EMPLOYMENT TRIBUNALS

Claimant: **Steve Jenner**

Respondent: **Brand Consulting Engineers Ltd**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **03 September 2021**

Before: **Employment Judge Housego**

Representation

Claimant: In person
Respondent: Julian Brown, managing director

JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.

2. The Respondent is ordered to pay the Claimant the sum of **£26,191.64**.

3. The deposit of **£1,000** paid by the Respondent as a condition of being permitted to continue to defend the claim is to be paid to the Claimant.

REASONS

Summary

1. The Respondent dismissed the Claimant by email on 03 July 2020. They say it was for gross misconduct; refusal to hand back a laptop computer when furloughed. The Claimant says this was not the case, was done without warning, was completely unfair and that there was no proper process, and no process at all.

Evidence

2. I heard oral evidence from the Claimant and for the Respondent from Julian Brown (managing director, who dismissed the Claimant) and from Gary Smith (office manager).

3. The Respondent provided a short bundle of documents some from the Claimant which it did not agree were relevant. They were.

Law

4. The reason put forward is conduct, which is a potentially fair reason for dismissal.[1] Was that the reason? If yes, did the Respondent have a genuine belief on reasonable grounds of misconduct by the Claimant? If yes, was it misconduct justifying summary dismissal? (A notice period was not paid.) Was dismissal within the range of responses of a reasonable employer? Was the dismissal procedurally fair? If not, what were the chances of dismissal if there had been a fair procedure? If there was an unfair dismissal did the Claimant cause or contribute to his dismissal by his conduct? If unfair was the Acas Code (below) followed and if not, should there be an uplift of up to 25%?

5. The decision whether a dismissal is fair or unfair involves findings of fact about what the employer did (the burden of proof, on the balance of probabilities, being on the employer), and an assessment of whether it was fair or unfair (where there is no burden or standard of proof). Findings of fact about contributory conduct are findings of fact, on the balance of probabilities, about what the Claimant did, or did not do.

6. In deciding fairness Section 98 (4) of the Employment Rights Act 1996 ("the Act") provides:

   "…. 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".

   There is no burden of proof for this assessment, for it is an assessment of the fairness of the actions of the employer. It is not for the Tribunal to substitute its own view for that of the employer. The test in *Burchell* (reference below) is whether the employer had a genuine belief in misconduct on reasonable grounds, after proper investigation.

7. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures ("the ACAS Code").

8. Compensation for unfair dismissal is dealt with in sections 118 to 126

[1] S98(2)(b) Employment Rights Act 1996

inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides:

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly."

9. The compensatory award is dealt with in section 123. Under section 123(1):

"the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

10. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides:

"where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

11. There is provision for increase in compensation of up to 25% if the Acas Code is not followed by an employer which unfairly dismisses an employee.

12. If the claim is successful, the Judge must set out the remedies for unfair dismissal of reinstatement or re-engagement, and ask the Claimant if he wishes to seek such an order.[2] The first possible remedy to be considered is an order for reinstatement or re-engagement.[3]

13. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sarkar v West London Mental Health NHS Trust [2010] IRLR 508 CA; Sainsburys Supermarkets Ltd. v Hitt [2002] EWCA Civ 1588; Software 2000 Ltd v. Andrews & Ors [2007] UKEAT 0533_06_2601; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The range of responses of the employer is not infinitely wide but is subject to S98(4): Newbound v Thames Water Utilities [2015] EWCA Civ 677, paragraph 61. It is unfair to dismiss automatically by reason of gross misconduct: Department for Work and Pensions v Mughal (Unfair Dismissal: Reasonableness of dismissal) [2016] UKEAT 0343_15_1406. I have considered the guidance in Software 2000 Ltd v. Andrews & Ors [2007] UKEAT 0533_06_2601 about remedy.

The Respondent's policies

14. The Respondent has no disciplinary policy and no grievance procedure.

[2] Sections 112-115 Employment Rights Act 1996.
[3] S116 Employment Rights Act 1996

The hearing

15. The hearing was short, as the facts are not substantially in dispute. The Respondent's two witness statements were each of only one page. Mr Brown declined to ask Mr Jenner any questions, even after I pointed out that he was obliged to challenge any part of Mr Jenner's evidence which he did not accept. I made a full typed record of proceedings.

Submissions

Respondent

16. Mr Brown said that the Claimant had disobeyed a lawful order (to return a laptop computer immediately) and that was gross misconduct justifying summary dismissal. The circumstances (Covid related) were exceptional.

Claimant

17. Mr. Jenner said that there was no process at all, that the dismissal was out of the blue, and completely unfair. He had not refused to return the laptop. All he had asked was that he have a telephone discussion with Mr Brown, and he had rung Mr Brown but been unable to reach him, and instead of speaking to him, Mr Brown had sent a letter of dismissal, and that after 16 years' service, all within about 48 hours of an innocent sounding text message.

Findings of fact

18. Mr Jenner worked as an engineer for the Respondent, a company owned by Mr Brown, from 02 August 2004. There is a staff of about 24 of whom all but 4 are technical.

19. Mr Jenner has type 1 diabetes. When lockdown 1 started (about 20 March 2021) everyone worked from home. Mr Brown organised half a dozen laptops and Mr Jenner had one of them.

20. On 20 April 2020, Mr Brown emailed his staff to say that unless there was a suitable reason not to do so, everyone should now return to work, as it was now not only key workers who were allowed to travel.

21. Mr Jenner did not wish to so, by reason of his underlying health issue. It was entirely reasonable of him to say so.

22. On 01 May 2020, Mr Jenner emailed Mr Brown. He said that he was unable to reach him on the telephone. He said that he been working productively at home. He regretted that there was little to no communication with the office about work. He said that he felt he was being pressured to return to work, when it was not right for him to do so. He said that as time had gone by it was harder and harder to speak to Mr Brown about matters. He hoped that they might work to achieve a closer relationship when he returned to the office.

23. On 05 May 2020, Mr Brown replied. He said that working from home was

not sensible for collaborative design work. He said any issues should go to the office manager, and that he was irritated by reference to Mr Jenner's son's company and suggested he go and work for them. He criticised Mr Jenner's work ethic, and said that he found the email from Mr Jenner *"simply impertinent".* Mr Jenner (and three others) continued to work from home.

24. On 20 May 2020 Mr Jenner was furloughed, as were many other of the Respondent's employees. Working on collaborative projects was not easy from home, and many projects were stalled as the clients had ceased to progress them as their staff were not at work either, and had in consequence been furloughed.

25. There was then no contact between the Respondent and Mr Jenner for some time.

26. Some clients recommenced work on projects, and when they did so, Mr Brown unfurloughed the teams working on their projects. Teams/Zoom meetings increased, and so Mr Brown wanted to use the new laptops for them.

27. On Wednesday 01 July 2020 at 14:21 a colleague texted Mr Jenner *"Hi Steve how you doing? We need your laptop back in the office, can I come and collect it please when convenient?"* No-one explained why.

28. The next day the colleague called round, unannounced, but Mr Jenner was not at home. Mr Jenner texted the colleague at 13:36 on Thursday 02 July 2020 *"Hi Dave – Luke just told me you turned up for laptop – sorry was out didn't realise was so urgent – could you get Julian [Brown] to phone me about it – thanks"*.

29. At about 2:30 – 3:00 pm Mr Smith phoned Mr Jenner about the laptop. Mr Jenner wanted to speak to Mr Brown, and Mr Smith said he would tell Mr Brown so, and he did that. Mr Jenner did not refuse to return the laptop, but wanted to talk to Mr Brown about the future, he having been furloughed for some time with no contact, and now his laptop (which he had used to work from home) was being removed from him.

30. Mr Brown's evidence was that he was *"too busy"* to call Mr Jenner. He was not too busy to have a letter prepared and emailed to Mr Jenner.

31. That was by Mr Brown's PA, who emailed the letter from Mr Brown to Mr Jenner, at 15:32 on 02 July 2020. It said that he had refused to agree to handing over the laptop, which was needed in the office, and it should be returned immediately. If there was difficulty, he should contact the office manager to arrange collection. It ended *"We look forward to receiving the laptop forthwith"*.

32. On 03 July 2020 at about 8:40 am, Mr Jenner replied by text to Mr Brown, and two others : *" Hoping all is well with you and your family. Regarding the email yesterday afternoon I am shocked to think you say I have refused to return it – Dave turned up at my house when I was out and when Gary called I asked if I could speak with you so no further arrangements were made about the laptop return. Please could you call me when you are free. Thank*

you. Regards, Steve." Mr Brown accepted that he read that text that same morning.

33. Mr Brown said in his oral evidence that he was again *"too busy"* to ring Mr Jenner. Instead, he had his PA email Mr Jenner a letter, at 17:01:

"Your Office manager has requested the return of the practice's laptop. There is no need to speak to me. You simply have to do as you are instructed by your line manager. You are still refusing to do so.

Under the circumstances I am left with no alternative but to terminate your employment with the practice forthwith.

You will be paid one month's salary in lieu of notice together with any outstanding holiday pay.

We shall arrange for a courier to return your personal items from the office and collect the laptop at the same time."

34. Mr Jenner contacted Acas and Mr Brown wrote a further letter on 10 July 2020, stating that he had not returned the laptop **"***immediately"* as he had been required to do, and so he had been dismissed for gross misconduct. He would not be getting notice pay.

Conclusions

35. This was plainly unfair. Mr Brown was refusing to speak to Mr Jenner. There was no indication of why the laptop was required, or that not bringing it into the office instantly was considered disobedience. There was no indication that it was regarded as a disciplinary matter not to do so.

36. No process was followed at all, let alone a fair one.

37. Mr Jenner had worked for Mr Brown (who had been there throughout the 16 years of Mr Jenner's employment) for many years. It was totally disproportionate.

38. It was not misconduct, let alone gross misconduct. Even if it had been misconduct, dismissal was plainly outside the responses of the reasonable employer.

39. This was high handedness to the point of arrogance.

40. It is plain from the written and oral evidence that Mr Brown found Mr Jenner's approach to the request to return to work irritating, although it was entirely justified by his health condition, and that he used this as a pretext to dismiss Mr Jenner.

41. There is little that needs be said in this judgment as to why this was so unfair, as it leaps from the bare narrative.

42. In legal terms, the reason was not conduct.

43. If it had been, there was no genuine belief in misconduct. Nor were there any reasonable grounds for thinking it was, nor was there any investigation. The dismissal would not have been within S98(4).

44. Nothing Mr Jenner did caused or contributed in a blameworthy way to his dismissal.

45. Had a fair procedure been followed Mr Jenner would not have been dismissed.

Remedy

46. Mr Jenner got a new job (with a similar salary and pension) during that period and so suffered no other loss. Reinstatement or re-engagement is not sought.

47. *Polkey*: I do not consider that there should be any reduction under this head. The procedure itself was non-existent. A fair procedure would not have led to dismissal.

48. There is no question of a reduction for contribution by Mr Jenner.

49. The procedure was in breach of the ACAS code and so there is an increase in the awards for that reason. It is hard to imagine a worse case than this, so that has to be the maximum of 25%.

50. Mr Jenner did not receive any notice, or notice pay, and so is entitled to 12 weeks' notice pay, as he had been employed for over 12 years.

51. The basic award for someone of his age (49) is 8 years at 1.5 weeks' pay and 8 years at 1 week's pay, which is a total of 20 weeks' pay at the capped figure of £538. That is **£10,760**. I checked this on the government website calculator.

52. The compensatory award is limited to loss of statutory rights, which Mr Jenner claims at a reasonable **£500**.

53. The Respondent did not agree the Claimant's calculation of 12 weeks' notice pay. I agree with the Respondent's calculation, which was **£9,693.31**, based on a salary of £42,000 a year, which is £807.69 weekly.

54. All those awards are uplifted by 25%[4].

55. The awards are £10,760, £500 and £9,693.31 and these total £20,953.31. 25% of this is £5,238.33, and so the total the Respondent is to pay the Claimant is **£26,191.64**.

56. Subsequent to the hearing I became aware that EJ Crosfill made a deposit

[4] The reasoning for this is set out in the first instance decision of Shifferaw v Hudson Music Company Ltd 2205394/2013 on 10 August 2017: https://assets.publishing.service.gov.uk/media/59ae8d64e5274a5305ec3374/Ms_N_Shifferaw_v_Hudson_Music_Co_Ltd_220539-2013__Reasons.pdf

order of £1,000 at the previous hearing on 11 June 2021. As the case has been decided for the reasons given in that order, I order the deposit of £1,000 to be paid to the Claimant, pursuant to Rule 39(5)(b).

Employment Judge Housego
Date 03 September 2021