parcel of their role at the School of Signals and that they are under regular cyber-attack, but that was not a matter raised in the disciplinary hearing, and again there is no policy to the effect that this incident of inadvertently plugging in a USB connection from a video camera is one of gross misconduct.
43. If it is dismissible in itself, one would expect there to be a clear policy to that effect, explaining that anyone plugging a device into a computer at the camp would be putting their job at risk. The USB ports themselves might be disabled, or at least have a warning sign placed on them. There is nothing to show that Mr Deary realised at the time that he was doing anything particularly wrong, and nor did SDS when he was initially asked for help – he simply plugged the USB port into his own laptop.
44. Largely for the same reason, I also find in these circumstances that dismissal was outside the range of reasonable responses. It is important that a Tribunal not substitute its view of the seriousness of an incident for that of the employer, and I accept that the MOD, particularly at the School of Signals, does treat cyber-security very seriously. And no doubt they are anxious to avoid any member of staff being offended. However, they have written procedures to reflect that level of seriousness, and again, since they have not put those documents forward in evidence I cannot accept that the IT issue (which seems to have been regarded as the main offence) is normally regarded as a dismissible offence. That view is reinforced by the evidence of Ms Pickford who declined to say that the IT issue on its own would have led to dismissal.
45. Then there is the question of equity and the treatment of SDS, who received a final written warning. He was disciplined for the IT incident and also for publicly accusing Mr Deary of various offences in his email to Mr Rawcliffe, and it was Mr Rawcliffe who imposed this sanction. The gist of the case against Mr Deary was that any misuse of the computer system was serious or gross misconduct and that the real harm was failing to report it, and in that SDS was equally culpable. Not only did he fail to report it, he assisted Mr Deary in concealing it. It is clear that he knew far more than Mr Deary about these matters.
46. It is semantics to suggest that he was simply trying to solve the problem rather than causing it. The causing here was inadvertent, and if the view is taken that no excuses are allowed for such mistakes, then clearly the same should apply to Mr Deary. He was the one who found out that there was a virus on the system, and he decided not to report it.
47. A lot was also made of the fact that SDS showed remorse whereas Mr Deary did

not. I have to say that the account given by SDS appears to have been accepted quite uncritically in his disciplinary hearing. He said, for example, that he was friends with Mr Deary, and that he bore him no ill will, a point that was not explored at all. What is clear is that the two men could not carry on working together and it may have been thought easier to remove Mr Deary. There was very significant delay in this case, which shows that it was a very difficult matter to resolve. That is also indicated by the frequent change of investigation officer. Mr Deary was not suspended either, as might have been expected if dismissal was the likely outcome from the outset.

48. The question of remorse is also a difficult one. Mr Deary's dominant emotion throughout these proceedings was indignation that SDS had raised these allegations, and perhaps also that SDS's account was being accepted uncritically, so he saw himself as a victim on injustice. It is more difficult to display genuine remorse in those circumstances. He did however admit the IT incident as soon as he was asked. As to the video incident, he might have been better advised to express regret but the fact is, as already covered, only SDS claimed that it had been offensive, and this incident seems not only to have been uninvestigated but to have been given undue prominence.
49. The disciplinary allegations against SDS are not identical to those against Mr Deary, but their responsibility for the IT incident appears to have been very similar, and there does appear to have been a disparity of treatment in the approach taken. Those reflections would not themselves undermine the fairness of the dismissal, since it is well established that each case falls to be decided on its own merits, but they underline my concern about the fairness of the conclusion reached.

Remedy

50. I also have to consider what difference a fair investigation would have made (known as the *Polkey* issue) and contributory fault. On the first point, the investigation was not the only reason for finding the dismissal unfair. It was also outside the range of reasonable responses, and so although Mr Deary was at fault over each incident to some extent, it does not follow that he would have been dismissed. Nor, given his long service, does there seem any real chance that if given a warning Mr Deary would not simply have remained in post until retirement.
51. Contributory fault is also not automatic. It might arise were, for example, other misconduct came to light after dismissal, but here again my main finding is that dismissal was outside the range of reasonable responses, and so there was simply the wrong outcome and so no discount should be applied.
52. Mr Deary has made significant strides to mitigate his loss and I accept that he has made reasonable efforts to do so. Having heard further submissions on each side about his claim for compensation, my findings are as follows:

53. His former normal annual salary was £29,672.64, i.e. £2,472.72 per month. For the basic award the amount of a week's pay is capped at £538, and given his age and length of service that figure is multiplied by 30, to give a total of £15,750.
54. His net pay after tax and national insurance was £23,510.04 per annum or £1,959.17 per month. In the "Prescribed Period" from dismissal to the date of hearing, a period of one year, one month and nine days, he would have earned £26,050.51. However in that period he worked as a support worker on a housing project from 1 August 2020, earning £11,048.07. That left a net loss of £15,002.44. To that I add an award of £500 for loss of statutory rights, bringing the compensatory award in the prescribed period to £15,502.44.
55. Turning to future loss, Mr Deary proposes to retire in two and a half months, or so his schedule of loss states, and I therefore award that period of net less, at £458.61 per month, amounting to a further £1,146.53.
56. The Compensatory Award therefore comprises:
- | | |
|---------------------------|-------------------|
| a. Prescribed element | £15,502.44 |
| b. Non-Prescribed element | £1,146.53 |
| Total | £16,648.97 |
57. The overall award is:
- | | |
|-----------------------|-------------------|
| a. Basic Award | £15,750 |
| b. Compensatory Award | £16,648.97 |
| Total Award | £32,398.97 |
58. For the purposes of the recoupment provisions, the Prescribed Element (PE) is £15,502.44. The period of the PE is from 31 January 2020 to 12 March 2021 and the amount by which the award exceeded the PE is £16,896.53.

Employment Judge Fowell
Date: 29 April 2021

Reasons sent to the parties: 04 May 2021

FOR THE TRIBUNAL OFFICE